African values and human rights as two sides of the same coin: A reply to Oyowe

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Summary

In an article previously published in this Journal, Anthony Oyowe critically engages with my attempt to demonstrate how the human rights characteristic of South Africa's Constitution can be grounded on a certain interpretation of Afro-communitarian values that are often associated with talk of ubuntu. *Drawing on recurrent themes of human dignity and communal relationships in the sub-Saharan tradition, I have advanced a moral-philosophical principle that I argue entails and plausibly explains a wide array of individual rights to civil liberties, political power, criminal procedures and economic resources. Oyowe's most important criticism of my theory is in effect that it is caught in a dilemma: Either the principle I articulate can account for human rights, in which case it does not count as communitarian, or it does count as the latter, but cannot account for the former. In this article, I reply to Oyowe, contending that he misinterprets key facets of my theory to the point of not yet engaging with its core strategy for deriving human rights from salient elements of* ubuntu. *I conclude that Oyowe is unjustified in claiming that there are 'theoretical lapses' that 'cast enormous doubts' on my project of deriving human rights from a basic moral principle with a recognisably sub-Saharan and communitarian pedigree.*

Key words: *African ethics; communitarianism; dignity; human rights;* ubuntu

1 Introduction

In an article previously published in this *Journal* titled 'Strange bedfellows',[1] Anthony Oyowe critically engages with my attempt to demonstrate how the human rights characteristic of South Africa's Constitution[2] can be grounded on a certain interpretation of the African values that are often associated with talk of *ubuntu*, the Nguni term for humanness that is used to capture sub-Saharan approaches to morality.[3] Drawing on recurrent themes of human dignity and communal relationships in the sub-Saharan tradition, I have advanced a moral-philosophical principle that I argue entails and plausibly explains a wide array of individual rights to civil liberties, political power, criminal procedures and economic resources. Oyowe, however, maintains that human rights and African values do not belong together. More specifically, his most important criticism of my theory is in effect that it is caught in a dilemma: Either the principle I articulate can account for human rights, in which case it does not count as communitarian and an articulation of *ubuntu*, or it does count as the latter, but cannot account for the former.

In partly titling this article 'two sides of the same coin', the reader can guess where I am headed. Here I reply to Oyowe, contending that he misinterprets key facets of my theory to the point of attacking a strawman and not yet engaging with its core strategy for deriving human rights from salient elements of *ubuntu*. In a nutshell, Oyowe reads my theory as positing two distinct final goods to be promoted, namely, those of individual freedom and communal relationship, whereas I instead posit a single basic good, human dignity *qua* the capacity for communal relationship, that is to be respected. Human rights, I contend, are ways of treating people as special by virtue of their capacity to commune, not ways of balancing competing interests in freedom and community. Misreading my theory, Oyowe's criticisms misfire, or so I shall argue.

My primary aim is to resolve the dilemma that Oyowe poses, meaning that I do not address a variety of other points scattered amongst the buckshot of his objections. For example, I do not take up his reasons for thinking that I have an implausible understanding of how human rights essentially function.[4] Instead, I focus strictly on Oyowe's charge that there are 'theoretical lapses' that 'cast enormous

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1   A Oyowe 'Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa' (2013) 13 *African Human Rights Law Journal* 103.

2   Constitution of the Republic of South Africa, 1996.

3   The central article also appeared in this journal as T Metz '*Ubuntu* as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532.

4   I do not believe that rights are essentially claims that protect interests, whereas Oyowe does, and I maintain that to have a right is well understood as a matter of someone else having a duty, whereas he does not. For a reply to Oyowe on these abstract matters, the reader is invited to contact the author for unpublished comments.

doubts'[5] on my project of showing that *ubuntu*, interpreted as a moral-philosophical principle, is a promising foundation for typical elements of South Africa's Bill of Rights.[6]

I begin by briefly sketching the moral theory I have constructed that is informed by *ubuntu* and the way it promises to capture human rights salient in South Africa's Constitution (part 2), after which I spell out Oyowe's dilemma that I must choose between interpreting the theory in a communitarian way and it being able to entail and well explain human rights and their violations (part 3). I then reply to Oyowe, indicating how my theory is reasonably labelled 'communitarian', how it plausibly grounds many human rights, and how Oyowe does not yet understand the central strategy I employ for reconciling communitarian values and human rights (part 4). I conclude by briefly reflecting on what my approach, if sound, means for constitutional interpretation in South Africa (part 5).

