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Abstract

This article is a critical engagement with the most recent contribution to the debate on the nature and content of *ubuntu*. The contribution (by Radebe and Phooko) attempts to provide the concept of *ubuntu* with substantive content in order for the concept to provide legal solutions for legal problems. This article shows how this attempt largely fails for three reasons. In the first place because some of the suggested rules are social/moral rules that cannot be enforced by law. In the second place because other rules are already contained in common law, legislation or case law. In the third place the remaining rules are arguably either unconstitutional or inappropriate in an open and democratic society. The conclusion is that the suggested rules are not appropriate in an open society.

Keywords

uBuntu; Constitution; legal philosophy..

.....

1 Introduction

The concept of *ubuntu* was introduced into South African jurisprudence in the post-amble to the Interim Constitution,¹ but was not included in the final Constitution.² Its inclusion is now a moot point, but it is curious that it wasn't included.³ The concept of *ubuntu* was extensively discussed in the death penalty case,⁴ where five of the judges gave lengthy expositions on the nature and reach of the concept.⁵ Despite not being included in the Constitution, the concept was thereafter widely used in case law as if it were.⁶

However, as was pointed out elsewhere,⁷ this use of the concept was as superficial as it was widespread. In almost all cases judges simply repeated phrases without developing the concept further. The reason for this lack of development was also discussed elsewhere,⁸ but basically has to do with the formalism inherent in South African jurisprudence. The term was also widely used in legislation⁹ and other documents.¹⁰ But, while the courts and legislature have been quite happy to use the concept (in whatever way they may have understood it) the same cannot be said of academic commentators. From the start the idea had its proponents and detractors, as it should be, and the early history of this was also discussed previously.¹¹

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¹ Last, unnumbered section of the *Constitution of the Republic of South Africa* 200 of 1993.

² *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the Constitution).

³ Moosa "Tension in Legal and Religious Values" 131 argues that the Constitution was "de-Africanised" as a result of this omission.

⁴ *S v Makwanyane* 1995 3 SA 391 (CC).

⁵ *S v Makwanyane* 1995 3 SA 391 (CC) paras 131, 224, 237, 241-243, 263 and 308.

⁶ See *Azanian Peoples' Organisation (AZAPO) v Truth and Reconciliation Commission* 1996 4 SA 562 (C) 566 and 677; *Dulabh v Department of Land Affairs* 1997 4 SA 1108 (LCC) 1126; *Williamson v Schoon* 1997 3 SA 1053 (T) 1070; *Ryland v Edros* 1997 2 SA 690 (C) 708; *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) para 50; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 3 SA 119 (C) 123; *Faria v Road Accident Fund* 2009 4 All SA 169 (GSHC); *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 233 (CC); *PE Municipality v Various occupiers* 2005 1 SA 217 (CC).

⁷ See Kroeze 2002 *Stell LR* 253-256 for an analysis of these decisions.

⁸ Kroeze 2002 *Stell LR* 256ff.

⁹ See, for example, s 2(b) of the *Child Justice Act* 75 of 2008.

¹⁰ See, for example, IoDSA 2009 https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf para 38.5.

¹¹ For the early debate on this, see Kroeze 2002 *Stell LR* 256-258.

This paper will not repeat the earlier debate, but will instead critically discuss a paper that is, to my knowledge, the latest attempt at the justification for or development of *ubuntu*. The paper, by Radebe and Phooko,¹² seeks to do three things. In the first place it tries to show why most of the criticisms of *ubuntu* are wrong. In the second place it seeks to develop the concept that some have characterised as bloated and yet strangely empty.¹³ In the third place, and more importantly, it seeks to develop *ubuntu* as a *legal* concept to enable *legal* solutions.¹⁴ All these aspects will be dealt with.

However, it is important to emphasise what the paper is not trying to do. This is not an engagement with the concept itself. It is an exercise in immanent criticism.¹⁵ That means that the arguments are taken seriously on their own merit, without making a judgement as to the value of the concept itself. The goal is to determine (a) if the concept can be used for the purpose Radebe and Phooko want to use it (i.e. as a constitutional principle that provides legal solutions) and (b) if the arguments are logically consistent.

2 Criticism and response

As mentioned above, there have been numerous commentaries on *ubuntu* whether positive or negative. Radebe and Phooko very selectively deal with only a few authors.¹⁶ The contributions by Idowu,¹⁷ Bohler-Muller,¹⁸ Kroeze,¹⁹ Onyango,²⁰ Pieterse²¹ and Kuwali,²² to name but a few, are not even mentioned, much less discussed. Instead, Radebe and Phooko focus their attention on what they perceive as negative comments from Cornell and Van Marle,²³ English²⁴ and Keevy²⁵ as well as the largely positive

¹² Radebe and Phooko 2017 *SAJP* 239-251.

