THE REACH OF AMNESTY FOR POLITICAL CRIMES: WHICH BURDENS ON THE GUILTY DOES NATIONAL RECONCILIATION PERMIT?

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1 Introduction

Let us suppose that the basics of the Reconciliation Act were morally justified.[1] That is, for the sake of this article, set aside the rich debate about whether justice was adequately served by granting amnesty to those guilty of political crimes in exchange for full disclosure about them. Bracket as well issues of whether it was right to free offenders from both criminal and civil liability in exchange for the complete truth about their wrongdoing. There remain important ethical and legal questions to ask about this Act, one of which is this: Which additional burdens, if any, should be lifted from wrongdoers in the wake of according them freedom from judicial liability? For two recent examples that the Constitutional Court has considered: should having been granted amnesty for killings under apartheid be understood to entail that a newspaper may not call one a 'murderer'?; or should an officer having been granted such amnesty be held to mean that the police force may not discharge him because of conviction for a serious offence? What, if any, negative reputational, occupational and other consequences should those granted judicial amnesty for political crimes rightly suffer, and for which basic moral reasons?

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1 Promotion of National Unity and Reconciliation Act 34 of 1995.

In this article, I seek to answer these questions by philosophically reflecting on a Constitutional Court judgment that I shall abbreviate as '*Du Toit*'.[2] Wybrand du Toit was a member of the South African Police Service (SAPS) discharged for having been convicted of murdering four people. Upon having been granted amnesty for these crimes, he sought reinstatement, and sued upon being denied it. The Court concluded that the SAPS was permitted not to reinstate Du Toit. Here, I distinguish the different major ethical or 'jurisprudential'[3] reasons the Court gives for its conclusion, avoiding the more narrowly pragmatic and legal ones; I argue that the moral rationales rest on empirical contingencies for which there is little evidence, and that their logic in fact provides some reason to reject the order in *Du Toit*; and, furthermore, I sketch an attractive moral philosophy that I maintain provides a stronger, unitary foundation for the Court's key pronouncements.

Although I do take up the issue of defamation, which the Court is addressing as I write in a case I shall label '*McBride*',[4] I do so only briefly and as a consequence of thorough reflection on *Du Toit*. Robert McBride was granted amnesty for, among other things, having bombed a bar and thereby killed three people and wounded dozens. When he sought an administrative appointment, a newspaper published an article that called him a 'murderer', and McBride sued for defamation. I will argue that just as Du Toit is not entitled to his job back, so the Court would be right, for the same basic moral-philosophical reasons, to rule that McBride is not entitled to his name back.

Ultimately what is at stake in *Du Toit* and *McBride* is the *precise sort of national reconciliation that is particularly desirable*, an issue that it is apt to address with a moral philosophy. The one that I appeal to is grounded on values that are salient in the sub-Saharan region, often put under the title of '*ubuntu*' or '*botho*' among Nguni and Sotho-Tswana speakers, respectively, in Southern Africa. I am aware that legal scholars and other professionals and intellectuals often criticise the idea that *ubuntu* can serve as a public morality. Many claim that it is particularistic, vague, illiberal, anachronistic and unsuitable for a diverse society. In recent work, I have sought to interpret *ubuntu* in a way that avoids these problems; I have

2 *Wybrand Andreas Lodewicus Du Toit v Minister for Safety and Security of the Republic of South Africa & the National Commissioner of the South African Police Service* [2009] ZACC 22; 2010 1 SACR 1 (CC); 2009 12 BCLR 1171 (CC); (2009) 30 ILJ 2601 (CC).

3 By 'jurisprudential' here I mean something like philosophically ideal. My question is: which judgment would be the best in light of a desire for moral soundness and factual accuracy? Sometimes judges have the most reason *not* to reason in a purely jurisprudential way, so construed; for example, they can have good reason to give weight to precedent that is morally or factually incorrect in some way.

