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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² Last, unnumbered section of the *Constitution of the Republic of South Africa* 200 of 1993.
⁴ Moosa “Tension in Legal and Religious Values” 131 argues that the Constitution was “de-Africanised” as a result of this omission.
⁵ *S v Makwanyane* 1995 3 SA 391 (CC).
⁷ 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).
⁸ Kroeze 2002 *Stell LR* 253-256 for an analysis of these decisions.
⁹ Kroeze 2002 *Stell LR* 256ff.
¹⁰ See, for example, s 2(b) of the *Child Justice Act* 75 of 2008.
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 \textit{ubuntu}. The paper, by Radebe and Phooko,\footnote{Radebe and Phooko 2017 \textit{SAJP} 239-251.} seeks to do three things. In the first place it tries to show why most of the criticisms of \textit{ubuntu} are wrong. In the second place it seeks to develop the concept that some have characterised as bloated and yet strangely empty.\footnote{See Kroese 2002 \textit{Stell LR} 252, 260-261.} In the third place, and more importantly, it seeks to develop \textit{ubuntu} as a \textit{legal} concept to enable \textit{legal} solutions.\footnote{Radebe and Phooko 2017 \textit{SAJP} 239, in the quote at the start of the article, emphasises "legal solutions", "legal scholars and courts" and "legal problems".} 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.\footnote{See Finlayson 2015 \textit{Br J Hist Philos} 1142: "Concisely formulated, to criticize immanently is to criticize an object 'on its own terms.'"} 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 \textit{ubuntu} whether positive or negative. Radebe and Phooko very selectively deal with only a few authors.\footnote{Radebe and Phooko 2017 \textit{SAJP} 239-251.} The contributions by Idowu,\footnote{Idowu 2012 \textit{JJS} 56-83.} Bohler-Muller,\footnote{Bohler-Muller "Some Thoughts on the \textit{ubuntu} Jurisprudence" 377-387.} Kroese,\footnote{Kroese 2002 \textit{Stell LR} 252-264.} Onyango,\footnote{Onyango \textit{African Customary Law} 113-114.} Pieterse\footnote{Pieterse "'Traditional' African Jurisprudence" 441. Radebe and Phooko misspelled the name as Peterse.} and Kuwali,\footnote{Kuwali "Decoding Afrocentrism" 85.} 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,\footnote{Cornell and Van Marle 2005 \textit{AHRLJ} 195-220.} English\footnote{English 1996 \textit{SAJHR} 641-648.} and Keevy\footnote{Keevy 2009 \textit{JJS} 19-58.} as well as the largely positive
comments from Metz.\textsuperscript{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.\textsuperscript{27} Radebe and Phooko only refer to what they perceive as Cornell and Van Marle’s view that \textit{ubuntu} is seen as a bloated concept that is, for that reason, not suitable for inclusion as a constitutional value.\textsuperscript{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,\textsuperscript{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 \textit{ubuntu}, Cornell and Van Marle conclude as follows:

\begin{quote}
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.\textsuperscript{30}
\end{quote}

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.\textsuperscript{31} This is a circular argument in which, if the validity of \textit{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 \textit{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 separated\textsuperscript{32} and that \textit{ubuntu} is part of this system that entrenches patriarchy and discriminates against gay people.\textsuperscript{33} Far from making "unsubstantiated and sweeping statements" – as Radebe and

\begin{itemize}
\item \textsuperscript{26} Metz 2007 \textit{Polit Philos} 321-341.
\item \textsuperscript{27} Cornell and Van Marle 2005 \textit{SAJHR} 195.
\item \textsuperscript{28} Radebe and Phooko 2017 \textit{SAJP} 246.
\item \textsuperscript{29} Pieterse "Traditional' African Jurisprudence" 441.
\item \textsuperscript{30} Cornell and Van Marle 2005 \textit{AJHR} 220.
\item \textsuperscript{31} Radebe and Phooko 2017 \textit{SAJP} 246: "(T)he Constitutional Court has demonstrated in a battery of cases that \textit{ubuntu} is a constitutional value...".
\item \textsuperscript{32} Interestingly, Radebe and Phooko 2017 \textit{SAJP} 243 make essentially the same claim: "Ubuntu is based on religion" and 242: "African humanism (which they equate with \textit{ubuntu}) has religion as its foundation".
\item \textsuperscript{33} Keevy 2009 \textit{JJS} 36-47.
\end{itemize}
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 Ipse 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 Cambria L Rev 77.
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."
A philosophical and hermeneutic approach that resulted in enormous damage being done. But 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. Metz 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. 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..." 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". 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.

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

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38 For an overview of these approaches, see Kroeze 1993 *SAPL* 230-237; Dugard 1971 *SALJ* 181ff.
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".
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". 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. 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. This kind of thinking is prevalent in many communities where poverty and hunger are all too real threats. 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.
The same can be said of the idea that people must help one another in times of need, such as with funerals. Unfortuately 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. 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". 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.

Ubuntu apparently also rejects "scientific humanism", in favour of "African humanism". 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". 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". 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,

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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.
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.\textsuperscript{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".\textsuperscript{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.\textsuperscript{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 \textit{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.

\subsection*{3.2 Positive law}

The second group of aspects that Radebe and Phooko identify as central to the concept of \textit{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 \textit{ubuntu} would be unnecessary. And recently the Appeal Court confirmed that, where common law rules exist, reliance on \textit{ubuntu} is inappropriate.\textsuperscript{61}

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\textsuperscript{58} Radebe and Phooko 2017 \textit{SAJP} 244.
\textsuperscript{59} Radebe and Phooko 2017 \textit{SAJP} 243.
\textsuperscript{60} Radebe and Phooko 2017 \textit{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 ...".
\textsuperscript{61} Liberty Group Limited v Mall Space Management 2020 1 \textit{SA} 30 (SCA) [37] – relying on Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2018 2 \textit{SA} 314 (SCA).
\end{flushleft}
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.
\(^{65}\) 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

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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

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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 ownership\(^ {88}\) 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
private, rural land is governed by one set of laws,\textsuperscript{90} with another set of laws imposing limitations on this type of land.\textsuperscript{91} Redistribution of private, urban land is governed by a different act.\textsuperscript{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.\textsuperscript{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".\textsuperscript{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

\textsuperscript{93} Preamble of the Constitution.
\textsuperscript{94} Popper _Open Society_. 
unchanging; and thirdly that everyone accepts this as proper and natural.\footnote{Popper Open Society 12. This is reminiscent of what Michelman calls classical republicanism in American thought – see Michelman 1988 Yale LJ 1493-1537.} 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.\footnote{Popper Open Society 94 is here comparing the ideas of Pericles with those of Plato.} 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 \textit{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.\footnote{See s 36 of the Constitution.}

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.\footnote{Popper Open Society 175.} 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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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
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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<td>DPSA</td>
<td>Department of Public Service and Administration</td>
</tr>
<tr>
<td>IoDSA</td>
<td>Institute of Directors in Southern Africa</td>
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<tr>
<td>J Polit Philos</td>
<td>Journal of Political Philosophy</td>
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