2   Deriving human rights from *ubuntu*

The philosophical project at hand is an attempt to demonstrate that salient communitarian elements of pre-colonial sub-Saharan world views can be interpreted in a way that powerfully accounts for much of South Africa's Bill of Rights. In this section, I repeat enough of my earlier work to make Oyowe's target clear.

2.1   Nature of human rights

Oyowe and I do not disagree that much about what human rights are, or at least not on matters that would suggest that we are speaking past one another when using the phrase 'human rights'. This phrase refers in the first instance to weighty moral claims of individuals to receive certain treatment or objects, which claims they have by virtue of a quality they share with (nearly) all other human persons, and which must be fulfilled even if long-term benefits would be realised by not doing so.[7] For example, if people have a right to equality,[8] that means (amongst other things) that the state may not discriminate against them on grounds of race or ethnicity, even if a majority of those in society would be happier or more culturally 'pure' as a result. Furthermore, Oyowe agrees with me that if human rights are justified, they probably are by virtue of human dignity, that is, a superlative non-instrumental value characteristic of human beings, and a companion normative perspective that obligates agents to treat them with respect.[9]

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5   Oyowe (n 1 above) 103.
6   Ch 2 Constitution of the Republic of South Africa.
7   Compare Oyowe (n 1 above) 114-115.
8   Sec 9 Constitution of the Republic of South Africa.
9   See Oyowe (n 1 above) 119.

Although I believe that the way I interpret *ubuntu* can ground a variety of kinds of human rights, in the following I concentrate particularly on 'negative' rights, that is, rights to be free from others' interference or to have the liberties to engage in behaviours that others might dislike. One reason for such a focus is that, as will become clear in the following section, Oyowe is most keen to demonstrate that *ubuntu* cannot capture negative rights. Another reason, however, is that it is well known that *ubuntu* and related value systems below the Sahara are routinely criticised for being unable to account for the value of individual liberty, namely, freedom from coercion to hold beliefs and to perform actions of which others disapprove. Although below I do briefly address some 'positive' rights, for instance, to culture[10] and to socio-economic goods,[11] it is most urgent to demonstrate that communitarian values, properly understood, can make good sense of a person's right to live in ways that do not comport with the lifestyles of the majority. Hence, the rights from South Africa's Constitution that I most often discuss are those to life, freedom and security of the person, privacy, freedom of religion, freedom of expression and the like.[12]

2.2 An interpretation of *ubuntu*

Having clarified the objects to be theoretically captured, I now lay out the *ubuntu*-based principle that I have used to do so. I lack the space to indicate why I believe that the principle is informed by sub-Saharan values and norms.[13] I instead focus on presenting my findings, that is, the results of my attempt to develop a comprehensive account of morality that is both African and philosophically compelling.

My theoretical interpretation of *ubuntu* and related moral perspectives starts with the acknowledgment that indigenous black societies below the Sahara have characteristically sought out communal relationships as a higher-order end. As I have contended in earlier work,[14] communal relationships are well understood in the sub-Saharan tradition as the combination of what I call 'identity' and 'solidarity'. Part of what it is to enter into community with others is to identify with them, or share a way of life with them, by which is meant roughly enjoying a sense of togetherness and engaging in cooperative projects. Another part of communion is solidarity, or caring for others' quality of life, which amounts to helping others for altruistic reasons and typically consequent to sympathy with them. What African thinkers typically mean by 'community', or at least one

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10 Secs 30-31 Constitution of the Republic of South Africa.
11 Secs 26, 27 & 29 Constitution of the Republic of South Africa.
12 Secs 11-18 Constitution of the Republic of South Africa.
13 On which see T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321 and T Metz 'African conceptions of human dignity' (2012) 13 *Human Rights Review* 19.
14 Metz (nn 3 & 13 above).

morally-attractive way to understand what they mean by it, is as consisting of the combination of identity and solidarity.

