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MEMORANDUM
[Confidential]

TO: Honourable Adv. SP Holomisa, MP and
Honourable Mr. BA Mnguni, MP
Co-Chairpersons: Constitutional Review Committee

COPY: Acting Secretary to Parliament [Mr M B Coetzee]

FROM: Constitutional and Legal Services Office
[Adv C R van der Merwe –Parliamentary Legal Adviser]

DATE: 31 August 2012

SUBJECT: Annual Submission to the Constitutional Review
Committee: Submission of Langelihle Nkabinde on poor
performance of Municipalities and Ubuntu as part of the
right to Dignity

CR COMMITTEE
REFERENCE: CR12-15

REF: 197/2012

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INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Constitutional Review Committee ('CRC') to advise on the submission received from Langelihle Nkabinde ('Nkabinde').

SUBMISSION BY NKABINDE

2. Nkabinde addresses two issues in the CRC submission: An amendment to section 139(1) of the Constitution of the Republic of South Africa, 1996

(‘Constitution’) is proposed to allow provincial intervention where a municipality is performing poorly; and including the concept of “*ubuntu*” into section 10 of the Constitution.

SECTION 139(1): POOR PERFORMING MUNICIPALITIES

3. Nkabinde advocates for the strengthening of national and provincial government intervention into non-performing local government municipalities. Nkabinde proposes that section 139(1) be amended so that the discretionary intervention by the province when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation becomes an obligation placed on the province. Nkabinde further proposes insertions into the text to the effect that provincial officials must be deployed to oversee the functioning of the relevant municipality and that national government may be involved in the process of overseeing the municipality.
4. When analysing Nkabinde’s proposal, it appears to be more in the nature of criticism against the executive of the relevant provinces for not intervening in the affairs of poor performing municipalities, than addressing a *lacuna* in the Constitution. There are sufficient measures contained in the Constitution to ensure that municipalities perform, and if a municipality fails to do so, for the provincial and national government to intervene.
5. The government of the Republic of South Africa was set up “as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”¹ Co-operative government and intergovernmental principles² that deal specifically with interaction between the spheres of government include that all spheres of government and organs of state within spheres of government must -
 - 5.1. respect the constitutional status, institutions, powers and functions of government in the other spheres;³

¹ Section 40(1) of the Constitution.

² Section 41(1) of the Constitution.

³ Section 41(1)(e) of the Constitution.

- 5.2. not assume any power or function except those conferred on them in terms of the Constitution;⁴
- 5.3. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;⁵ and
- 5.4. co-operate with one another in mutual trust and good faith by *inter alia* fostering friendly relations and assisting and supporting one another.⁶
6. These principles are embodied in the Constitutional sections dealing with interaction between the spheres of government.
7. Section 155(7) of the Constitution gives legislative and executive authority to the national and provincial governments to see to the effective performance of municipalities' executive functions.⁷
8. Section 139(1) of the Constitution provides for the provincial executive to intervene in the affairs of a municipality under specific circumstances and sets out quite extensive powers with which to conduct such intervention.
- 8.1. As to Nkabinde's concern, the Constitution provides in section 133 that the members of the executive council of a province are collectively and individually accountable to the legislature of that province. Should a municipality thus be found to be a poor performer, the relevant provincial legislature should pursue the matter to ascertain the reason for the provincial executive not intervening in the affairs of that municipality, and may recommend that it does so.
- 8.2. The Constitution furthermore makes provision for national executive intervention in the affairs of a province. Section 100 of the Constitution reads quite similar to section 139, but in relation to the national government intervening in the affairs of provincial government if the provincial government cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. Should the oversight function of the

⁴ Section 41(1)(f) of the Constitution.

⁵ Section 41(1)(g) of the Constitution.

⁶ Section 41(1)(h)(i) and (ii) of the Constitution.

⁷ Read with section 156(1) of the Constitution.

provincial legislature not have the desired effect, the Constitution does provide for intervention by the national sphere of the executive into the affairs of that provincial executive.

9. Section 139 of the Constitution in subsections (4) and (5) provides for peremptory intervention by the provincial executive in the affairs of the municipality if the municipality—

9.1. “cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget”;⁸

9.2. “as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments”;⁹

10. Should the provincial executive be unable or fails to exercise these functions as set out in subsections 139(4) and (5), subsection 139(6) of the Constitution obligates the national executive to intervene.