¹³ See Kroeze 2002 *Stell LR* 252, 260-261.

¹⁴ Radebe and Phooko 2017 *SAJP* 239, in the quote at the start of the article, emphasises "legal solutions", "legal scholars and courts" and "legal problems".

¹⁵ See Finlayson 2015 *Br J Hist Philos* 1142: "Concisely formulated, to criticize immanently is to criticize an object 'on its own terms.'"

¹⁶ Radebe and Phooko 2017 *SAJP* 239, 246-249.

¹⁷ Idowu 2012 *JJS* 56-83.

¹⁸ Bohler-Muller "Some Thoughts on the *ubuntu* Jurisprudence" 377-387.

¹⁹ Kroeze 2002 *Stell LR* 252-264.

²⁰ Onyango *African Customary Law* 113-114.

²¹ Pieterse "'Traditional' African Jurisprudence" 441. Radebe and Phooko misspelled the name as Peterse.

²² Kuwali "Decoding Afrocentrism" 85.

²³ Cornell and Van Marle 2005 *AHRLJ* 195-220.

²⁴ English 1996 *SAJHR* 641-648.

²⁵ Keevy 2009 *JJS* 19-58.

comments from Metz.²⁶ Each of these perceived criticisms will be discussed as well as Radebe and Phooko's responses.

The first criticism ostensibly comes from Cornell and Van Marle.²⁷ Radebe and Phooko only refer to what they perceive as Cornell and Van Marle's view that *ubuntu* is seen as a bloated concept that is, for that reason, not suitable for inclusion as a constitutional value.²⁸ There are two problems with this statement. In the first place, this is not Cornell and Van Marle's viewpoint at all. In fact, they merely refer to the criticism of Pieterse,²⁹ without either accepting or rejecting it, in the introduction to their article. The second problem is that Radebe and Phooko seemingly did not engage with Cornell and Van Marle's real view at all. In a largely positive article based on a Derridean reading of *ubuntu*, Cornell and Van Marle conclude as follows:

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.³⁰

Having misrepresented Cornell and Van Marle's argument, Radebe and Phooko then engage in a rhetorical move they will repeatedly employ. Their response is simply that the Constitutional Court has said it is a constitutional value and therefore it is.³¹ This is a circular argument in which, if the validity of *ubuntu* as a constitutional value is questioned, the response is that it is a value because the courts say so. But, more importantly, even if it were Cornell and Van Marle's view that *ubuntu* is a bloated concept (which it isn't), that idea also needs to be addressed. It cannot be dismissed with the equivalent of "because the courts say so".

The same fate befalls the criticism of Keevy. Keevy argues that African law and religion cannot be separated³² and that *ubuntu* is part of this system that entrenches patriarchy and discriminates against gay people.³³ Far from making "unsubstantiated and sweeping statements" – as Radebe and

²⁶ Metz 2007 *Polit Philos* 321-341.

²⁷ Cornell and Van Marle 2005 *SAJHR* 195.

²⁸ Radebe and Phooko 2017 *SAJP* 246.

²⁹ Pieterse "Traditional" African Jurisprudence" 441.

³⁰ Cornell and Van Marle 2005 *AJHR* 220.

³¹ Radebe and Phooko 2017 *SAJP* 246: "(T)he Constitutional Court has demonstrated in a battery of cases that *ubuntu* is a constitutional value...".

³² Interestingly, Radebe and Phooko 2017 *SAJP* 243 make essentially the same claim: "Ubuntu is based on religion" and 242: "African humanism (which they equate with *ubuntu*) has religion as its foundation".

³³ Keevy 2009 *JJS* 36-47.

Phooko claim – Keevy proves African law and society (of which *ubuntu* is an intricate part) is indeed hierarchical and patriarchal in the extensive sources quoted in the article. But the strange retort that Radebe and Phooko repeat is that "Keevy's criticism that *ubuntu* is not in line with the Constitution and the Bill of Rights is without merit as it flies in the face of decisions of the Constitutional Court".³⁴ This rhetorical move is both circular (as pointed out above) and a logical fallacy called an appeal to authority. There is enough evidence that, philosophically speaking, an African approach to justice is based on status in the community and therefore is inherently hierarchical. For example, Agbakoba and Nwauche state that, in their version of African legal philosophy, justice as fairness requires that judges "take into consideration age, marital status, gender, title, political and religious office, dignity, time, future inheritance, etc."³⁵ Whatever one might think of this view of what they call "justice as fairness", the fact remains that a strong argument can be made that it might be in conflict with the South African equality clause.