4 *The Citizen (1978) (Pty) Ltd & Others v Robert John McBride* 2010 CCT 23/10.

articulated an ethical theory with a recognisably sub-Saharan pedigree that is principled, clear, gives due weight to individual liberty, is readily applicable to contemporary controversies and will be attractive to a wide array of reasonable citizens.[5] In this article, I show that a philosophically coherent and plausible account of *ubuntu* provides guidance about how to answer difficult and subtle questions about the kind of reconciliation that South Africa should be pursuing and hence about the proper implications of amnesty for political crimes.

I begin by sketching the elements of *Du Toit* in more detail (section 2), bringing out the kind of amnesty the Court favours and the major, reconciliation-based rationales it offers for it. Specifically, the Court defends a judicial amnesty that induces offenders to disclose political crimes they have committed, albeit one that does not prevent non-judicial institutions from responding negatively to them. I argue that the defences the Court gives for these elements are weak from a jurisprudential perspective, and that they need another source of support. Then, I show that they follow from a single, basic moral principle informed by *ubuntu*, which I first sketch (section 3) and then apply in the section after that (section 4). I conclude by discussing some of the broader implications of this moral-philosophical defence of *Du Toit* for other 2010 Constitutional Court cases, with particular reference to *McBride* (section 5).

2 A critical analysis of *Du Toit*

This section is partly exegetical, a matter of putting down the essentials of the *Du Toit* case as they bear on the reconciliation-based arguments for amnesty, and also partly evaluative, an indication of why these arguments are implausible on both ethical and empirical grounds.

As noted above, Du Toit was a member of the SAPS, and was convicted, in 1996, of four counts of murder. He was subsequently discharged from the police service, in accordance with section 36(1) of the SAPS Act,[6] which says:

> A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment

5 T Metz 'Toward an African moral theory' (2007) 15 *The Journal of Political Philosophy* 321; 'Human dignity, capital punishment, and an African moral theory: toward a new philosophy of human rights' (2010) 9 *Journal of Human Rights* 81.

6 South African Police Service Act 68 of 1995.

> is wholly suspended, the member concerned shall not be deemed to have been so discharged.

As the four killings were politically motivated, Du Toit sought and eventually received amnesty for them from the Committee on Amnesty in accordance with the Reconciliation Act, subsequent to which Du Toit tried to rejoin the SAPS, on two grounds. First, section 36(2)(a) of the SAPS Act permits an application for reinstatement if the officer's conviction is 'set aside following an appeal or review'. Second, section 20(10) of the Reconciliation Act states that with regard to those who have received amnesty

> any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place ...

However, the National Commissioner of the SAPS denied Du Toit's request, consequent to which Du Toit sued the National Commissioner as well as the Minister in charge of the SAPS. As mentioned, the Constitutional Court ruled unanimously in favour of the SAPS, maintaining that it was not legally required to reinstate Du Toit despite his having received amnesty for the killings.

2.1 The nature of reconciliation

What principally motivates the Court's ruling is a certain conception of national reconciliation and of how to achieve it. The Court takes the main point of the Reconciliation Act to be the 'building of bridges across racial, gender, class and ideological divides',[7] with amnesty an essential means for achieving it.[8]

National reconciliation, the ultimate end, is not well defined in *Du Toit*. The most one gets is the intimation that it involves establishing the 'proper rule of law' and 'strengthening peace, democracy and justice.'[9] Such characterisations are wanting, however, because the granting of amnesty for political crimes is itself an *infringement* of the rule of law and hence also of justice, as the Court admits.[10] To be clear, the Court should have indicated the respects in which despite the rule of law and justice being infringed by amnesty, it would on the whole advance reconciliation. In addition, there are different kinds of peace and democracy, some of which are more desirable than others

7 *Du Toit* (n 2 above) para 18.
8 *Du Toit* (n 2 above) paras 19-20, 59; see, too, the epilogue to the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993).
9 *Du Toit* (n 2 above) para 21.
10 *Du Toit* (n 2 above) paras 23-26.

or properly understood as elements of reconciliation than others. My suggestion is not that the Court is wrong to mention values such as rule of law and democracy, but rather that these values are left vague insofar as they are meant to constitute reconciliation. Below I aim to be more specific about the relationship between reconciliation and these values.