11. Provision for intervention is thus sufficiently provided for up to the level of the national sphere.

12. Another aspect that is important to consider is the consequences of stating an action as an obligation in the Constitution. When an action is an obligation, neither the provincial legislature, nor the courts may consider circumstances such as capacity or financial constraints when considering why the action was not executed. An obligation must be executed regardless.

Legal advice

13. Although the decision to amend the discretionary intervention provided for in section 139(1) is in essence a policy decision, it is not an amendment that will address a *lacuna* in the Constitution. The Constitution already provides for the performance of municipalities, and failing performance for intervention, as well as for measures to ensure that intervention is executed.

⁸ Section 139(4) of the Constitution;

⁹ Section 139(5) of the Constitution;

14. Changing discretion to an obligation furthermore means that intervention becomes an absolute and will no longer be one of the possible solutions. Should, for example in the report of the Auditor General, a finding be made that a municipality cannot or did not fulfil an executive obligation in terms of the Constitution or legislation and section 139 is worded as an obligation, the provincial executive must intervene.

SECTION 10: UBUNTU AS PART OF THE RIGHT TO DIGNITY

15. Nkabinde proposes the inclusion of the term "*ubuntu*" into the right to human dignity set out in section 10 of the Constitution. The argument is that a Constitution "with western legal norms and values should also incorporate African norms and values such as *Ubuntu*. Nkabinde is of the opinion that such an inclusion would obligate courts to view the rights enshrined in the Constitution through "the lens of an African cultural perspective".

16. Should African and Western norms and values clash, Nkabinde opines that this can be addressed through section 36 of the Constitution which deals with limitation of rights.

17. The term "*ubuntu*" and the values that it embodies are already entrenched in our law in more areas of law than its inclusion in the right to dignity could achieve. The term was first used in South African law in the epilogue to the Constitution of the Republic of South Africa, 1993 ('Interim Constitution').

18. The exact meaning of the term is a subject of academic debate, but it seems writers and courts agree that it refers to innate excellent qualities of humaneness and humanity, morality, group solidarity, value and acceptance from the members of a person's community, compassion, unconditional respect, human dignity, conformity to basic norms and collective unity. The beauty of the term lies therein that it does not only focus on the right of each human being to be the subject of these values (i.e. being treated in accordance with these values), but also on the duty of each human being to apply these values (give).¹⁰

19. Our courts are of the opinion that our Constitution is suffused by *ubuntu*:

¹⁰ *S v Makwanyane aa* (CCT3/94) [1995] ZACC 3, 1995 (2) SACR 1 (6 June 1995) par 224-225, 308; *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) par 224-225; TW Bennett "Ubuntu: An African Equity" *Potchefstroom Electronic Law Journal* 2011 Volume 14 No 4 page 29, on page 52.

"The concept "ubuntu" appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human rights."¹¹

"The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order."¹²

"[Ubuntu] is intrinsic to and constitutive of our constitutional culture... It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution."¹³

20. Having regard to the view our courts hold on *ubuntu*, one can understand the sentiment expressed by academics that we have "no need to look for [African] characteristics [in the Bill of Rights], for the Bill of Rights reflects universal values and ideals, of which African values form an integral part'. All values are 'essentially the same, even though they might be expressed in different idiom'."¹⁴

21. *Ubuntu* is not limited to constitutional law. Our courts are applying *ubuntu* in public and private law.¹⁵ *Ubuntu* has also been hailed as setting out the values underpinning the public service¹⁶ and informing public policy.¹⁷ Restorative justice, which is now an accepted part of South African law in both public and private law, is the application of *ubuntu*.¹⁸

¹¹ *S v Makwanyane aa* (CCT3/94) [1995] ZACC 3, 1995 (2) SACR 1 (6 June 1995) par 237.

¹² *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7 (1 October 2004) par 37.

¹³ *Dikoko v Mokhatla* (CCT62/05) [2006] ZACC 10 (3 August 2006) par 113.

¹⁴ Keep H and Midgley R "The Emerging Role of Ubuntu-botho in Developing a Consensual South African Legal Culture" in Bruinsma F and Nelken D (eds) *Recht der Werkelijkheid* (Reed Business BV Gravenhage 2007) 29-56 as quoted by TW Bennett "Ubuntu: An African Equity" *Potchefstroom Electronic Law Journal* 2011 VOLUME 14 No 4 page 29, on page 52-53.