The criticism of English³⁶ is also misrepresented. English's main argument is that *ubuntu* is in conflict with basic individual rights typical of a liberal constitutional state. The issue of dispute resolution – that Radebe and Phooko try to make into the central argument – was a side-issue. But, having set up the straw man, they can then proceed with their standard rhetorical move. They argue that English's argument is invalid because the Constitutional Court has already included *ubuntu* as a constitutional value.³⁷ *Iipse dixit* indeed.

Quite apart from the logically fallacious appeal to authority, it is disappointing that Radebe and Phooko chose not to engage with the substantive arguments presented. English exposes the philosophical conflict at the heart of the Constitution – the one between traditional liberalist thinking and a different "African" approach. But Radebe and Phooko do not address this issue at all. And, by always falling back on "but the court said so" they fail to recognise that courts can and do follow the wrong philosophy sometimes. In the recent past, Apartheid courts followed a certain

³⁴ Radebe and Phooko 2017 *SAJP* 248.

³⁵ Agbakoba and Nwauche 2006 *Cambrian L Rev* 77.

³⁶ English 1996 *SAJHR* 641-648.

³⁷ Radebe and Phooko 2017 *SAJP* 248: "In any event, the Constitutional Court has long settled the debate in that *ubuntu* is part of South Africa's constitutionalism and human rights in numerous cases."

philosophical and hermeneutic approach that resulted in enormous damage being done.³⁸ Courts are not infallible.

But it is in their reaction to Metz's contribution that the real basis of the approach of Radebe and Phooko is revealed. Metz³⁹ proposes twelve values that would meet both the requirements of *ubuntu* and that of Western democracy. Radebe and Phooko criticise this on five grounds. In the first place they argue that he subscribes to the idea of a common African morality. But Metz does not subscribe to such a notion and Radebe and Phooko admit it.⁴⁰ However, throughout their article, Radebe and Phooko assume the exact thing they accuse Metz of, by constantly speaking of "the" African way of life, as if there is only one such a way.

In the second place they state that he doesn't understand how consensus and inclusiveness work in African societies. They acknowledge that "in African societies" (*sic*) decisions are taken after long discussions to seek consensus, but that consensus is not necessarily always achieved. Their solution is that "those who are still aggrieved ... are allowed to form their own communities..."⁴¹ In other words, the solution for failure to achieve consensus is to exclude those members who do not agree. That seems to be the opposite of inclusiveness.

In the third place they argue that his view on land in African thought is correct, but he "fails to acknowledge that ... there were empires in African societies".⁴² While this statement is factually correct, it is unclear what that has to do with "the" African view on land. In the fourth place they state that, contrary to Metz's position, there is no moral obligation on followers of *ubuntu* to have a family. And while this might or might not be true, it is impossible to establish the truth as Radebe and Phooko give no source for the claim they make here. And, finally, his reference to rituals and traditions "lacks specificity" in that he doesn't list the specific traditions and rituals.⁴³

What is revealing about these responses is that not only do they set up a straw man again, but they provide no evidence for their assertions. It is almost as if they don't need to substantiate their claims because they have

³⁸ For an overview of these approaches, see Kroeze 1993 *SAPL* 230-237; Dugard 1971 *SALJ* 181ff.

³⁹ Metz 2007 *J Polit Philos* 321-341.

⁴⁰ Radebe and Phooko 2017 *SAJP* 245: "Metz also admits as much, saying that people in societies do not share a common morality."

⁴¹ Radebe and Phooko 2017 *SAJP* 245.

⁴² Radebe and Phooko 2017 *SAJP* 245.

⁴³ Radebe and Phooko 2017 *SAJP* 245.

some kind of "insider knowledge" of how *ubuntu* really works. As a point of departure they said the following:

(I)n our view, *ubuntu* is a way of life of the African people which is underpinned by certain components that make up its substantive content, and permeates every aspect of their everyday existence and interactions with each other and the world at large.⁴⁴

What this implies, in the first place, is that there is, in their view, a single "way of life of the African people", but they criticise a similar viewpoint as "outlandish because of the false idea of a singular African culture or morality".⁴⁵ But you really cannot have it both ways. Either there is one African way of life or there isn't, but it cannot be true if one person asserts it, but not when another person asserts it. That's just not logical. What it also implies, in the second place, is that *ubuntu* becomes a *shibboleth* – only those who are part of these communities can really understand it and are allowed to comment on it.⁴⁶ But, such an approach makes a cross-cultural critique impossible. If only members of a certain group, whether "Western" or "African", can understand and critique their own cultures, then an external engagement with *ubuntu* becomes impossible. In a heterogeneous society, the ideas of one part of that society cannot be elevated above criticism with the claim that it can only be understood by members of that part of the society. The grounding of a constitutional order requires values that all can identify with.

