

Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts

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If I am not for myself, then who will be for me?
If I am not for others, then who am I?
If not now, when?
Hillel

Haeba ke sa ithokomele, ke mang ea tla ntlhokomela?
Haeba ke sa hlokomele ba bang ba heso, na ke botho?
Haeba re sa hlokomelane ha joale, re tla hlokomelana neng?
Anonymous

History doesn't repeat itself, but it often rhymes.
Mark Twain

In the decade or so in which Professor Cornell has engaged South Africa's jurisprudence, her name has become synonymous with academic discourse on the values of dignity and uBuntu. As colleagues and collaborators, it is often hard to know where Drucilla Cornell's thoughts on these subjects end and one's own ruminations begin.¹ What follows then is an amplification of, or a riff upon, Professor Cornell's lead essay: 'Is there a difference that makes a difference?' Contestation is not on the cards.

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¹We have both written at length on dignity and ubuntu, and in many cases in conjunction with, or with support from, Professor Cornell. See, eg, Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; Cornell and Mokgoro (eds) *uBuntu in the law of South Africa* (2012); Woolman 'Dignity' in Woolman and Bishop (eds) *Constitutional law of South Africa* (2005)(2nd ed); ch 34; Cornell, Woolman, Bishop, Brickhill, Fuller and Dunbar (eds) *The dignity jurisprudence of the Constitutional Court of South Africa* (2012).

But emotion is. Adjudication and academic scholarship in the social sciences – as much as any other form of judgment – requires ‘emotional intelligence’² and a kind of connected spectatorship based upon mutual respect, care, trust and respect.³ As Professor Cornell insists throughout her immense and influential body of work,⁴ law cannot be reduced to a benighted Hartian set of first order rules of recognition and the second order rules that flow from them.⁵ Cornell’s persistent emphasis on law as far more than a body of rules functions as a regular reminder that our ‘formal’ training (at institutions as physically far apart as the University of Bophuthatswana or Columbia Law School, but as ontologically close with respect to the Hartian indoctrination into legal doctrine that we received) was missing something critical to the creation of a just legal order. No matter how much law strives to have a formal existence, messy human beings living out different ways of being in the world must learn to accommodate one another when it comes to determining the meaning of the basic law and honouring the constraints that the text invariably imposes.⁶ Following Henk Botha and Larry Tribe, we write neither ‘for those who feel confident that canons of appropriate constitutional construction may be derived from some neutral source’ nor ‘for those who have convinced themselves that anything goes as long as it helps end what they see as injustice’.⁷ When we write about the relationship between

²See Ellmann ‘Marking the path of the law’ (2009) 2 *Constitutional Court Review* 97 (Ellmann contends that emotional attachment, as opposed to detachment, plays a greater role in adjudication than even legal realists tend to posit and that the role of emotional attachment in the law ought, as a result, to be given greater recognition in the development of the law school curriculum (primarily in the form of an increased emphasis on clinical courses.)

³See Smith *The theory of moral sentiments* (1760). See also Sen *The idea of justice* (2010); Sen *Development as freedom* (1999).

⁴See Cornell *The imaginary domain* (1995); Cornell *At the heart of freedom* (1998); Cornell *Just cause: Freedom, identity and rights* (2000); Cornell *Defending ideals: War, democracy, and political struggles* (2004); Cornell *Moral images of freedom* (2008); Cornell ‘A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation’ (2004) 19 *SAPR/PL* 666, 667 ([‘]f we give Kantian dignity its broadest meaning, it is not associated with our actual freedom but with the postulation of *ourselves* as beings who not only can, but must, confront ... ethical decisions, and in making those decisions ... give value to our world’). For an insightful overview of Cornell’s oeuvre, see Van Marle ‘“No last word”: Reflections on the imaginary domain, dignity and intrinsic worth’ (2002) *Stell LR* 299, 305-307.

⁵Pace HLA Hart *The concept of law* (1960), Cornell writes:

Synchronization points us to the real problem . . . How do we develop an institutional analysis which allows us not only to synchronize the competing rights of individuals, but also the conflicts between the individual and the community, and between different groups in society. The goal of a modern legal system is synchronization and not coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community which may not yield a coherent whole. The conflicts may be mediated and synchronized but not eradicated.