¹⁵ Courts have in cases related to constitutional law, criminal law, administrative law, law of property, contract law and family law incorporated the values encompassed by "ubuntu" into their judgments.

¹⁶ *Koyabe ao v Minister for Home Affairs ao* (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) (25 August 2009) par 62; *Joseph v University of Limpopo ao* (JA14/09) 32 ILJ 2085 (LAC) (13 May 2011) par 46 vn 39.

¹⁷ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) par 51.

¹⁸ *Dikoko v Mokhatla* (CCT62/05) [2006] ZACC 10 (3 August 2006) par 86 and 114.

22. Given this broad application in all areas of South African law, one can understand why academia¹⁹ warn against limiting the application of *ubuntu* in the South African law:

*"[Ubuntu] has a much broader scope suggesting that it is closer to a value or, better still, a representation of the right way of living... To demand an exact definition of ubuntu would be to impose a premature restriction on its function..."*²⁰

We should, therefore, hesitate before defining ubuntu and circumscribing its area of operation too soon. If we concede that meaning is not fixed in a primordial past, but that it is in the process of being shaped by courts, law-makers and scholars, ubuntu may be allowed free play to provide a new set of values and principles for our law...

Whether embracing a different set of values or simply expressing universal values differently, ubuntu is being deployed to give voice to something distinctively African, and we may concur with the attempt to incorporate that quality "into the legal system so as to form a cohesive, plural, South African legal culture".²¹ This culture will be one characterised by such ideas as reconciliation, sharing, compassion, civility, responsibility, trust and harmony."²²

Legal Advice

23. Whether to include the concept of *ubuntu* by name into the Constitution is a policy decision. Incorporating *ubuntu* into section 10 of the Constitution would however not address a *lacuna* in the law as it has already been accepted as an integral part of South African law.

¹⁹ Shutte, A. 1995. *Philosophy for Africa*. American edition. Milwaukee: Marquette University Press p iv as quoted by Christian B.N. Gade in "The Historical Development of the Written Discourses on Ubuntu", South African Journal of Philosophy 303 314-315.

²⁰ TW Bennett "Ubuntu: An African Equity" *Potchefstroom Electronic Law Journal* 2011 Volume 14 No 4 page 29, on page 47

²¹ Keep H and Midgley R "The Emerging Role of Ubuntu-botho in Developing a Consensual South African Legal Culture" in Bruinsma F and Nelken D (eds) *Recht der Werkelijkheid* (Reed Business BV Gravenhage 2007) 29-56 as quoted by TW Bennett "Ubuntu: An African Equity" *Potchefstroom Electronic Law Journal* 2011 Volume 14 No 4 page 29, on page 53.

²² TW Bennett "Ubuntu: An African Equity" *Potchefstroom Electronic Law Journal* 2011 Volume 14 No 4 page 29, on page 52.

24. The term *ubuntu* is not only regarded as underpinning the whole of the Constitution, but is directly applied in public and private law. The values embodied in the term – being embedded into the Constitution - have become the spill around which our legal system turns.

25. Should the policy decision be taken to incorporate *ubuntu* into section 10, care must be taken with the wording thereof so that such incorporation does not limit the application of the term in our law, as academia has warned.

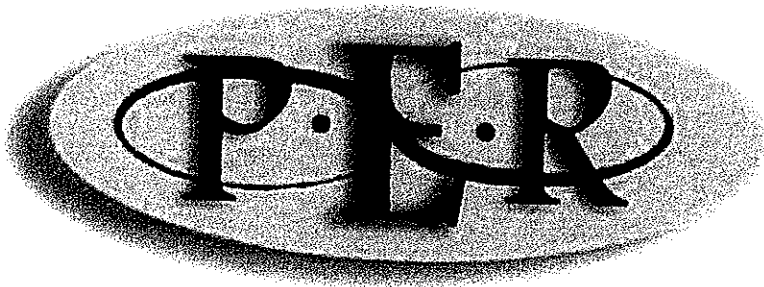


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UBUNTU: AN AFRICAN EQUITY

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closer to a value or, better still, a representation of the right way of living.¹⁰⁰ In this sense, it is akin to the Hindu notion of *dharma*.¹⁰¹