To begin to see how this approach is appealing as a philosophical ethic, consider that 'friendliness' is how English speakers would typically label communal relationships of identity and solidarity. To be friendly is not much other than to share a way of life with others and to care for their quality of life and for their sake. And, so, an initial way to understand African ethics from a theoretical perspective is to suggest that morally-wrong actions are to be identified as those that are, roughly, unfriendly. Lying, stealing, cheating, coercing, abusing, breaking promises, refusing ever to help and the like are plausibly immoral insofar as they put distance between the one acting and the one acted upon; they are subordinating rather than co-ordinating; they are expected to harm rather than to benefit; and they are motivated by attitudes of cruelty, selfishness and the like. That is the compelling moral perspective that I find in the sub-Saharan tradition that differs from typical Western accounts of wrongness as failure to maximise the general welfare (utilitarianism) or disrespect of an individual's autonomy (Kantianism).

Now, in order to capture the nature of wrongness with specificity, one must indicate precisely how a given agent is to respond to friendly or communal relationships. One suggestion would be that an agent ought to produce as much friendliness or community and to reduce as much unfriendliness or anti-sociality as he can, given the options available to him. However, such an account of how to respond to communal relationships plainly cannot account for human rights, particularly negative ones.[15] If seriously harming an innocent person would have the effect of enhancing communion relative to not doing so, then such a consequentialist approach would permit intentionally inflicting the harm. In contrast, I want to account for the intuition that individuals have rights not to be harmed or otherwise interfered with for the greater good, even the good of more communal relationships in the long run. So, the question has been this: How can one account for human rights, given an ethic according to which a moral agent ought to seek out communal relationships as a higher-order end?

My strategy for answering this question has been to appeal to the value of human dignity, taking a cue from both the Western and African traditions. From the former, I have noted that the strongest and most influential account of human rights up to now has been a Kantian one, according to which upholding human rights are ways of treating people, and specifically their capacity for autonomy, with respect. From the latter, I have recognised the widespread appeal to the dignity of human life amongst sub-Saharan peoples,[16] which

15   As indicated in Metz 'Toward an African moral theory' (n 13 above) 338, and Metz (n 3 above) 539-540.
16   For citations, see Metz 'African conceptions of human dignity' (n 13 above).

often prompted behaviour that we would call 'recognition of human rights' (but that they themselves have much more often labelled 'respect').

For instance, despite the intimate attachments in small-scale sub-Saharan societies, they were well known for extending hospitality to strangers passing through, respecting all human beings as part of an encompassing family or as beings with whom to relate communally.[17] For another example, a recurrent practice in indigenous African societies has been to base policy on consensus, amongst either elected leaders or all adults. Instead of aggregating votes and doing whatever would maximise the satisfaction of interests, respect for the dignity of individuals has been understood to require a practice of seeking everyone's agreement (or at least input) before proceeding.[18]

Of course, African societies were not perfect when it came to exhibiting what we would today call a 'human rights culture'. Sexism, for one, has been a salient problem, from an egalitarian standpoint. Regardless of whether sub-Saharan societies violated human rights in the past, my point is that some of the communitarian values they have recurrently espoused can be interpreted in a way that makes good sense – to an open-minded interlocutor anywhere in the world, and not merely in Africa – of which human rights people have and why.

Within characteristically African practices and especially beliefs there is the idea of human dignity, which I draw upon to create a novel moral theory.

Specifically, I posit a conception of human dignity according to which individuals have a superlative non-instrumental value insofar as they are in principle capable of entering into community with others. My proposal is that we have human rights insofar as we are beings that can both exhibit friendliness and be treated in a friendly way. What makes us more special than anything else in the mineral, vegetable and animal kingdoms is, roughly, our inherent capacity both to commune with others and to be communed with by others. Where the Kantian finds value in people's capacity to govern themselves, a more characteristically African view deems it to inhere in their capacity to relate to others.

Here, then, is my favoured reconstruction of *ubuntu* as a normative principle:[19] One must honour a person who has a dignity insofar as he can be both the subject and object of communal relationships. Alternately stated, an act is wrong insofar as it degrades a person's

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17   For a representative analysis, see K Gyekye 'African ethics' in E Zalta (ed) *Stanford encyclopedia of philosophy* (2010) http://plato.stanford.edu/entries/african-ethics/ (accessed 31 July 2014).