Cornell ‘Pragmatism, recollective imagination, and transformative legal interpretation’ (1993) *Transformations* 23, 35-6.

⁶Botha ‘Freedom and constraint in constitutional adjudication’ (2004) 20 *SAJHR* 249.

⁷Tribe ‘The futile search for legitimacy’ *Constitutional choices* (1985) 4-5.

uBuntu and the Constitution, we provide substantive grounds (expressly present in the Interim Constitution and implicit in the Final Constitution) for how we believe judges on a *South African* bench ought to read the text. Put slightly differently, though uBuntu may shadow Western notions of dignity (drawn from the work of Kant) or communitarianism (drawn from the work of Rousseau or Marx), it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law. It hardly seems controversial to ground the South African Constitution in the lived experience of South Africans so long as an uBuntu-based reading does no violence to the text.

That's not an opinion. It's law.

When the Constitutional Court handed down *Makwanyane* in 1995, it clearly decided the matter in the spirit of uBuntu. The enabling environment at the Constitutional Court – of equals serving among equals with a deep sense of consideration and respect for each other's views, and of a commitment to the ideal of a new constitutional democracy in which every contribution counts – allowed members of the Court to plant the seed of uBuntu jurisprudence (found in the postscript of the Interim Constitution). While most of the justices emphasised the violation of the right to human dignity or the right to freedom and security of the person as a basis for finding the death penalty infirm, several others based their findings in accepted axioms of uBuntu:

Generally uBuntu translates as humanness. In its most fundamental sense it translates as personhood and morality. Metaphorically it expresses itself in *umuntu, ngabantu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity making a shift from confrontation to conciliation.⁸

Members of the *Makwanyane* Court found the death penalty repugnant because retribution and group catharsis as the bases for punishment are inconsistent with an uBuntu-based jurisprudence of reconciliation, restorative justice and democratic solidarity. As importantly, their findings should be understood as broadly representative of South African views regarding the moral underpinnings of the basic law.

⁸S v *Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), 1995 2 SACR 1 (CC) ('*Makwanyane*') para 308. In *Makwanyane*, Langa J writes:

Ubuntu captures, conceptually, a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. *Id* paras 224-225.

The presence of 'uBuntu' as a guiding norm in the interpretation of our basic law is essential, in the minds of ordinary people, for the legitimation of our legal system.⁹ We ignore 'uBuntu' at our own peril. Indeed, without saying much more on this subject, a growing sense of disjunction between the ideals of the Constitution and the lived experience of most South Africans warrants a reappraisal of the place of uBuntu in South African law. It is this *difference* between dignity – as espoused by Kant and other Western philosophers – and uBuntu as practiced by the majority of South Africans that animates Professor Cornell's lead essay on the subject. We need to do more than infuse our dignity jurisprudence with a soupcon of uBuntu. The legitimation of the South African legal order depends upon our ability to synchronise these two closely related, but distinct terms. In *Khosa*, the Court offered the following South African gloss on the demands of dignity – one framed in a decidedly South African lingua franca – in finding that the State's refusal to provide permanent residents with social welfare benefits constitutes a violation of the right to social security and the right to equality:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.¹⁰

If dignity and uBuntu can be squared in such a fashion, and in the context of such a difficult case as the right to adequate access to social security, then one might ask, as Professor Cornell does – why has uBuntu been met by the academy and by the courts with such resistance?

We can identify two additional sources for this resistance: (1) the problem of translatability; and (2) the tension between radical reconstructions of uBuntu (such

⁹See Sigonyela 'On uBuntu and the legitimacy of our constitutional order' *Is this seat taken* Colloquium, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (2010-08-29)(manuscript on file with authors.)