It is senseless to object to the ambiguity of such terms, for precision cannot be expected of concepts that must play such multifarious roles in society. This point is especially true for a legal system such as South Africa's, when the country is in the process of forging new values. To demand an exact definition of ubuntu would be to impose a premature restriction on its function.¹⁰²

Another objection claims that the communal ethic of ubuntu denies individual autonomy, and that the "appeal to cohesion privileges dangerous hierarchies [and] corrupt tribal authorities". Because ubuntu is associated with an African tradition it is backward-looking and can have little to offer to the modern world. Drucilla Cornell, however, one of the foremost scholars working on dignity jurisprudence, would contest these objections on the ground that both ubuntu and the related concept of dignity are banners of a high ethical endeavour.¹⁰³

Whatever the truth of the sceptics' allegations, we need to be aware that we are not bound by a single (or traditional) conception of ubuntu. New meanings have been - and still are being - shaped by courts and writers, and they are concentrating on realising certain values critical to South Africa's changing social order. To this end the courts have emphasised such connotations in ubuntu as civility, respect, dignity, harmony and compassion, as well as compatibility with the Bill of Rights.

Yet another objection to ubuntu is redundancy. Is ubuntu necessary when we have a right to dignity enshrined in the Constitution?¹⁰⁴ Indeed, the Constitutional Court has often talked of dignity and ubuntu as analogous concepts.¹⁰⁵ Any exact correlation,

¹⁰⁰ Ramose *African Philosophy* 40.

¹⁰¹ Which can be variously translated as "righteous duty, law, morality or religion": Menski *Hindu Law* 98.

¹⁰² Hence Cornell and Van Marle 2005 *Afr Hum Rts LJ* 205 argue that the generality of ubuntu is its strength.

¹⁰³ Cornell 2009 www.isthisseattaken.co.za.

¹⁰⁴ Section 10 *Constitution of the Republic of South Africa*, 1996: "Everyone has inherent dignity and the right to have their dignity respected and protected".

¹⁰⁵ See, for example, *S v Makwanyane* 1995 3 SA 391 (CC) para 225: "An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme

As a result, the doctrine of equity is no longer accepted as a wholly beneficial adjunct to the common law.¹³² Although its strength lies in its flexibility and the possibility of achieving justice on a case-by-case basis,¹³³ equity jurisprudence has hardened into an institution sharing the same inflexibility as its common-law partner.¹³⁴ Ironically, it can even result in inequitable outcomes.¹³⁵

We should, therefore, hesitate before defining ubuntu and circumscribing its area of operation too soon. If we concede that meaning is not fixed in a primordial past, but that it is in the process of being shaped by courts, law-makers and scholars, ubuntu may be allowed free play to provide a new set of values and principles for our law. fn 12

These values and principles, however, are distinctively African. It must be remembered that ubuntu is a "loan word" in English, which suggests that it was adopted to signify a phenomenon that was never before expressed in its new environment.

A new word is a solution to a problem. Often the need is obvious, but sometimes it is unseen or barely felt, and then it is only in finding something to plug the gap that we actually realise the gap was there in the first place.¹³⁶

Ubuntu involves more than entitlements to equal treatment or fair play. It also obliges the individual "to give the same respect, dignity, value and acceptance to each member of [the] 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".¹³⁷ fn 10

Keep and Midgley observe that there is "very little in the Bill of Rights that is ostensibly "African" or a reflection of African values". The response could be that we have "no need to look for such characteristics, for the Bill of Rights reflects universal fn 14

¹³² Allen *Law in the Making* 425, for one, doubts whether the doctrine was of benefit to English law in general.

¹³³ Zweigert and Kötz *Introduction to Comparative Law* 196.

¹³⁴ Kiralfy *Historical Introduction* 569.

¹³⁵ Allen *Law in the Making* 425.

¹³⁶ Hitchings *Secret Life of Words* 5.

¹³⁷ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 224-225.

values and ideals, of which African values form an integral part". All values are "essentially the same, even though they might be expressed in different idiom".

Whether embracing a different set of values or simply expressing universal values differently, ubuntu is being deployed to give voice to something distinctively African, and we may concur with the attempt to incorporate that quality "into the legal system so as to form a cohesive, plural, South African legal culture".¹³⁸ This culture will be one characterised by such ideas as reconciliation, sharing, compassion, civility, responsibility, trust and harmony.