It seems quite clear that Radebe and Phooko, far from dealing with criticism of *ubuntu*, have instead just deflected criticism. In almost every case they have used a three-step rhetorical strategy, namely to set up a straw-man argument that is then easy to knock down; to reiterate their view that the court has said it is a value and therefore it is; and then to claim that the writers do not know how *ubuntu* really works. But nowhere is there an attempt to show how the substance of the criticism (robustly presented) is wrong. And the constant appeal to authority weakens rather than strengthens their response. It must therefore be concluded that they have not successfully defeated the criticisms they ostensibly dealt with.

⁴⁴ Radebe and Phooko 2017 SAJP 240.

⁴⁵ Radebe and Phooko 2017 SAJP 249.

⁴⁶ Shibboleth is "a word, phrase, *custom*, etc., only *known* to a *particular group* of *people*, that you can use to *prove* to them that you are a *real member* of that *group*". Cambridge Dictionary date unknown <https://dictionary.cambridge.org/dictionary/english/shibboleth>.

3 Components of *ubuntu*

Having dealt with the perceived criticisms, Radebe and Phooko next turn to their primary purpose, namely to provide "clarification of the constitutional value of *ubuntu*".⁴⁷ It is important to emphasise that their focus is on *ubuntu* as a *constitutional* value to provide *legal* solutions. As such it obviously needs to meet the requirements of constitutionality. To provide the substantive content for *ubuntu* they list a number of aspects (15 in all) that they claim can ground this philosophy. It is assumed that in order to ground a legal philosophy these aspects need to be at least tangentially connected to the law. Or at least to be able to be regulated by the law. To make sense of the various aspects, they will not be discussed in the order Radebe and Phooko give them but will, instead, be grouped into three categories. The first group will include those aspects that are moral rules incapable of being regulated by law.⁴⁸ In the second group will be included those aspects mentioned by Radebe and Phooko that already form part of settled South African law. The final group will be those aspects that do not form part of the first two groups. By a process of elimination the last group will form the core of the concept of *ubuntu*.

3.1 Social and/or moral rules

Radebe and Phooko place a lot of emphasis on the way in which *ubuntu* serves to regulate social relationships in the community. The first of these rules requires, according to Radebe and Phooko that one should share vegetables with neighbours without their having to ask for them. This speaks to the idea of communitarianism in that it shows concern for the welfare of the whole community.⁴⁹ This kind of thinking is prevalent in many communities where poverty and hunger are all too real threats.⁵⁰ But it is difficult to understand how this could be made compulsory by the law. While charity is a commendable trait, it is difficult to see how it would translate into a constitutional value or legal rule. And Radebe and Phooko do not show how that would happen.

⁴⁷ Radebe and Phooko 2017 *SAJP* 250.

⁴⁸ There is, of course, the ongoing natural law/legal positivism debate on the role of morality in law. However, the approach in South African jurisprudence is more in line with a legal positivist rather than a natural law one. See Fagan 1995 *SAJHR* 545-570. It is also the preferred approach – see Kroeze 1993 *SAPL* 230-237.

⁴⁹ Radebe and Phooko 2017 *SAJP* 241.

⁵⁰ See Smith *et al* 2017 <https://www.nature.com/articles/s41467-017-02036-8.pdf>; Barceló *et al* 2013 <https://journals.sagepub.com/doi/full/10.1177/0894439313511943>; Lewis *et al* 2014 <https://www.nature.com/articles/ncomms6789.pdf?origin=ppub>.

The same can be said of the idea that people must help one another in times of need, such as with funerals.⁵¹ Unfortunately the same problems arise with this idea as with the previous one. It is, to my mind, impossible to force people into charitable behaviour by means of legal rules. Not to mention that it would interfere with their rights and freedoms to choose not to help. Enforcing such a rule would not pass constitutional muster.