18   For just one example, see Wiredu's discussion of the ideas of human dignity and rights amongst the Ghanaian Akan in K Wiredu *Cultural universals and particulars: An African perspective* (1996).

19   Applied to persons, for now setting aside other beings such as animals.

special ability to enter into mutual relationships of identity and solidarity. Or, referring to the maxim that 'a person is a person through other persons', so widely invoked to capture *ubuntu*, I recommend interpreting it as a prescription to become a real person (to develop one's humanness) by prizing friendly relationships with those who must be treated with respect in virtue of their capacity for them.

2.3   From *ubuntu* to human rights

The last step to take in this section is to show how the moral-philosophical principle of respecting people's capacity for communal relationships entails and plausibly explains human rights. Here is the key rationale. Suppose that what is special about human beings is their capacity to be in communal relationships. In that case, one should neither stunt that capacity for the sake of something worth less than it, nor treat (innocent) others in an anti-social way.[20] Respecting another's dignified capacity both to exhibit friendliness and to be befriended means treating it as the most important value, and hence entails (in the case of innocents) not impairing their ability to be friendly as well as not failing to be friendly towards them.

Now, characteristic negative human rights violations are behaviours that *do* impair others' ability to be friendly as well as constitute grave forms of unfriendliness. What genocide, slavery, human trafficking, apartheid and totalitarianism have in common is more or less that those who engage in these practices treat people, who are special by virtue of their capacity for friendly relationship, in an extraordinarily unfriendly way (when unnecessary to rebut any unfriendliness on their part). As I explained in the article on which Oyowe focuses, many human rights are plausibly viewed as[21]

> protections against enmity, against an agent treating others as separate and inferior, undermining their ends, seeking to make them worse off, and exhibiting negative attitudes toward them such as power seeking and *Schadenfreude.*

Raping someone to feel a sense of power and torturing an innocent person for fun are actions that stunt another's capacity for identity and solidarity for a trivial end and evince enormous division and ill-will, the opposites of community, toward him. Instead of expressing togetherness, one creates distance; instead of engaging in co-ordinated behaviour, one subordinates; instead of helping another, one harms; and instead of being altruistic and sympathetic, one is indifferent or cruel.

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20   Unless a comparable unfriendliness (the opposites of the ideal of community, involving distance, subordination, harm and cruelty) towards them is necessary to rebut their initial unfriendliness, that is, roughly, unless they are guilty.
21   Metz (n 3 above) 546.

This present rationale also plausibly accounts for positive rights. One way of treating people as special by virtue of their capacity for communal relationships is to recognise the respects in which they have actualised that capacity, which rationale makes sense of rights to the protection and enhancement of culture.[22] Another way to treat people as dignified because of their capacity to be party to relationships of identity and solidarity is to enable them to actualise that capacity, where food, education, housing, health care and the like are naturally relevant.[23] Failures of the state either to acknowledge people's actual communities or to help them commune with one another would be failures to treat people's capacity for communal relationships as the highest value and hence would be degradations of it.

In sum, supposing that individuals have a dignity by virtue of their capacity for friendliness, roughly an agent must treat them (when innocent) in a friendly way, where human rights violations are ways of treating (innocent) individuals in grossly unfriendly ways. Such an explanation of what a human rights violation is constitutes a promising rival to the standard Western, Kantian view that it is essentially a degradation of autonomy. It is a moral-philosophical gem mined from African worldviews, one worth studying under a loupe.

3   Oyowe's dilemma

According to Oyowe, I have not demonstrated that a communitarian ethic can support human rights and, furthermore, according to him, any ethic that can support human rights cannot be communitarian. Much depends, therefore, on what he means by 'communitarian'.