¹⁰See *Khosa v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) ('*Khosa*') (Mokgoro J) para 74. In *Khosa*, the Court goes beyond dignity as minimal respect, or dignity as equal concern and arrives at dignity as a collective concern. The Constitutional Court has discussed dignity as a collective responsibility in a number of its unfair discrimination decisions. See, eg, *Hoffmann v South African Airways* 2001 1 SA 1 (CC), 2000 11 BCLR 1211 (CC) para 43 ('The interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.') The Constitutional Court has written about dignity qua collective responsibility in the context of evictions and claims asserted under s 26. See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 18 ('It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation'.)

as those understandings proffered by Professor Cornell and others¹¹) and conservative manifestations of this indigenous philosophy often used to block egalitarian (and especially feminist) reform of highly stratified patriarchal structures in traditional communities and South Africa's capitalist economy.

Rosalind English deserves credit for engaging uBuntu long before it was fashionable to do so. However, she remained skeptical of its uses all the same:

In relying on uBuntu as a form of community consensus, the Court has tried to appear to be reaching out for some external order of values and, at the same time, to be resurrecting indigenous values that have been allowed to fall into destitution. Neither of these efforts has quite come off.¹²

In sum, neither the Court nor other participants in this conversation about the place of uBuntu in our constitutional order could quite make it do the work that its proponents wanted it to do. But did those efforts not come off because uBuntu was dropped from the text of the Final Constitution or because its expositors could not convey with precision in the dominant language – English – and political culture – liberal capitalism – a term that was well understood in indigenous cultures throughout South Africa? We think that the failure of engagement reflects

¹¹See, eg, Metz 'African ethics' *International encyclopaedia of ethics* (2010)(manuscript of file with authors). Metz maintains that

[t]here are kinds of communitarian and vitalist approaches to morality commonly held by sub-Saharan ethical theorists that international scholars should take seriously as genuine rivals to utilitarian, Kantian, contractarian, and care-oriented outlooks that dominate contemporary Euro-American discussion of right action Many friends of sub-Saharan morality would sum it up by saying what is most often translated (overly literally) as either 'A person is a person through other persons' or 'I am because we are'. One encounters such phrases in a variety of societies, ranging from those in South Africa to Kenya in East Africa and Ghana in West Africa. While these phrases do connote the empirical or even metaphysical idea that one needs others in order to exist, they also convey a normative outlook. In particular, personhood and selfhood, in much African moral thought, is value-laden, meaning that one's basic aim as a moral agent should be to become a *complete* person or a *real* self. Or, using the influential term used among Zulu and Xhosa speakers in South Africa, one's fundamental goal ought to be to obtain '*ubuntu*', to develop humanness or live a genuinely human way of life. Insofar as a large swathe of sub-Saharan thought takes one's proper ultimate end to be to become (roughly) a *mensch*, it may be construed as a self-realisation morality, not unlike Greek and more generally perfectionist standpoints ... However, unlike the self-realisation approaches that are dominant in the West, characteristic African versions are *thoroughly relational or communitarian* in the way they specify what constitutes one's true or valuable nature. That is, most Western accounts of morality that direct an agent to develop valuable facets of her human nature conceive of there being non-derivative self-regarding aspects of it, such as properly organising one's mental dispositions (Plato's *Republic*) or understanding parts of the physical universe (Aristotle's *Nicomachean ethics*). In contrast, a large majority of sub-Saharan conceptions of self-realisation account for it *entirely* in terms of positive relationships with other beings. In general, one develops one's humanity just insofar as one enters into community with others, particularly with other humans, but also with 'spiritual' agents who cannot be seen. Traditionally speaking, one's selfhood is partly constituted by communal relationships with God and ancestors, *viz.* elderly and morally wise progenitors of a clan who are thought to have survived the death of their bodies and to continue to interact with those in this world (the 'living-dead' as they are often called)(citations omitted).

Metz's view of African ethics is not all sunshine and roses. See, eg, Metz 'African moral theory and public governance: Nepotism, preferential hiring and other partiality' in Murove (ed) *African ethics: An anthology for comparative and applied ethics* (2009) 335.

¹²English '*Ubuntu*: The quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 640, 648.

