

NOTES / AANTEKENINGE

DE-LINKING *UBUNTU*: TOWARDS A UNIQUE SOUTH AFRICAN JURISPRUDENCE*

1 Introduction

The adoption in 1993 of the interim Constitution of the Republic of South Africa Act (200 of 1993) as the supreme law of the Republic marked a watershed moment in the history of South Africa. It was a moment of transition for which the interim Constitution was to serve as a bridge. In the words of the post-amble:

“This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.” (Under the section titled: “National Unity and Reconciliation”.)

Given the volatile political context within which South Africa’s transition was negotiated, the drafters of the Constitution saw fit to append a post-amble in which they called for the “need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation” (under the section titled: “National Unity and Reconciliation”). For a country where the traditional legal discourse has been the domain of Western liberal values, the inclusion of an African value of *ubuntu* in the Constitution was in itself “a historic bridge”. In the words of Etienne Mureinik, if this bridge is to “span the open sewer of violent and contentious transition” those who are entrusted with its upkeep need to know where the bridge is from and where it is leading to (Mureinik “A Bridge a Where? Introducing the Interim Bill of Rights” 1994 *SAJHR* 31). For Mureinik, the interim Constitution is a bridge away from a culture of authority to a culture of justification where every exercise of power must be justified (Mureinik 1994 *SAJHR* 32).

Davis and Le Roux have extended the bridge metaphor to represent the

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model of transformation that South Africa chose to follow in which there was no revolution nor a violent rupture from the past (Davis and Le Roux *Precedents & Possibility: The (Ab)use of Law in South Africa* (2009) 6). The bridge provided a sense of continuity between the old and the new. About this they write:

“The old was, in many instances, to remain although the substance of the old would be changed in incremental stages. This path of negotiated evolution rather than violent, sudden revolution can be illustrated by the manner in which the bridge was constructed. The Constitutional bridge was to be created mostly by bridge-builders who were fluent in the old legal traditions. Their construction was undertaken with the only tool in their possession, namely our inherited legal traditions, together with a constitutional mandate to engage in reconstruction of these traditions through the new text” (Davis and Le Roux 6-7).

With the benefit of hindsight, the construction of the bridge by builders who were fluent in the old system has led to a bridge that has more of the old and less of the new. The old, like the western-dominated legal traditions, were given more prevalence and the new, for example the value of *ubuntu*, were in some cases just discarded or rendered unusable. This paper seeks to argue that if the interim Constitution was the bridge, then *ubuntu* was a detour route to a “pluralist democracy” (Botha “The Values and Principles Underlying the 1993 Constitution” 1994 *SAPL/PR* 244). Once the construction of the main road to a pluralist democracy was concluded the detour route was closed. Rains fell, grass grew and with the passing of time it became difficult to decipher where the detour route was and where it re-joined the main road. However, what was not considered by the builders, was the fact that the detour, provided those who travelled on it with a view into the rich scenic history and values of the majority of South Africans which had for years been relegated to the margins.

For lawyers trained within the Western paradigm of defining and categorising concepts, *ubuntu* is a very frustrating concept to deal with. This is so because *ubuntu* defies categories. The closest one can come to understanding *ubuntu* is by describing it and not defining it. Even in its original Nguni language, it goes by the maxim: *umuntu ngumuntu ngabantu* (a person is a person through other persons). This does not at all refer to a category or definition; it only describes a state of being. About this Mokgoro writes that “in one’s own experience, *ubuntu* is one of those things which you recognize when you see” (Mokgoro “*Ubuntu* and the Law in South Africa” 1998 *Buffalo Human Rights Law Review* 51; see also Bohler-Muller “The Story of an Africa Value” 2005 20 *SAPR/PL* 267, where she writes that “*Ubuntu*, it seems, is one of those things that you recognize when you see it”; and Cornell “*uBuntu*, Pluralism and the Responsibility of Legal Academics to the New South Africa” 2009 20 *Law Critique* 48, who writes that *ubuntu* can be best described as “an activist ethics of virtue”). This complexity is further attested to by Tutu, who writes that

“When we want to give high praise to someone we say, ‘*Yu, u nobuntu*’; ‘Hey, so-and-so has *ubuntu*’. Then you are generous, you are hospitable, you are

friendly and caring and compassionate. You share what you have. It is to say, 'My humanity is caught up, is extricable bound up in yours' (Tutu *No Future Without Forgiveness* (1999) 31).