Oyowe maintains that there are two key aspects to communitarianism: a descriptive or metaphysical thesis and a prescriptive or moral one. The former is the claim that individuals necessarily, perhaps causally, depend on the community at least for their existence and development into a normal adult human being, while the latter is the claim that community is a non-instrumental good normally to be favoured in cases of conflict with other goods.[24]

First, Oyowe maintains that my conception of dignity conflicts with the descriptive thesis about how individuals come to be. He claims that 'grounding dignity in a yet-to-be-realised capacity for community represents the individual as existing in principle outside the network of relationships that constitutes community'.[25] He further maintains that I have implicitly reversed the metaphysical relationship, so that

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22   For more on how the present understanding of *ubuntu* can ground a right to culture, see T Metz 'African values, human rights and group rights' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 131 142-144.
23   For additional discussion of socio-economic rights, see Metz (n 3 above) 550-551.
24   Oyowe (n 1 above) 105.
25   Oyowe 108.

community is thought to depend for its realisation on the individual, namely, her capacity for dignity or her individual choice.

Second, turn now to the prescriptive facet of communitarianism. On this score, Oyowe maintains that since I routinely prize liberty and negative rights to be free from interference, I am implicitly committed to individual freedom (or personal autonomy or something similar) as a final good that is distinct from that of community. A large majority of Oyowe's article then discusses the implications of a position that deems good for its own sake both individual freedom and communal relationship, and he naturally finds the implications unattractive: either liberty as a good outweighs community, in which case the communitarianism is lost, or community outweighs liberty, in which case the human rights are lost; or they are of equal value, in which case the theory is indeterminate in cases of conflict. As Oyowe says:[26]

> [T]he onus is on Metz to show that communal harmony and individual freedom are indeed compatible … [B]y compatibility, Metz must have meant that his theory can either (i) incorporate both values while offering some criteria of ordering between them; or (ii) equally value communal harmony and individual freedom as non-instrumental goods, in which case it eschews any such ranking of moral values.

However, I as explain in the next section, this is not at all what I meant. I do not posit two distinct final goods, community and freedom, that are to be compared and weighed up against each other in cases of conflict. Instead, I argue that to express respect for the sole basic value of the dignity of the capacity for community *just is* (in part) to uphold individual freedom.

4 Reply to Oyowe

Oyowe's view is that I am a closet Western liberal who accords final value to individual freedom and that this is the only strategy by which I could conceivably account for human rights. Any genuine appeal to communitarianism would mean prizing community over liberty and hence failing to account for at least negative human rights. In this section, I clarify the nature of my strategy for reconciling communitarian values and human rights, focusing in particular on showing how it avoids Oyowe's claims in the previous section that my position is neither descriptively nor prescriptively communitarian.

4.1 Descriptive communitarianism

Consider first the charge that my theory cannot account for the metaphysical thesis that individuals necessarily depend on a community for their existence and that it rather implies that a given community is constructed out of individuals who exist prior to it and then make a voluntary choice to enter it. By 'community' in this

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26   Oyowe 112.

context, Oyowe does not mean what I meant above by 'communal relationships', 'communion' and (on occasion) 'community'. What I mean by the latter is the combination of relationships of identity and solidarity, which can be realised at a dyadic level, between two people alone. What Oyowe means by 'community' is instead something like society as a whole which, he points out, is essential for bringing the individual into existence or enabling her to flourish.

I have two replies to these claims. First, they cannot be sensibly construed as defining elements of communitarianism since they are sociological banalities that no one would reasonably reject. Much too often in the literature, communitarians believe they are targeting liberalism and other 'individualist' philosophies by noting that individuals cannot exist or flourish on their own. However, I am simply not aware of any influential Western, liberal or individualist thinker who has claimed that it is possible for, say, a baby to grow up into a normal adult without socialisation, or an adult to make substantial achievements as a Robinson Crusoe on a deserted island without a cultural tradition, emotional support, substantial resources, peer recognition and so on. Who has made, or would make, such patently false empirical claims?

What leads Oyowe and communitarians to continually assert the descriptive thesis usually rests on a misreading of the social contract tradition. It is well known that social contract theorists characteristically imagine a 'state of nature' in which there is no state, institutional justice or other form of government, and then pose the question of under what conditions individuals would be reasonable to agree to form one. This thought experiment routinely gets misinterpreted in two ways.

For one, critics mistakenly hold that the state of nature includes the absence of non-governmental relationships such as the family. However, the big guns of the Western tradition, such as Hobbes,[27] Locke[28] and Rawls,[29] simply do not think in these terms. Their thought experiments are focused on the absence of political organisation or policy, nothing more.