¹³⁸ Keep and Midgley "Emerging Role of Ubuntu-botho" 30.

The Historical Development of the Written Discourses on *Ubuntu*¹

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Abstract

In this article, I demonstrate that the term '*ubuntu*' has frequently appeared in writing since at least 1846. I also analyse changes in how *ubuntu* has been defined in written sources in the period 1846 to 2011. The analysis shows that in written sources published prior to 1950, it appears that *ubuntu* is always defined as a human quality. At different stages during the second half of the 1900s, some authors began to define *ubuntu* more broadly: definitions included *ubuntu* as African humanism, a philosophy, an ethic, and as a worldview. Furthermore, my findings indicate that it was during the period from 1993 to 1995 that the Nguni proverb '*umuntu ngumuntu ngabantu*' (often translated as 'a person is a person through other persons') was used for the first time to describe what *ubuntu* is. Most authors today refer to the proverb when describing *ubuntu*, irrespective of whether they consider *ubuntu* to be a human quality, African humanism, a philosophy, an ethic, or a worldview.

Introduction

This article offers a historical analysis of the various ways that *ubuntu* has been defined in written sources. Such an analysis has not been conducted before. The analysis indicates that many of the present ideas about the nature of *ubuntu*, for instance, that *ubuntu* is African humanism, a philosophy, an ethic, or a worldview, first emerged in written sources during the second half of the 1900s. Furthermore, the analysis shows that *ubuntu* became an object of particular interest and consideration during the political periods of transition from white minority rule to black majority rule in Zimbabwe and South Africa.

Chris Vervliet has written that '*ubuntu* is rooted in a search towards African dignity' (Vervliet 2009: 20). Of course, the search for African dignity in postcolonial Africa

¹ On 24 November 2010, an earlier version of this article was presented as a working paper at a Colloquium of the Institute of Peace and Strategic Studies, Gulu University, Uganda. I want to thank those who were present for their comments. Furthermore, I want to direct special thanks to Steen Wackerhausen, Morten Raffnsøe-Møller, Aase Rieck Sørensen, Augustine Shutte, Mfuniselwa John Bhengu, Chris Vervliet, Daniel Komakech, Lioba Lenhart, Julia Vorhöfelter, Birgitte B.N. Gade, Lenore Messick, and an anonymous referee. I am particularly grateful for your guidance and comments.

cause Augustine Shutte did not present *Philosophy for Africa* as a book on *ubuntu* when the first edition was published in 1993. The term 'ubuntu' was not even mentioned in the book's index. In the 1993 edition, I have only found one sentence containing the term 'ubuntu,' and in this sentence *ubuntu* is not associated with the proverb. The sentence is: 'The traditional African idea of the extended family as something that includes far more than parents and children is perhaps the most common and most powerful protection of the value of *ubuntu*' (Shutte 1993: 157). What differentiates the South African and the American edition of *Philosophy for Africa* is that the American edition contains a new foreword. In this foreword, Augustine Shutte suddenly presents *Philosophy for Africa* as a book on *ubuntu*:

South Africa is world-famous for apartheid – that unique racist philosophy and system constructed over the last fifty years. Because of apartheid (which means "separateness") another feature of South African life has been hidden from the world for all that time. But now the apartheid era has ended and our recent treasure has been revealed to the world by our president, Nelson Mandela, by public figures like Bishop Tutu and by events like the recent elections, the inauguration of the president, and the World Cup of Rugby. It is called *ubuntu* (which means "humanity"). We feel it is something of great value we can offer to the rest of the world. This is what this book is about (Shutte 1995: v).

In the foreword of the American edition, Augustine Shutte also explains why he thinks *ubuntu* is related to the proverb:

Central to my book is the conception of humanity embodied in the traditional African proverb *umuntu ngumuntu ngabantu* (a person is a person through persons). This understanding of human nature has its counterpart in the moral sphere in the idea of *ubuntu*. In English this is equivalent to humanity, understood as a moral notion referring to a general quality of character, or attitude or behaviour or way of life (Shutte 1995: vi).

According to the American foreword of *Philosophy for Africa*, *ubuntu* is therefore closely connected with the proverb: 'This emphasis on the interpersonal quality of humanity – embodied in the expression *umuntu ngumuntu ngabantu* – is at the heart of *ubuntu* and the source of many of its distinctive insights and values' (Shutte 1995: ix).