From the foregoing it is clear that *ubuntu* is a value of great importance in African communities. It has some religious, cultural and philosophical importance for Africans (Kroeze "Doing Things with Values II: The Case of *Ubuntu*" 2001 *Stell LR* 253). According to Ramose, *ubuntu* is the fundamental ontological and epistemological category in the African thought of the Bantu-speaking people (Ramose *African Philosophy Through Ubuntu* (1999) 50; see also Pieterse "'Traditional' African Jurisprudence" in Roederer and Moellendorf (eds) *Jurisprudence* (2007) 442, where he writes that "*Ubuntu* indeed represents the crux of African Philosophy").

In the first case to be decided by the Constitutional Court, the court invoked *ubuntu* to declare death penalty unconstitutional (*S v Makwanyane* 1995 3 SA 391 (CC), hereinafter "the *Makwanyane* case"). Interesting to note is how each of the six judges who invoked *ubuntu* struggled to conceptualise or describe the concept without, as Langa noted, explaining it (see par 227 of Langa's judgment). For Langa *ubuntu* is "a culture which places some emphasis on communality and on the interdependence of the members of the community" (par 224 of the *Makwanyane* case), while for Mokgoro, it translates into humanness (par 308). For Mahomed *ubuntu* "expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women" (par 263).

Following the *Makwanyane* case, *Ubuntu* was used again in the case of *AZAPO v President of the Republic of South Africa* (1996 4 SA 671 (CC), hereinafter "the *AZAPO* case"). The applicants challenged the constitutionality of section 20 of the Promotion of National Unity and Reconciliation Act (34 of 1995), which they argued was in violation of the right to have justifiable disputes settled in a court of law. In holding that the Amnesty provisions were justified, Mahomed DP did not take the concept further than stating that "it was for this reason that those who negotiated the constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, *ubuntu* over victimisation" (par 19 of the *AZAPO* case). A few years after the *AZAPO* case, the court once again invoked the value of *ubuntu* in another emotional issue regarding the people living with HIV/AIDS. In the words of Ngcobo J, "[p]eople living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them" (*Hoffman v South African Airways* 2001 1 SA 1 (CC) par 38, hereinafter "the *Hoffman* case"). The *Hoffman* decision was followed by a nine-year period of non-invocation of *ubuntu* (see *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Dikoko v Mokhatla* 2007 1 BCLR 1; and *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 BCLR (CC)).

When the 1996 Constitution was drafted, the concept of *ubuntu* was omitted, an omission which according to Davis can "presumably be explained by the fact that the overseas expert, while a talented drafter in his

own right, clearly employed a Canadian drafter's manual, which did not contain African terminology" (Davis *Democracy and Deliberation* (1999) 65 fn 49). The net effect of this omission was that the Constitution was "de-Africanised" (Moosa as quoted in Cornell and Van Marle "Exploring *Ubuntu*: Tentative Reflections" 2005 5 *African Human Rights Law Journal* 208).

Judicially the *Makwanyane* case remains the highest and most intense judicial engagement *ubuntu* has ever received (see Bekker "The Re-emergence of *Ubuntu*: A Critical Analysis" 2006 21 *SAPR/PL* 339-344, Bekker is of the view that the Constitutional Court made a great break in the *Dikoko* case with regard to the interpretation of *ubuntu* as a constitutional value). As Bekker writes, after *Makwanyane*, the invocation of *ubuntu* as a constitutional value "seemed to have withered away to a historical artefact of a newly born democracy" (Bekker 2006 21 *SAPR/PL* 333).

This then begs the question: if *ubuntu* is such an important African value why is its appearance in the traditional legal discourse in a pluralist constitutional state like South Africa so sporadic? A number of reasons have been advanced as to why the translation of *ubuntu* into a legal concept has not been a success. Section two of this paper will examine commentators' views of how the Constitutional Court has used or failed to use *ubuntu* as a jurisprudential tool. In the third part the paper will argue that the irregular use of *ubuntu* lies in the history of the interface between Western and the African worldviews. For the fourth part the paper will argue in favour of de-linking *ubuntu* as a way of establishing a jurisprudence that is unique to South Africa, and then conclude.