(in part) a general malaise on the part of academics and jurists. For some, this lassitude takes the form of a rather thin and potted post-structuralist or post-modernist account of other cultures – as in ‘it’s a black thing, we couldn’t possibly understand.’¹³ But as Professor Cornell’s writing and her uBuntu project make clear, no good reason exists to countenance such relativism. Our point here is decidedly Davidsonian.¹⁴ What all relativists have in common – from Foucault or Derrida to Kuhn and Feyerabend – is a notion of ‘incommensurable conceptual schemes’. Davidson writes:

Philosophers of many persuasions are prone to talk of conceptual schemes. Conceptual schemes, we are told, are ways of organizing experience: they are systems of categories that give form to the data of sensation; they are points of view from which individuals, cultures or periods survey the passing scene. There may be no translating from one scheme to another, in which case the beliefs, desires, hopes, and bits of knowledge that characterize one person have no true counterparts to the subscriber to another scheme. Reality is relative to a scheme: what counts as real in one system may not in another Conceptual relativism is a heady and exotic doctrine, or would be if we could make sense of it. The trouble is, as so often in philosophy, that it is hard to improve intelligibility while retaining the excitement.¹⁵

That’s about as charitable as Davidson can be in dismissing epistemological claims made by philosophers working within post-modern or post-structuralist frameworks. About the confusion associated with conceptual schemes, he argues:

Since knowledge of beliefs comes only with the ability to interpret words, the only possibility at the start is to assume general agreement on beliefs The guiding policy is to do this as far as possible The method is not designed to eliminate disagreement, nor can it; its purpose is to make meaningful disagreement possible, and this depends entirely on a foundation – *some* foundation – in agreement We make maximum sense of the words and thoughts of others when we interpret them in a way that optimizes agreement Where does that leave the case for conceptual relativism? The answer is, I think, that we must say much the same thing about differences in conceptual schemes as we say about differences in belief: we improve the clarity and bite of declarations of difference,

¹³A mainstay of the meta-theory of cultural anthropology and literary studies, relativism even managed to worm its way into the philosophy of science – Feyerabend *Against method* (1975); Feyerabend *A farewell to reason* (1987) – though it’s fair to say that most scientists do not take such relativism seriously.

¹⁴As Davidson writes in his ‘Introduction’ *Inquiries into truth and interpretation* (1984) xiv (emphasis added):

So a theorem like ‘Schnee ist weiss’ is true in the mouth of a German speaker if and only if ‘snow is white’ has to be taken not merely as true, but as capable of supporting counterfactual claims. Indeed, given that the evidence for this law, if it is one, depends ultimately on certain causal relations between speakers and the world, one can say that it is no accident that ‘Schnee ist weiss’ is true if and only if snow is white; it is the whiteness of snow that *makes* ‘Schnee ist weiss’ true.’

¹⁵Davidson ‘On the very idea of a conceptual scheme’ *Inquiries into truth and interpretation* (1984) 183, 183.

whether of scheme or opinion, by enlarging the basis of shared (translatable) language or of shared opinion.¹⁶

The apposite conclusions to be drawn from Davidson's analysis are (a) that no good reason exists to think that the large majority of beliefs held by members of another culture are somehow beyond our ken, and (b) that it is our intellectual job as academics and jurists, and our ethical responsibility as members of the same South African polity, to try to get our heads and hearts around words and concepts that undoubtedly feel (at first instance) foreign and uncomfortable.

The greater challenge, we believe, lies not in whether we can understand or can determine the exact contours of uBuntu, but in describing and defending a certain conception of uBuntu. Here we think that Professor Cornell would be well-served not only to defend uBuntu against its usurpation by the constitutional *grundnorm* of dignity, but to tackle head on conservative variants of uBuntu that would block her social democratic vision of a future South Africa. *Bhe v Magistrate, Khayalitscha*¹⁷ – striking down traditional rules of male primogeniture – or *Shilubana v Nwamitwa*¹⁸ – upholding changes to traditional norms that had previously permitted only male ascension to tribal authority – may seem like easy cases when analyzed in terms of the existing jurisprudence of rights to equality of sex and gender and the right to dignity. But they are most assuredly not. Why?