Radebe and Phooko also claim that there is a difference between *ubuntu* and Christianity in that *ubuntu* is not concerned with a reality beyond the physical.⁵² This statement is contradicted by repeated references to the ancestors and statements such as the following: "*Ukama* and *ubuntu* share similarities in their embrace of relations in both the physical world and the *metaphysical* world".⁵³ Belief in a metaphysical reality shows that *ubuntu* is not that different from Christianity in that respect. Regardless of the contradiction, however, regulating belief in the metaphysical world (or not) is once again beyond the reach of human laws. It is also, almost incidentally, in conflict with the freedom of religion clause in the Constitution.⁵⁴

Ubuntu apparently also rejects "scientific humanism", in favour of "African humanism".⁵⁵ What exactly is understood by "scientific humanism" is neither explained nor critically engaged with. But it hardly needs explaining that a belief about how the world works or does not work (ontology) cannot be regulated by the law. Ontology is a philosophical discipline that is, thankfully, beyond the realm of the law.

Ubuntu apparently also means that "(e)verything is related to human beings, not other things".⁵⁶ Once again it is difficult to see how this would translate into human laws. Law is fundamentally concerned with regulating relationships between human beings *and* between human beings and things, so limiting a constitutional value to only the relationship between human beings would not be helpful.

Radebe and Phooko also claim that *ubuntu* "discourages idleness and laziness".⁵⁷ To be honest, most people would love it if laws could be used to extinguish idleness and laziness but it is doubtful if that is possible. And,

⁵¹ Radebe and Phooko 2017 SAJP 242. But apparently a new urban practice called "after tears" is not *ubuntu*.

⁵² Radebe and Phooko 2017 SAJP 242.

⁵³ Radebe and Phooko 2017 SAJP 244. Emphasis added.

⁵⁴ Section 15 of the Constitution that deals with freedom of religion, belief and opinion.

⁵⁵ Radebe and Phooko 2017 SAJP 242.

⁵⁶ Radebe and Phooko 2017 SAJP 242.

⁵⁷ Radebe and Phooko 2017 SAJP 243.

once again, it is hard to imagine what legislation to that effect would look like. Finally Radebe and Phooko suggest that the use of rituals implies a concern for the welfare of the environment for the sake of the community.⁵⁸ On the one hand environmental legislation already enforces certain behaviours aimed at environmental protection, but it is difficult to see how rituals and so forth can be enforced on people who do not subscribe to them. And it would, of course, be unconstitutional to do so.

One of the most bizarre statements by Radebe and Phooko is that black people go on holiday to see other people, contrasting this with "Westerners who mostly go on holiday to lonely places".⁵⁹ Not only is it impossible to see what this has to do with a constitutional value, but the sweeping generalisation is disturbing. Whilst criticising other writers for assuming a homogenous "African way of life", Radebe and Phooko have no problem with assuming a homogenous "Western" way of life.⁶⁰ Now, it might be possible that *all* people in *all* Western societies share the same values and ways of life, but it is extremely unlikely. And Radebe and Phooko have not substantiated such an extraordinary claim.

What seems clear is that Radebe and Phooko have identified some very desirable traits in human relationships and have transformed them into core aspects of *ubuntu* as a constitutional value. But that requires indicating exactly how these aspects can be translated into legal doctrine. That step has not been undertaken. And, until that step is in fact undertaken, these aspects remain nothing more than societal habits and behaviours.

3.2 Positive law

The second group of aspects that Radebe and Phooko identify as central to the concept of *ubuntu* consists of things that are already part of either the common law or legislation. It would seem to be quite obvious that, if aspects already form part of the law, including them as aspects of *ubuntu* would be unnecessary. And recently the Appeal Court confirmed that, where common law rules exist, reliance on *ubuntu* is inappropriate.⁶¹

⁵⁸ Radebe and Phooko 2017 SAJP 244.

⁵⁹ Radebe and Phooko 2017 SAJP 243.

⁶⁰ Radebe and Phooko 2017 SAJP 241: "...heavier moral obligation than in Western societies ..."; 242: "The Western idea or way of life..."; 243: "... unlike in Western culture ..."; 245: "...Western people in modern democracies ...".

⁶¹ *Liberty Group Limited v Mall Space Management* 2020 1 SA 30 (SCA) [37] – relying on *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA).