2 Commentators' views on the use of *ubuntu* as a jurisprudential tool

The use of *ubuntu* in *Makwanyane* unleashed the concept as the "new buzzword" (Bekker 2006 21 *SAPR/PL* 333) among legal commentators. However, the enthusiasm of the justices of the Constitutional Court in an attempting to use *ubuntu* as a jurisprudential tool was met with a barrage of criticism from commentators. One such scathing criticism came from English ("*Ubuntu*: The Quest for an African Jurisprudence" 1996 12 *SAJHR* 641). Her criticisms are directed first at the very inclusion of the value of *ubuntu* in the interim Constitution. In her view, *ubuntu* was used as a "marketing device designed to put an African *imprimatur* on a set of civil liberties and freedoms largely forged out of Western instruments". (English 1996 12 *SAJHR* 641; and see also Pieterse 445-446 who writes that "In addition to legitimizing the rejection of the death penalty, the use of *ubuntu* in *Makwanyane* ... may also be seen as an attempt to 'Africanize' post-apartheid South African jurisprudence, as well as to legitimize both the Constitution and the Constitutional Court, through attempt to show that the values underlying the former and the judgments of the latter echo the traditional values held by the majority of South Africans".) Regarding the use of the concept by the judges, she laments the fact that none of the

definitions advanced by the justices of the court is specific enough to work as a guiding norm (English 1996 12 *SAJHR* 642). She then asks, “is *ubuntu* then, a genuine useful jurisprudential tool, or does it simply mean all things to all men?” (English 1996 12 *SAJHR* 646.) She goes on to write that

“In relying on *ubuntu* as a form of community consensus the court has tried to appear to be reaching out for some sort of external order of values, and at the same time, to be resurrecting indigenous values that have been allowed to fall into desuetude. Neither of these efforts has quite come off. Constitutional adjudication is about conflict, not harmony, and if *ubuntu* is to be a useful addition to constitutional discourse, we have to get rid of this idea that it is in some way a balm for the conflict at the heart of the society” (English 1996 12 *SAJHR* 648).

On an almost complementary note, Van Der Walt is of the view that future courts will have difficulty overriding the fact that South African law is founded on the value of *ubuntu* which proscribes vengeance, victimisation and the desire to get even with the criminal (Van der Walt *Law and Sacrifice: Towards a Post-apartheid Theory of Law* (2005) 109). However, he finds the lack of jurisprudential rigour in the decision to be frightening (Van der Walt 109). This evidences itself in the arguments advanced by the justices in their employ of *ubuntu*. For instance, Chaskalson P anchors his arguments not on African jurisprudence or literature but on an American case (Van der Walt 109; and see Kroeze 2001 *Stell LR* 253, who writes that “Chaskalson does not indicate how American Jurisprudence is relevant to *ubuntu*, nor does he indicate exactly how *ubuntu* is relevant to the case at hand”.) There is a sense of disappointment in Van Der Walt that Chaskalson has made an extensive reference to Western and international sources to declare death penalty unconstitutional and yet there is little or no effort to establish clearly not only what *ubuntu* means but also what it has to offer for a legal system (Van der Walt 109).

Regarding Justices Madala and Mokgoro, Van Der Walt finds their substantiations to be thin and jurisprudentially vague. About this he writes “The sentiments of humanness, solidarity, personhood, compassion, morality, unity and conformity that they stress, do not as such communicate anything markedly different from the Christian morality that has been endorsing capital punishment for almost 2000 years on end” (Van der Walt 109-110). To Mahomed J’s take on *ubuntu* Van Der Walt is concerned that it does not offer guidance as to how a society should respond to violent crime (Van der Walt 110).