For another, and more deeply, the state of nature, for them, is not supposed to represent what the world was like or even could be like, *contra* the readings of communitarians. Instead, it is supposed to bring out what is of normative importance for evaluating some facet of government. So, when Rawls imagines persons behind a veil of ignorance seeking generally useful means for achieving ends, he is not committed to the absurd view that individuals could in the real world live apart from each other, shorn of particularities. Instead, Rawls is in effect claiming that what is morally important about people is their

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27   T Hobbes *Leviathan* (1651).
28   J Locke *Second treatise of government* (1690).
29   J Rawls *A theory of justice* (1971).

capacity for autonomy, and that a conception of justice needs to be appraised in light of how it bears on that capacity.

In short, it is a category mistake to suppose that Western liberals, even social contract theorists, maintain that individuals could exist without families and societies that enable them to flourish. Hence, pointing out the obvious fact that individuals depend on society cannot be what differentiates communitarianism from their perspectives.

My second reply to the charge that my views flout the metaphysical element of communitarianism is that they in fact imply nothing metaphysical. To contend that what makes individuals special is their capacity for communal relationships, regardless of whether that capacity has been exercised to a certain degree, neither asserts nor implies any view about how individuals have existed or could exist in relation to the societies in which they have been raised and now live. It simply points to what gives them a dignity. Oyowe is incorrect, therefore, when he says that, on my view,[30]

> [t]he mere possession of that capacity sets the individual apart from the community, insofar as having that capacity expresses the promise of the individual's subsequent entry into community ... Metz implicitly represents the individual as necessarily occupying a place outside of those relationships that constitute community.

No, I do not. I coherently can, and hereby do, explicitly claim that individuals could not have a dignity by virtue of their capacity for communal relationships without having been reared by families that in turn have been supported by other families in the form of a society and that individuals almost never voluntarily join a society from outside of it. When I consider an individual's ability, apart from how it has been exercised in relation to others, I am not asserting that he could live apart from them or have that ability without having been supported by them; I am merely focusing, for the philosophical moment, on what I take to be a morally valuable facet of her.

4.2 Prescriptive communitarianism

If my analysis in the previous subsection was correct, and there is no reasonable disagreement amongst interlocutors about whether individuals and their capacities can exist apart from a social context, then the real issue as to whether my view counts as communitarian is a normative one. Here, recall, Oyowe believes that my 'theory is less communitarian than it purports to be ... [and] even if the theory was sufficiently communitarian, it could not successfully resist the charge of collectivism – the criticism that individual liberty and communal harmony are incompatible'.[31] He maintains that they are incompatible since I am committed to the view that they are two

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30   Oyowe (n 1 above) 108-109.
31   Oyowe 112.

different goods, and it is clear that they sometimes conflict with one another.

As I indicated above, my theory does not posit *two* distinct final goods to be *promoted*: those of individual freedom and communal relationship. I must *not* be viewed as 'trying to accommodate two potentially-conflicting non-instrumental values'.[32] Instead, I posit a *single* basic good, that of human dignity *qua* capacity for communal relationship, and I maintain that it is to be *respected*.

My key claim is that part of what it means to treat someone as special by virtue of her capacity for communal or friendly relationship is to commune with or be friendly towards her (at least when she has not misused that capacity), and that what it means to be friendly towards a person is to avoid subordinating her, amongst other conditions such as avoiding harming her and acting consequent to negative attitudes such as cruelty. Hence, co-ordinating rather than subordinating, that is, upholding another's negative right to be free from interference, *just is* (in part) what it is to treat someone with respect in virtue of her capacity for communal relationships.

To illustrate my position, consider an example of someone who has a right to privacy of a sort that would permit him to engage in gay sex without consequent legal coercion. I explain the right in terms of respectful treatment. This person has a dignity insofar as he is a being that by nature has the capacity to be friendly and to be befriended, and treating that superlatively valuable element of him with respect means not restricting his capacity to be friendly for something worth less than it and not treating him in an unfriendly way (if he has not acted in an unfriendly way towards others). And as it would both seriously stunt his capacity to be friendly, as well as be quite unfriendly, to lock him up in a small cage for decades, I conclude that it would be wrong to do so; indeed, a human rights violation.