In the first place Radebe and Phooko argue that it is central to *ubuntu* that family members must assist one another, stating "this carries a heavier moral obligation than in Western societies".⁶² This is of course not true. Most "Western" societies take this duty so seriously that it is encoded in law and is not merely a moral obligation. For example, the South African common law (based on Roman-Dutch law) not only places a legal obligation on family members to support children, but also imposes an obligation of reciprocal support between members of families.⁶³

Radebe and Phooko also link the idea of *Batho Pele*⁶⁴ in the context of service delivery to the concept of *ubuntu*.⁶⁵ They claim that this government policy was confirmed "by the Constitutional Court as a practical component of the constitutional value of *ubuntu*".⁶⁶ Evidence for this statement comes from one footnote in one court case where *ubuntu* was never raised as an issue and the statement is therefore probably *obiter*.⁶⁷ More importantly, the Constitution itself provides the values that are to underpin public service and service delivery.⁶⁸ Even if the idea of *Batho Pele* had been translated into legislation, it would be superseded by the constitutional provisions and can therefore be ignored.

Radebe and Phooko also claim that *ubuntu* requires prioritising human life over wealth acquisition.⁶⁹ Although they do not say this explicitly, they seem to think this is different from rules in Western societies. However, their assumption is belied by the primacy given to the right to life in those same societies.⁷⁰ The prioritisation of human life over anything else is a core component of not only constitutional law,⁷¹ but obviously also of South African law in general.⁷²

⁶² Radebe and Phooko 2017 SAJP 241.

⁶³ Heaton *South African Family Law* 322-324; 328.

⁶⁴ For an exposition of the principles of *Batho Pele* see DPSA 2014 <http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf>.

⁶⁵ Radebe and Phooko 2017 SAJP 241.

⁶⁶ Radebe and Phooko 2017 SAJP 241.

⁶⁷ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) fn 39.

⁶⁸ Chapter 10, s 195 of the Constitution.

⁶⁹ Radebe and Phooko 2017 SAJP 243 quoting Ramose.

⁷⁰ See, for example, Art 3 of the *Universal Declaration of Human Rights* (1948), which has the right to life as the first right to be protected by all signatories.

⁷¹ Section 11 of the Constitution.

⁷² See Carstens and Pearmain *Foundational Principles* 27 and sources quoted there. The sources that confirm this principle are so numerous that it would be impractical to list them all here.

The preliminary conclusion is that the aspects mentioned in the previous two sections that Radebe and Phooko associate with *ubuntu* can be ignored for the purposes of grounding a *legal* philosophy or providing legal solutions. They are either moral/social rules outside the realm of the law or already incorporated into law. This implies that the substantive content of *ubuntu* is reduced to the aspects discussed in the next section.

3.3 *Aspects unique to ubuntu*

Having listed the aspects identified by Radebe and Phooko which can be disregarded for the purposes of grounding a legal concept, the attention now shifts to the aspects that are neither merely social or moral rules nor already included as legal rules. There are four aspects that need to be discussed.

The first of these pertains to the treatment of children and is contained in the saying *ingane yami yingane yakho* (my child is also your child). According to Radebe and Phooko, this implies that all children must respect all adults; all adults must take care of all children; and all adults can discipline all children to ensure "socially and morally acceptable conduct".⁷³ The first problem with this is, of course, that it presupposes the kind of morally homogenous society that Radebe and Phooko are convinced does not exist.⁷⁴ In a society where no moral consensus exists, there would also be no consensus as to what would constitute "socially and morally acceptable conduct". It is entirely possible, for example, that certain sections of the population teach their children not to respect all adults simply because respect is earned, not merely conferred. Teaching children to evaluate people's conduct based on moral judgement rather than on age is as legitimate an approach to child-rearing as anything else.⁷⁵

The second problem with regarding this as central to the constitutional value of *ubuntu*, especially the "disciplining" part, is that it is largely unlawful and probably unconstitutional. If a random person should "discipline" another person's child in public, this would probably constitute assault. And, while this might be appropriate in a family or tribal setup, it is completely inappropriate in a constitutional state. The idea that random people can

⁷³ Radebe and Phooko 2017 *SAJP* 241.

⁷⁴ Radebe and Phooko 2017 *SAJP* 245: "The idea of a common and shared morality in any society has long been discredited ..."

⁷⁵ The right to freedom of religion, belief and opinion (s 15 of the Constitution) and the right to freedom of expression (s 16 of the Constitution) include the rights of parents to determine the upbringing of their children. But they are also protected by the common law rights and responsibilities of parents – see Heaton *South African Family Law* 285.

decide when a child is not acting socially and morally "correct" and can then discipline that child is unacceptable. More importantly, the Constitutional Court has recently stated, in finding that corporal punishment in the home is unconstitutional, that "(v)iolence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or the threat thereof."⁷⁶ If chastising your own child in your home is unconstitutional, the same should apply to a stranger doing the same in public. So, even if it is true that the Constitutional Court has recognised *ubuntu* as a constitutional value, including unconstitutional behaviour would be illogical. As a result, the approach to child rearing advocated by Radebe and Phooko cannot be regarded as part of the constitutional value of *ubuntu*.