Though Langa J anchored his substantiation of *ubuntu* on an African case, his effort, according to Van Der Walt, does not offer “more insight than do his colleagues regarding the specific and singular meaning of *ubuntu* for the constitutionality of capital punishment” (Van der Walt 110-111; and see also Kroeze 2001 *Stell LR* 254, where she writes that “The judgment by Langa is indicative of much of the debate around *ubuntu*. While there is consensus that it entails some form of communality, the specifics are not dealt with”). He goes on to write that “a rigorous jurisprudence must remain dissatisfied with the feeling good flavour of a jurisprudence that has done little more than add a local, indigenous and communitarian touch to the

Christian, Kantian or Millsian respect for the individual that informs Western Jurisprudence. A rigorous jurisprudence would ask more probing questions regarding *ubuntu*" (Van der Walt 111).

Pieterse, on the other hand, is of the view that attempts to incorporate *ubuntu* into the formal jurisprudence have not succeeded mainly due to courts and commentators treating *ubuntu* as "a uni-dimensional concept rather than as a philosophical doctrine" (Pieterse 444). This he argues, has led to courts and commentators applying *ubuntu* in a "piecemeal and inconstant fashion" (Pieterse 445). He points out that even though there was a "unity of political purpose, there is no uniformity among the justices as to *ubuntu's* content, nor the context within which it should be used. In some instances it is "bizarrely" equated with American constitutional law (Pieterse 446).

As for Bekker, the use of *ubuntu* in the *Makwanyane* case illustrates the deficiencies of the concept as a constitutional value in its current form (Bekker 2006 21 *SAPR/PL* 335). He argues that in its present all-embracing form, *ubuntu* will not be able to provide an effective, workable constitutional value. If the concept wants to be useful, "the concept will have to be redefined to link the value systems of both the original indigenous law and Western law with each other" (Bekker 2006 21 *SAPR/PL* 344). Van Der Walt does not, however, indicate what it is in *ubuntu* that needs to be re-defined so as to make it a useful constitutional value.

For Mangobe Ramose the use of *ubuntu* in *Makwanyane* was *obiter dictum* as the same conclusion could have been reached without recourse to *ubuntu* (Ramose "An African Perspective on Justice and Race" <http://them.polylog.org/3/frm-en.htm> (accessed 2009-02-06).

Interesting to note is that all the above criticisms can be put into two categories. The commentators above either take issue with the way the justices of the court invoked the value of *ubuntu* or take issue with the concept itself. It is almost apparent that there is a format, form or template that *ubuntu* or the justices of the court were supposed to follow and did not. These commentators want to understand *ubuntu* not for what it is, but "through the prism of Western jurisprudence" (Ntlama and Ndima "The Significance South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice Systems" 2009 4 *International Journal of African Renaissance Studies-Multi-Inter- and Transdisciplinarity* 12). In this regard Kroeze's analysis becomes apt (Kroeze 2001 *Stell LR* 253). She argues that the formalism in Constitutional adjudication is the reason why *ubuntu* has not been used in further judgments (Kroeze 2001 *Stell LR* 260). This she attributes to the "the politics of form" which is normative legal thought (Kroeze 2001 *Stell LR* 258). In using *ubuntu* in *Makwanyane*, she argues that the court employed what she calls "three basic rhetorical moves" which she says are familiar to a traditional legal thinker (Kroeze 2001 *Stell LR* 258). In the first move the court used *ubuntu* as a value which is not any different from values found in any civilised society or legal system. She argues that if *ubuntu* were to serve a role of the other, then its otherness is

denied and as a result the “other” is erased and becomes irrelevant (Kroeze 2001 *Stell LR* 260; and see Bohler-Müller 2005 20 *SAPR/PL* 272, where she writes that “In *S v Makwanyane* the concept of *ubuntu* was embraced as a constitutional value and method of voicing the marginalised Other”). Once you treat *ubuntu* as just a local example of a universal value, she argues, then it is no longer a separate value and therefore needs no separate treatment or articulation (Kroeze 2001 *Stell LR* 260).

The second move Kroeze attributes to the way *ubuntu* is defined by both the courts and academics. She argues that to say that *ubuntu* includes the values of “communality, respect, dignity, value, acceptance, sharing, co-responsibility, humanness, social justice, fairness, personhood, morality, group solidarity, compassion, joy, love, fulfilment, conciliation *etcetera* is just too much and as a result the concept “collapses under the weight of expectations” (Kroeze 2001 *Stell LR* 260).