Although Oyowe sometimes indicates an awareness that I am deontologist, one who denies that morality is a consequentialist matter of maximising good states of affairs, he never comes to grips with my dignity and respect-based strategy for grounding human rights such as negative ones to be free from interference. Failing to recognise and discuss the view that human rights are ways of honouring people's capacity for communal relationships, his criticisms miss their target, applying to some view that I have never advanced.

Oyowe is drawn towards a consequentialist interpretation of my work probably because he finds it to be the only properly communitarian theory. I suspect this issue is at the core of our substantive dispute. Oyowe in effect maintains that only a view that posits communal relationships as a final good to be promoted can count as communitarian, or sufficiently so, and that leads him to ascribe such a consequentialism to me.

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32   Oyowe 123.

Here are three reasons to find my respect-based principle to be prescriptively communitarian, and not to think that one must be a consequentialist with regard to the value of community in order to count. Recall that my theoretical rendition of *ubuntu* is the claim that right acts are those that respect people by virtue of their capacity for communal relationships, ones of identity and solidarity. It is communitarian, first, in that it conceives of the basic good in terms of the capacity for communal relationships. Western principles normally conceive of the basic good in terms of properties intrinsic to an individual, ones that make no essential reference to others. So, for instance, the Kantian says that dignity inheres in the individual's capacity to govern herself, while the utilitarian maintains that moral status inheres in the individual's ability to experience pleasure and pain. In contrast, my view is essentially relational, deeming basic value to consist not merely of properties internal to a person, but rather extrinsic ones. What is special about a person, I maintain, is her ability to relate to others communally. That is an important difference from the liberal and individualist traditions in the West.

A second reason for finding my principle to be communitarian is that its key elements are derived from the beliefs and practices of a wide array of indigenous sub-Saharan peoples, who are invariably described as adhering to communitarian ways of life.[33] Of course, one will find some similar elements in the Western tradition, for instance in the work of Karl Marx[34] and, more recently, the ethic of care.[35] However, communitarian ideals are much more characteristic of the African tradition than they are of the Western. It is well known not only that the conception of communal relationships that I work with is often pursued on moral grounds by traditional African societies, but also that they subscribe to the ethical perspective that individual human beings have a dignity that demands respect. Putting those two ideas together as I have, it seems fair to call the view that we have a dignity by virtue of our capacity for communal relationships an 'Afro-communitarian' perspective.

Third, and finally, other views salient in the African philosophical tradition that accept human rights are widely called 'communitarian'. For example, Kwame Gyekye, who has also worked to explain the respects in which African thought is best interpreted as accepting human rights,[36] calls his view 'moderate communitarianism' and nearly everyone, including those thinkers who reject his view, call it the same thing. And notice that Oyowe himself calls Gyekye's view –

33 For just one example, consider K Wiredu 'Social philosophy in postcolonial Africa: Some preliminaries concerning communalism and communitarianism' (2008) 27 *South African Journal of Philosophy* 332.

34 K Marx 'On James Mill' (1843) in D McLellan (ed) *Karl Marx: Selected writings* (1977) 114.

35 N Noddings *Caring* (1984).

36 K Gyekye *Tradition and modernity* (1997) 35-76.

which grounds human rights on human dignity[37] – 'moderate communitarianism'.[38] My view is therefore entitled to a similar label.

I conclude, therefore, that the principle I have constructed in light of values and norms associated with *ubuntu* is communitarian and, furthermore, that Oyowe has not provided any reason to doubt that it fails to entail and plausibly explain a wide array of human rights. Oyowe uses terms such as 'disingenuously',[39] 'deeply disturbing'[40] and 'betraying a deep-seated incoherence'[41] to characterise my attempt to ground human rights on a philosophical interpretation of ideas associated with *ubuntu*. I hope this reply has made it clear that, while such characterisations might apply to the views Oyowe discusses, he has not provided reasons to think they apply to mine.