Convinced that *ubuntu* can contribute to the struggle for a new South Africa, Augustine Shutte goes on to introduce an idea for a new project, which he calls 'the *ubuntu* project'¹²:

In particular there is a need for critical and creative contact between the African and European traditions of understanding humanity itself, both as a reality and as a value. This conviction, developed in conversation with kindred spirits, gave rise to the idea for a new project, which I call the *ubuntu* project (Shutte 1995: vi).

Augustine Shutte explains that:

The aim of the *ubuntu* project will be to investigate the different aspects of this conception of humanity, especially those concerning moral values, the virtues appropriate to different roles and positions in life, our social practices and polit-

¹² The relationship between Augustine Shutte's call for an *ubuntu* project and the subsequent *ubuntu* project launched by Drucilla Cornell in 2003 has, as far as I am aware, not been investigated (see <http://theubuntuproject.org/about-2/>).

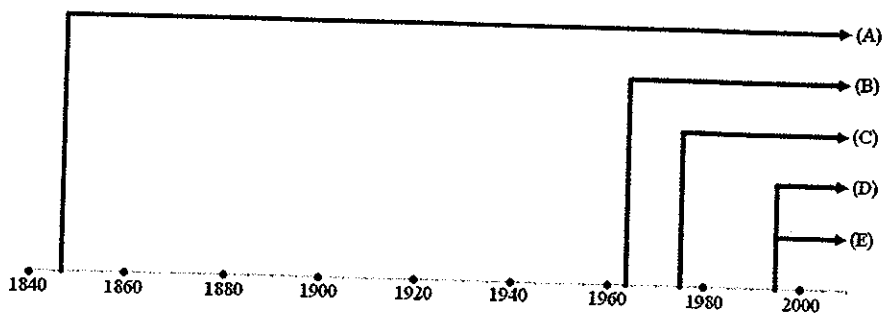
ical goals, the conception we have of human flourishing and fulfilment, and the meaning of human life and death (Shutte 1995: vi).

I will return to Augustine Shutte's *ubuntu* project towards the end of this article. Presently, I want to emphasise that as a result of Augustine Shutte connecting *ubuntu* and the proverb in the second edition of *Philosophy for Africa* but not in the first, it suggests that it may have been between 1993 and 1995 when *ubuntu* was defined for the first time as something that has a connection with the proverb. Perhaps it is therefore reasonable to assume that the following occurred in the context of the transition to democracy in South Africa:

- In 1993, Augustine Shutte increased the awareness of the proverb '*umuntu ngumuntu ngabantu*' by publishing *Philosophy for Africa*.
- In 1993, the Epilogue of the Interim Constitution was the cause of increasing discussion about the nature of *ubuntu* by stating that in addressing the divisions and strife of the past, there is 'a need for *ubuntu*.'
- During the period 1993 to 1995, Augustine Shutte developed the idea that the proverb '*umuntu ngumuntu ngabantu*' could be used to describe what *ubuntu* is. This idea spread like ripples on a pond.

The Historical Development

Diagram 1: An illustration of how *ubuntu* has been defined in written sources during different historical periods.



- (A) Period in which *ubuntu* was defined as a human quality.
 (B) Period in which *ubuntu* was defined as something either connected to, or identical to, a philosophy or an ethic.

Submission to the Constitutional Review Committee

The submission seeks to propose constitutional amendments in order to bring it up to speed with the current challenges facing South Africa. It is one matter to have a review of the Constitution because of a constitutionally entrenched legal requirement and it is something else entirely to have the Constitution reviewed and accordingly amended within the context of a 21st century South Africa that we currently find ourselves in, I sincerely hope that Honourable Members will view this submission in the latter context. Our Constitution is one of the best in the world and even though it is not a document to be lightly tinkered with, it should however be seen to be progressive and amenable to amendments that seek to address problems that have escalated and had a impacted severely on the poor in this country.

Given the lack of service delivery that poor South Africans are experiencing, given the serious concerns raised by the Auditor General¹ regarding the poor performance of municipalities and that since the advent of democracy in South Africa, the worsening poverty conditions have meant that the time has come to strengthen the provisions that relate to interventions for non-performing municipalities. In addition such interventions should be inclusive of national government as well as provincial government should the intervention of the latter not amount to increased performance levels.