For the third rhetoric move which she considers to be the most important is that *ubuntu* is presented as an alternative to liberalism. For this she writes “if liberalism is individualistic, *ubuntu* must be communitarian; if liberalism emphasises individual rights, *ubuntu* must stress group rights; competition v compassion; confrontation v conciliation ... But this keeps the debates stuck in the liberalist dichotomies and hierarchies. It limits the choices to either liberalism or communitarianism” (Kroeze 2001 *Stell LR* 261). Kroeze argues that if *ubuntu* is to be transformative, it is then denied its transformative power by liberal formalism. Her conclusion is that *ubuntu* was rendered ineffective, because it did not fit with the discourse of traditional legal thinking (Kroeze 2001 *Stell LR* 261).

While Kroeze’s analysis is important as it provides an analytical tool, it remains unhelpful in that it does not go beyond the diagnosis of the problem. The natural progression from a diagnosis should be to issue out a prescription. Having looked at the impact of colonization and *apartheid* on the use of law in South Africa, this paper will argue in favour of de-linking *ubuntu* from the traditional dominant Western jurisprudence.

3 The interface between the African and Western worldviews

Like most African countries, the history of South Africa is incomplete without mention of the colonial domination. The South African legal history is dominated by the contest between two Western systems, English law and Roman-Dutch law, to the exclusion of African indigenous law (see Hostein “The Permanence of Roman Law Concepts in South African Law” 1969 (II) *CILSA* 192-205; Van Niekerk “A Common Law for Southern Africa: Roman Law or Indigenous African Law?” 1998 (2) *CILSA* 158-173; and Van Niekerk “The Status of Indigenous Law in the South African Legal Order: A New Paradigm for the Common Law?” XXXXII 1 *Codicillus* 5-13). To date the South African legal system still bears vestiges of the colonial domination. During the colonial period in general and *apartheid* in particular, African indigenous law was relegated to the margins (see Ndima “The African Law

in the 21st Century in South Africa” 2003 *CILSA* 325-345). Even where African law applied, it was either applied in its distorted form or it first had to pass the repugnancy clause test first. As to when it was applicable, it was still not up to the colonized, but up to the colonizers to decide (Ndima 2003 *CILSA* 328-329). It is this context which sets the scene for the recognition of indigenous law and the inclusion of *ubuntu* in the interim Constitution. Ndima argues that now that African indigenous system is constitutionally recognized, the courts should give “priority to reversing” the distortions (Ndima 2003 *CILSA* 327).

Even under the Constitutional dispensation, however, the road to recognition of the African law is still steep (Van Niekerk “The Challenge of Legal Pluralism” 2008 23 *SAPL/PR* 208). This recognition still takes place within a position of power, where the power dynamics are still not any different from the colonial days, that is, Western norms continue to dominate indigenous ones. To this effect Van Niekerk writes

“[i]n spite of the Constitutional recognition of indigenous law as part of the South African legal system, it still enjoys the status of law only when authorised by the State. Its recognition is in accordance with practical rules, contained in legislation, which determine when indigenous law may be applied, when it should be regarded as acceptable (generally, when it is not repugnant to western perceptions of what is moral and what is in the public interest) how it should be ascertained, and what should be done when there is a conflict of law” (Van Niekerk 2008 23 *SAPL/PR* 208).

The vestiges of the domination of the colonial period continue to linger on even under the pluralistic Constitution. For instance, it is not clear as to what the status of Indigenous law is within the South African common law. Van Niekerk proffers three possibilities (Van Niekerk XXXII 1 *Codicillus* 6). The first one, which she considers the most obvious, is to see indigenous law as a fourth layer in the three-layered cake of the South African law consisting of Roman law, Roman-Dutch law and English law. The second possibility she suggests is to put Indigenous law into a customary law slot. Thirdly, she asks, if it would be preferable to seek a completely new source paradigm for indigenous law.