The second unique aspect is the view of crime and redress. Radebe and Phooko are at pains to point out that a crime is not committed against an individual but against the whole community. Therefore the criminal must seek absolution from the community and not the individual.⁷⁷ This communitarian idea can be found in diverse societies throughout history,⁷⁸ but it is unclear how this would be operationalised in a modern democracy. In fact, it would be in conflict with almost all the rights of arrested persons guaranteed in the Constitution.⁷⁹ As such it is, of course, once again an illustration of the conflict at the heart of the Constitution, namely between individual rights and social duties. It is a pity that Radebe and Phooko do not address this basic conflict rather than just insisting on an idea that might not be constitutional in a modern constitutional state.

In the third place, like most other writers on African legal thought, Radebe and Phooko also emphasise the role of consensus and reconciliation.⁸⁰ But, as was pointed out above, they have already admitted that there is no "common morality" in contemporary society. And, in my opinion, claiming a supposed consensus on values where none exist is just a way of stifling dissent.⁸¹ It is also interesting that Radebe and Phooko emphasise that it is

⁷⁶ *Freedom of Religion South Africa v Minister of Justice* 2020 1 SACR 113 (CC) [38].

⁷⁷ Radebe and Phooko 2017 SAJP 242.

⁷⁸ In fact, English 1996 SAJHR 644 explains how the exact same ideas and approaches could be found in the *Lex Salica*.

⁷⁹ Section 35 of the Constitution.

⁸⁰ For other writers see Idowu 2006 *Cambrian L Rev* 10; Agbakoba and Nwauche 2006 *Cambrian L Rev* 73 80.

⁸¹ See Schlag "Values" 50: "Values are like little divinities. Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence and self-abnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and human existence. In short,

not consensus at all cost. Their solution for a lack of consensus is that those who feel aggrieved by an issue following a long discussion are then "allowed to form their own communities".⁸² This leads inevitably to the conclusion that this cannot be a founding value in South Africa. Dissenting voices are caught between the rock of staying silent or the hard place of leaving. And that violates the right to freedom of expression and the right to freedom of association.⁸³ As uncomfortable as it might be, societies have to have mechanisms to deal with dissent in a way that does not violate rights. Telling the dissenters to, effectively, "shut up or leave" is not the answer.

Lastly, Radebe and Phooko also emphasise the African approach to land as a crucial aspect of *ubuntu*. They refer to the idea that, traditionally, there was no individual ownership of land because "land is intertwined in Africans' identity and spirituality".⁸⁴ It is particularly troublesome that this aspect is dealt with so superficially. The land debate in Africa is particularly complex and often hinges on a conflict between nostalgia for a communal past and claims for individual ownership.⁸⁵ But the assumption that it is uniquely African to have a spiritual connection to the land is also not true. In almost all cultures there is evidence of such a connection – even if only traces remain.⁸⁶

But there are bigger problems here pertaining to property law. In the first place they claim that the Constitution and various other pieces of legislation do not make provision for the kind of collective ownership they are proposing – a statement that is far from the truth.⁸⁷ Not only has the common law always allowed for collective ownership⁸⁸ but, for example, the Inyongama Trust was specifically established to meet this need.⁸⁹ In the second place they fail to realise the complexity of land law in South Africa. For the purpose of redistribution of land, for example, the legislation differentiates between private land and state land. The category of private land is then further divided into rural land and urban land. Redistribution of

'values' are the secular equivalent of God – they are the continuation of theology by other means."

⁸² Radebe and Phooko 2017 *SAJP* 245.

⁸³ Sections 16 and 18 of the Constitution.

⁸⁴ Radebe and Phooko 2017 *SAJP* 243.

⁸⁵ This debate is too complex to deal with here, but see Manji *Politics of Land Reform*.

⁸⁶ Korff date unknown <https://www.creativespirits.info/aboriginalculture/land/meaning-of-land-to-aboriginal-people>; Booth "We are the Land" 329-349; Salmón 2000 *Ecological Applications* 1327-1332 (on Mexican thinking).

⁸⁷ The Constitution implicitly recognises the validity of communal ownership in s 25(6).

⁸⁸ See, for example, Van der Walt and Pienaar *Introduction to the Law of Property* 53-63 (on co-ownership) and 347 on communal ownership.