The second proposed amendment is for the expansion of the right to dignity to include Ubuntu. South African constitutional jurisprudence is rich with western norms and value standards; I have no qualms with this. However surely a Constitution for Africans by Africans should incorporate African norms and value standards as well as western ones given our diversity.

Poor Performance of Municipalities

From evidence to date it is clear that much of local government is in distress and that this state of affairs has become deeply-rooted within South Africa's the systems of governance². The decentralisation of state power into three tiers of governance was ideally well placed given the type of totalitarian state we had under the apartheid government however it has become clear in light of the above statement that there is a need for the strengthening of national and provincial government intervention into non-performing local government municipalities. Of the 237 municipalities and 49 municipal entities audited, only seven municipalities and 10 municipal entities received clean audit reports during the last financial year³. In terms of the misuse of public funds the Auditor General reported that for the 2009/10 financial period there were increased levels of unauthorised (total R4,969 million) and irregular (total R4,135 million) expenditure. It is clear that the situation has escalated to untenable levels and given the statements from the Auditor General recently that notices issued by his office are ignored⁴ by some municipalities something has to be done urgently.

Proposed Constitutional Amendment

The "may" under S139 (1) must change to a must so that in every instance that there is a grossly underperforming municipality measures of intervention have to be taken. It is possible that changing

¹ Amanda Visser, Business Day 07/05/2012

² State of Local Government Report, 2009, pages 4-5

³ Auditor General of South Africa media release statement of the consolidated audit report on municipalities for the 2009-10 financial year, page 1

⁴ See note 1 above

the "may" into a must would burden state resources given the propensity of the problem however it is better that billions of rands are spent fixing municipalities than municipalities wasting billions of rands compounding the problem. There should be a new sub-clause 139(1)(b)(i), to read "The necessary steps may include deploying appropriately qualified provincial officials to oversee the expenditure of funds and the provision of services in accordance with the objects laid down under S152(1)(a)-(e). In the proposed wording the word "may" is used so that this measure is both optional and indicative of the need to have a stronger intervention that seeks to replace and temporarily limit some of the powers and functions of the municipality.

A new Section 139(1)(b)(ii) should be inserted to say: Where the intervention under Section 139(1)(b)(i) has been effected, national government may be included in the intervention undertaken by the provincial government including receiving regular reports and where necessary intervening if the intervention does not result in a turnaround. The intention behind the secondary proposal is to have national government oversee and to any necessary degree supervise the process undertaken by provincial government given that of the 13 interventions mentioned in the State of Local Government Report of 2009, there were still interventions in 10 of the municipalities⁵.

There may well be a need to have further legislation and other consequential amendments but that would have to be left to the relevant structures in government to effect. The essence of this proposal is really a response to the 'dire' situation described by the Auditor General. One would not want South Africa to be another Greece and it is hoped that drastic changes to limit the powers of those underperforming municipalities and to strengthen the oversight role of provincial and national government would be encouraged and strengthened one way or another.

Amendment to Section 10 of the Constitution

Section 10 of the Constitution provides for the right to human dignity. In a country as culturally diverse as South Africa a Constitution with western legal norms and values should also incorporate African norms and values such as Ubuntu which is proposed in this submission. This would also serve to obligate courts when interpreting certain rights of the Constitution to view them through the lens of an African cultural perspective that would be provided for in the Constitution. The right to dignity should have a definition of Ubuntu. Makgoro Y describes Ubuntu "as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the Group"⁶. The South African Constitution has western norms and values and this is fine, however South Africa is a racially divided society and the incorporation of African norms and values such as Ubuntu would serve as a step towards bridging the racial gap. Section 10 would be a start however the Committee is encouraged to pursue the idea of a constitutional interpretation of Constitutional provisions through the lens of western and African values that are firmly entrenched and sitting alongside one another. Of course Section 36 would always serve as a final arbitrator where there are competing rights underlined by either western or African values.

⁵ Note 2 pages 18-19.

⁶ Y Mokgoro, Ubuntu and the Law in South Africa 2009, African Journal Online, page 2

Zintle Ngoma - Submission

From: langelihle Nkabinde
To:
Date: 6/1/2012 2:36 PM
Subject: Submission
Attachments:

Good day please find attached my submission.

Kind Regards
Lange Nkabinde