The last view is the preferred one for this paper. This is so because the first two approaches have historically not accommodated indigenous values. Other than that, both the Western and African legal systems operate from jural postulates which are not the same. (See Van Niekerk 1998 2 *CILSA* 160, where she explains that jural postulates are the “basic axioms which underlie law and based on societal values of what is desirable and what not. They form an integral part of the structure of law and a conflict between such underlying principles is often reflected in a political struggle as has been amply proved in South Africa”.) The Western paradigm endorses the notion of the sovereign individual, in which case law becomes a tool which an individual can use against the community or other individuals. For the African view on the other hand, the harmony of the collective good takes precedence over individual claims. Rules and laws are there to maintain harmony (see Van Niekerk 1998 2 *CILSA* 160). This tension therefore

means that, “judged by Western standards many indigenous laws will be found unjust and should be abolished. By the same token, if judged within the framework of African jurisprudence, Western law may be found to be falling short of African jurisprudence” (see Van Niekerk 1998 2 *CILSA* 165).

The net effect of this tension between the two legal systems is that each time there was a contest between the two, one system has had to give way to the other. As it has been pointed out above, historically it has been the African system that gave way as it was applicable only when it was not repugnant to the Western one. In the new constitutional era, there continues to be difficulties with regard to the status of indigenous law as to when it is applicable and, as to its use particularly by the Constitutional Court (Ntlama and Ndima 2009 4 *International Journal of African Renaissance Studies-Multi-Inter- and Transdisciplinarity* 15, *eg*, of cases, where the Constitutional Court has abdicated its responsibility to develop customary law). This has therefore stunted the development of the indigenous legal system and by implication continued to marginalize crucial African values like *ubuntu*.

In the recent past, there have been renewed attempts to explore the usefulness of *ubuntu* in as far as law is concerned (Cornell and Van Marle 2005 5 *African Human Rights Law Journal* 208; Cornell “A Call for a Nuanced Constitutional Jurisprudence: *Ubuntu*, Dignity and Reconciliation” 2004 19 *SAPL/PL* 666-675; and Cornell 2009 20 *Law Critique* 48). Cornell and Van Marle provide an interesting reflection on *ubuntu* in that they point out the need to take cognisance of African philosophy in articulating African values. Drawing from the work of Mudimbe, they write that “the question of what African philosophy is must be pursued through the genealogy of the anthropological methods used to articulate African *gnosis* and the epistemological context in which it has been made possible” (Cornell and Van Marle 2005 5 *African Human Rights Law Journal* 197). It is this paper’s view that any attempt that wants to understand *ubuntu* but does not take African philosophy into account will certainly not succeed. Equally important is the fact that any attempt to want to understand African traditional thought must not do so by comparing it with Western thought but must understand it for what it is (see Wiredu “How Not to Compare African Traditional Thought with Western Thought” 1997 75/76 *Transition* 320-327).

Despite their observation above, Cornell and Van Marle do not develop the importance of African philosophy any further, instead they write “there is clearly much work to be done in terms of the historical genealogy and, indeed, the anthropological investigation into what African philosophy is and 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” (Cornell and Van Marle 2005 5 *African Human Rights Law Journal* 197). Their failure to engage and delve into the historical genealogy, has deprived their reflection of a contextual African epistemology. Instead, their reflections continue to be rooted in the Western paradigm, devoid of African context. To locate reflections within the African context, this paper suggests that *ubuntu* be de-linked from the Western jurisprudence. By de-linking *ubuntu*, we will be acknowledging the fact that jurisprudence is

necessarily ethnocentric (see Lenta "Just Gaming? The Case for Postmodernism in South Africa Legal Theory" 2001 17 *SAJHR* 173).

4 De-linking of *ubuntu*

In this ever-changing world lawyers have a tendency to look towards law for meaning (Van der Walt "Modernity, Normality, and Meaning: The Struggle Between Progress and the Politic of Interpretation (Part 2)" *Stell LR* 2000 2 226-243). Drawing from the work of Coombe on the "politics of interpretation" (Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" 1988-1989 34 *McGill LJ* 608, who writes that "Anthropologists, then, must attempt to understand other cultures "from the native's point of view"; descriptions of other cultures must be cast in terms of constructions that people in those cultures place upon their experiences, the interpretive meanings they ascribe to their lives, because it is those lives and those experiences that anthropologists profess to describe"), Van der Walt writes that

"Lawyers trust tradition and convention as a source of meaningful answers to legal questions, and even when changes in moral or political conviction cast shadows of doubt over racist, sexist, colonialist and assorted other sins entrenched in the sediment of tradition, they assume that the smaller adaptations and cosmetic surgery can keep the stable background of tradition intact" (Van der Walt *Stell LR* 2000 2 230).