Two reasons. First, a significant proportion of our country's denizens view the Constitution 'as read' in cases such as *Shilubana* and *Bhe* as dramatically out of step with their 'lived experiences'.¹⁹ Indeed, a growing contingent of scholars and members of social movements contend that our Western-style constitutional democracy is viewed as an imposition, as an extension of colonial rule and white power through law (as opposed to violent, fascist and expressly racist oppression.)²⁰ Second, the process of 'recollective imagination' and 'transformative legal interpretation' of uBuntu into a set of beliefs and practices that will

¹⁶*Id* 197.

¹⁷2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC).

¹⁸2009 2 SA 66 (CC), 2008 9 BCLR 914 (CC).

¹⁹See Madlingozi 'The constitutional court, court watchers and the commons: A reply to Professor Michelman on constitutional dialogue, 'interpretive charity' and the citizenry as sangomas' (2008) 1 *Constitutional Court Review* 63. See also Sibanda *How constitutional democracy has blocked the promise of South Africa's liberation movements* (PhD, in progress 2011, University of the Witwatersrand); Khoisan Chief Jean Burgess 'The Constitution does not speak to me or for me' in *The Constitution and the masses* Conference at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (Constitution Hill 2010-10-29)(Chief Jean contends that not only does the Constitution's failure to recognise Khoi and San languages as official languages exclude Khoisan people from participation in South Africa's constitutional project, other laws that only permit persons who speak Khoisan languages to 'speak' for Khoisan communities further marginalise Khoisan peoples. As a result, she argues that such a flaw in the basic law functions as a barrier to Khoisan acceptance of the legitimacy of the Constitution.)

²⁰See Mngxitama 'Introduction to Bohmke's "The white revolutionary as a missionary"' (2010) 5 *New Frank Talk* 1.

bring about a representative, or democratic socialist, or communitarian, South Africa polity cannot be assumed. The critique of uBuntu as a potentially conservative brake on this country's emancipatory project cannot be cavalierly dismissed. If uBuntu is connected – however unreflectively – with practices such as male primogeniture, male ascension to leadership positions, male circumcision rites or compensation for teacher-student, male-on-female sexual violence, then such practices must be rooted out before uBuntu can lay claim to the mantle of revolutionary constitutional doctrine. We can agree with Professor Cornell's desire to place uBuntu at the core of South African constitutionalism even as we insist that her efforts must embrace, at the outset, the political conversion of those members of South African society who, when they speak of uBuntu, imagine a very different set of (conservative) political institutions and legal doctrines.

Professor Cornell's reflections on uBuntu and dignity are neither inventions in the German Idealist tradition nor fantasies about the underlying philosophy of many South African communities. What Professor Cornell's writings exhibit is a two-fold effort to excavate the profound and unique communitarian thought embedded in uBuntu and a rolling-up-of-the-sleeves exercise in determining the content of uBuntu-based forms of life throughout South Africa. It most certainly is a project in speculative, philosophical anthropology. But it is more than that. By tying her unabashedly political project to classically anthropological work in the field, Professor Cornell promises the possibility of a fully worked out African ethics and politics. If there is a tension in Professor Cornell's work, then it is a most natural tension between academic exercises and practical politics. As a Kantian scholar of the first order, a long-standing student of uBuntu and a savvy analyst of politics in South Africa, the challenge before Professor Cornell is to get individuals and communities within this radically heterogeneous country singing off the same hymn sheet. No easy task.

As her paper reflects, Professor Cornell struggles mightily to close the gap between uBuntu and dignity – at the same time as she recognises the differences between both constitutional norms. Need we try so hard to reconcile the two? No one has suggested that we need to square uBuntu with equality or freedom, or reduce it entirely to community rights. We might do well to consider allowing these values to occupy their own separate spaces – closely aligned and overlapping, but with different roles to play when we apply our minds to constitutional conflicts. Perhaps a Twainian twist is in order: uBuntu and dignity do not map directly on to one another, but they do rhyme.

Given this added layer of complexity, we might ask whether Professor Cornell can make good on the promise of *both* her uBuntu and dignity projects? She has already more than started. Yet a sense of urgency in South African politics (yes, an incipient violence) lingers over her poignant manifestos. We can ask of the uBuntu project, as Hillel did of his brethren over two millennia ago, 'If not now, when?'