5 Conclusion

I conclude this article by briefly considering what my account of human rights entails for how to understand the Constitution. As is well known to South African jurists, the epilogue of the interim Constitution explicitly mentioned *ubuntu* as a value to guide the post-apartheid era,[42] but such did not appear in the final Constitution that was eventually ratified. In light of the absence of explicit mention of *ubuntu* in the final Constitution, should justices avoid making any appeal to it when interpreting it? And rather than viewing the Bill of Rights as grounded on ideals of sub-Saharan peoples, might it not be more apt to view it as anti-African, a mere expression of the will of the 'conqueror', to use Ramose's term?[43] In particular, Ramose and others contend that what is commonly called the 'property clause', according to which no one may be deprived of property (except in terms of law of general application),[44] is unjustified by sub-Saharan values because it precludes compensatory justice.

The issue is complicated, and cannot be resolved adequately here. However, I note three things in reply. First, attempting to provide a theoretical justification for characteristic elements of the Bill of Rights does not imply that I believe that chapter of the Constitution to be perfect. Second, a plain reading of the rest of the section on property allows the state to effect redistribution for the sake of a legitimate public purpose, including an equitable allocation of land,[45] meaning

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37 Albeit dignity conceived as God-given life or the capacity autonomy, not as the capacity for communal relationship. See Gyekye (n 36 above) 63-64.
38 Oyowe (n 1 above) 104.
39 Oyowe 121.
40 Oyowe 123.
41 Oyowe 119.
42 Constitution of the Republic of South Africa, Act 200 of 1993.
43 M Ramose 'An African perspective on justice and race' (2001) 3 *Polylog*, http://them.polylog.org/3/frm-en.htm (accessed 14 July 2014).
44 Sec 25(1) Constitution of the Republic of South Africa.
45 Secs 25(2)-(9).

that the property clause is not to blame for the inadequate compensatory justice in post-apartheid South Africa.[46] Third, a significant element of why apartheid was wrong is that land was taken unjustly, which suggests that some kind of right to property is aptly constitutionally enforced.[47]

It is no doubt true that some of those who benefited from apartheid struggled to ensure that certain rights protecting individuals and minorities were put into the Constitution. And it is also true that those who benefited from apartheid have by and large continued to flourish under the new constitutional dispensation. However, from these points it does not follow that the Bill of Rights is 'un-African' or the like. The claim advanced in this article is that *ubuntu* grounds an approach to morality that makes good sense of human rights such as those to life, privacy and freedom of religious practice (amongst others). It is far from obvious that upholding those kinds of rights would make it impossible or even difficult for a state to advance compensatory justice. And given the importance of the idea of respect for human dignity among black sub-Saharan peoples, disregarding such rights would hardly count as 'African'.

Finally, should justices avoid appealing to *ubuntu* since it is nowhere mentioned in the Constitution? Again, the matter is complicated, ultimately requiring one to defend a theory of how to interpret legal documents. I favour a purposive approach, largely for reasons that Dworkin has championed,[48] but also because the Constitution itself explicitly prescribes such an interpretive method![49] In black and white, the Constitution instructs those interpreting it not to stick to the black and white. If, therefore, when reading the Bill of Rights one 'must promote the values that underlie an open and democratic society based on human dignity'[50] and 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation,[51] it follows that justices must appeal to *ubuntu*, supposing it is true that it is what entails and best explains salient human rights.

In this article, my aim has been to continue the project of putting flesh on the South African Constitutional Court's mere assertion that the 'spirit of *ubuntu* … suffuses the whole constitutional order … [and] is a unifying motif of the Bill of Rights'.[52] I have sought to show not

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46   But compare L Ntsebeza 'Land redistribution in South Africa: The property clause revisited' in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 107 120-124.

47   For a defence of the Constitution's property clause from a 'pro-poor' standpoint, see T Metz 'The desirability of a property clause' (2013) 25 *Stellenbosch Law Review* 312.

48   Eg, R Dworkin *Law's empire* (1986).

49   Sec 39 Constitution of the Republic of South Africa.

50   Sec 39(1) Constitution of the Republic of South Africa.

51   Sec 39(2) Constitution of the Republic of South Africa.

52   *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 37. See also *Dikoko v Mokhatla* (2006) ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 113.

merely that *ubuntu* is consistent with human rights or should be invoked to interpret hard cases, but more boldly that it provides a moral-theoretical foundation for which human rights should take centre stage in constitutional deliberation about such matters.