⁸⁹ See *Inyongama Trust Act* No 3KZ of 1994

private, rural land is governed by one set of laws,⁹⁰ with another set of laws imposing limitations on this type of land.⁹¹ Redistribution of private, urban land is governed by a different act.⁹² If the role of *ubuntu* in relation to land is to have any kind of meaning, the legislative complexities need to at least be acknowledged.

It turns out that the "substantive content" of the idea of *ubuntu* identified by Radebe and Phooko is limited to four aspects, namely those dealing with raising children, crime, reconciliation and land. In all these cases the substantive content is either logically inconsistent, over-simplified or simply unconstitutional. They are therefore not useful in the context of the constitutional state.

4 Conclusion

The stated purpose of Radebe and Phooko was to answer criticism of the *ubuntu* concept and to develop the concept to provide legal solutions in the form of a constitutional principle. But the criticisms were most decidedly not answered. Reliance on an argument from authority meant that the engagement with the substantive criticisms was never achieved. Unfortunately, the conclusion is that, in the guise presented by Radebe and Phooko, the concept also cannot be used for the desired purpose. That is because the aspects mentioned are either moral/social rules, are already part of positive law, or are constitutionally suspect.

How then is the contribution of Radebe and Phooko to be evaluated? It is the stated purpose of the Constitution to establish a "democratic and open" society.⁹³ What would such a society look like and could the ideas of Radebe and Popper contribute to that? For the purpose of evaluation it might be useful to look at Popper's analysis of what would constitute an "open society".⁹⁴ Popper first looks at what he calls a closed or tribal society and finds that it is based on three points of departure: firstly that the social structure is determined by social standing and religious taboos; secondly that every individual's place in this structure is predetermined and

⁹⁰ *Land Reform: Provision of Land and Assistance Act* 126 of 1993, ch VI of the *Development Facilitation Act* 67 of 1995, and the *Spatial Planning and Land Use Act* 16 of 2013.

⁹¹ *Security of Tenure Act* 62 of 1997 and the *Land Reform (Labour Tenants) Act* 3 of 1996.

⁹² Chapter V of the *Development Facilitation Act* 67 of 1995.

⁹³ Preamble of the Constitution.

⁹⁴ Popper *Open Society*.

unchanging; and thirdly that everyone accepts this as proper and natural.⁹⁵ These three points of departure then translate into a view of society that reflects acceptance of "natural" privileges associated with, for example, sex, class or status, the acceptance of collectivism and that the purpose of the individual is to maintain this stability.⁹⁶ It seems clear that the four unique aspects that Radebe and Phooko identify (children, crime, reconciliation and land) are only workable in a tribal society as defined by Popper. Radebe and Phooko acknowledge that the social and religious taboos, the hierarchical nature inherent in "natural" privileges and collectivism are all inherently part of the concept of *ubuntu*. But in a society that is ostensibly committed to "an open and democratic society based on human dignity, equality and freedom" these aspects are problematic.⁹⁷

On the other hand, the "open society" as characterised by Popper consists of three different ideas, namely, the elimination of "natural" privileges, the general idea of individualism and the idea that the purpose of the state is to protect the individual.⁹⁸ These are in stark contrast to the characteristics of the closed society, but provide a better fit with the modern democratic state as set out in the Constitution.

Perhaps the biggest contribution of Radebe and Phooko is that they bring the fundamental contradiction in the South Africa law and society into stark relief. The contradiction between individualism and collectivism, between change and stability, between tradition and modernity, between "Western" ideas and "African" ideas are all present but not acknowledged. Their stated goal of transforming social/moral ideas into legal ones is, unfortunately, also not achieved. It's a pity this opportunity was missed.

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⁹⁵ Popper *Open Society* 12. This is reminiscent of what Michelman calls classical republicanism in American thought – see Michelman 1988 *Yale LJ* 1493-1537.

⁹⁶ Popper *Open Society* 94 is here comparing the ideas of Pericles with those of Plato.

⁹⁷ See s 36 of the Constitution.

⁹⁸ Popper *Open Society* 175.

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List of Abbreviations

AHRLJ

African Human Rights Law Journal

Br J Hist Philos

British Journal for the History of Philosophy

Cambrian L Rev

Cambrian Law Review

DPSA	Department of Public Service and Administration
IoDSA	Institute of Directors in Southern Africa
J Polit Philos	Journal of Political Philosophy
JJS	Journal of Juridical Science
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
SAJP	South African Journal of Philosophy
Stell LR	Stellenbosch Law Review
Yale LJ	Yale Law Journal