Within the South African context, to rely solely on tradition, will be tantamount to being stuck in the old colonial and *apartheid* rut and therefore perpetuate the history of domination of one tradition over another.

Van der Walt warns against two dangers. The first danger he calls the danger of complacency about the relationship between the new constitutional order and Roman-Dutch law. His fear is that if Roman-Dutch law is not engaged with critically, then "our segregationist past will be smuggled back into the new constitutional order via well intended, uncritical recourse to common law as a source of stability and meaning" (Van der Walt *Stell LR* 2000 2 239). The second danger is the danger of complacency about the new constitutional order. His fear is that traditional notions and assumptions will be smuggled back through "complacent, uncritical, and massaging of the new constitutional order as supposedly innocuous source of stable and common meaning" (Van der Walt *Stell LR* 2000 2 240).

It is on this basis that this paper employs an extra-legal concept of de-linking as a basis for moving away from the traditional legal discourse and its dangers. Outside law there is an emerging literature and research the world over aimed at dealing with the effects of colonization (for this, this note draws from the work of Mignolo "Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-coloniality" 2007 21 *Cultural Studies* 449-514). The research is premised on the view that colonization was not only about politics and economics; it was also about the mind (see Wa Thiong'o *Decolonizing the Mind: The Politics of Language in African*

Literature (1994); and Fanon *The Wretched of the Earth* (2001)). To this end Wa Thiong'o has observed that

“colonialism imposed its control of the social production of wealth through military conquest and subsequent political dictatorship. But its most important area of domination was the mental universe of the colonized, the control, through culture, of how people perceived themselves and their relationship to the world” (Wa Thiong'o 16).

For a long time Europe projected itself as the epicentre of knowledge and power. De-linking therefore brings forth an epistemological shift that “denounces the pretended universality of a particular ethnicity” (Mignolo 2007 21 *Cultural Studies* 453) in this case a European one. The net effect of de-linking is that it leads to “other-universality” of other realities (Mignolo 2007 21 *Cultural Studies* 453). De-linking therefore provides an opportunity to conceive of a reality beyond the colonial matrix of domination. According to Mignolo de-linking provides an opportunity to see beginnings beyond Adam and Eve, foundational languages beyond Greek and Latin, economic theories beyond Adam Smith, and political theories beyond Thomas Hobbes and Machiavelli (Mignolo 2007 21 *Cultural Studies* 456). Importantly for this paper, to de-link means to change not only the terms of conversation but the content (Mignolo 2007 21 *Cultural Studies* 459). This becomes important because when *ubuntu* was included in the interim Constitution, it was linked to the traditional dominant legal discourse. The problem with this linking was that it created a situation whereby *ubuntu* was linked not on its own terms but on the terms of the Western-influenced legal system which had for years relegated it to the margins. Though linked to the traditional discourse, African jural postulates became irrelevant. This became apparent in the way the justices of the Constitutional Court invoked *ubuntu* and in the subsequent analysis by academics as pointed out above.

In light of the foregoing therefore, the benefit of de-linking *ubuntu* from the traditional legal discourse will create an opportunity for the “re-construction and restitution of silenced histories” (Mignolo 2007 21 *Cultural Studies* 451). When de-linked, *ubuntu* will be assessed, analysed and understood in its proper African worldview context, and only then would its importance be realised and valued for what it is.

5 Conclusion

Under colonialism and later *apartheid*, African values were relegated to the margins and were not given a place of prominence as part of the rich diverse legal history of South Africa. When indigenous law was applied, it was often in a distorted manner. The dawn of the constitutional democracy marked a shift in approach as indigenous law was recognized and *ubuntu* was included in the interim Constitution. The inclusion of *ubuntu* into the Western-dominated legal discourse did not mark the beginning of the development of this important value. Also the Constitutional Court justices invoked *ubuntu* without paying heed to the jural postulates underlying it, and by so doing rendered it unusable. This paper has argued that to develop

ubuntu and give it some relevance, *ubuntu* must be de-linked from the dominant Western legal paradigm. Only then will *ubuntu* be seen and understood for what it is within the African context.

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