Another hint from the Court about what reconciliation involves is the interesting suggestion of the offender being given 'a pardoned freedom to go forth and contribute to society.'[11] That value is distinct, on the face of it, from those of the rule of law, peace and democracy. A certain understanding of justice might capture it, but the Court does not in *Du Toit*, so far as I can tell, associate talk of 'justice' with the notion of offenders doing something to actively rebuild society. Furthermore, below I provide a theoretical account of reconciliation implying that they are rightly seen as different goods that nonetheless belong together as complementary elements of it.

2.2 A truth-oriented amnesty

As indicated, the Court views amnesty to be a means to the end of national reconciliation, as construed above. And the Court believes that not just any amnesty would be likely to foster it, but rather one with two particular characteristics. First, the Court upholds the rationale behind the Reconciliation Act, which deems truth about the past in exchange for legal amnesty to be a 'necessary tool'[12] by which to attain reconciliation. While it is required 'to "close the book" on the past',[13] the book must first be read. Why?

The Court maintains that only upon substantial disclosure of political crimes will living victims receive the 'closure' and 'solace'[14] that, in turn, are requisite for reconciliation to come about. Indeed, the Court says that the 'primary aim of the (Reconciliation) Act was to use the closure acquired as a stepping stone to reconciliation for the future'.[15]

Before considering the other salient element of the Court's favoured interpretation of amnesty, let us pause to consider the present rationale. In standard argumentative form, the Court's argument for amnesty for political crimes is this:

11 *Du Toit* (n 2 above) para 56.
12 *Du Toit* (n 2 above) para 20.
13 *Du Toit* (n 2 above) para 18.
14 *Du Toit* (n 2 above) para 22; see also para 21.
15 *Du Toit* (n 2 above) para 55.

(1) Reconciliation just is, in large part, a matter of establishing the rule of law, peace and democracy,[16] and it is the overriding value.

(2) Such reconciliation would not have (been as likely to) come about without closure and solace on the part of victims.

(3) Closure and solace on the part of victims would not have (been as likely to) come about without them having substantially apprehended the truth about political crimes.

(4) In order for victims to have substantially apprehended the truth about political crimes, it was necessary to offer amnesty to offenders in exchange for full disclosure of their misdeeds.

(5) Therefore, a truth-oriented amnesty was appropriate.

In the following, I shall often refer back to different parts of this argument by invoking the numbered claim.

I have raised concerns about (1) above, and now seek to question the other facets of the Court's reasoning, supposing, for the sake of argument, that (1) is true. The first thing to note about the logic of this argument is that it provides *some* (*pro tanto*) reason to come to a conclusion that is directly opposite to the one that the Court did in *Du Toit*. If (roughly) the more truth, the more reconciliation, then the state should do whatever it can to spare the guilty from suffering any burdens they might undergo consequent to revealing the truth, including extra-legal ones such as losing a job on the police force. The present argument for amnesty as a means to reconciliation not merely fails to underwrite the Court's ruling, but also appears to *undermine* it, something not acknowledged in *Du Toit*.

In reply, the Court could fairly remind us that the point of truth is to provide closure and solace, and suggest that these emotions on the part of victims would be hindered if the offenders were relieved of too many burdens. If that were true, then the logic of the argument would not contradict the Court's conclusion that Du Toit is not legally entitled to his job back. But, is it true? What is most likely to foster closure and solace: fewer burdens on the guilty and more truth about the past, or more burdens on the guilty and less truth about the past? I submit that the answer to this question is unclear, requiring substantial psychological studies that probably have not been conducted.

The rest of the argument similarly relies on empirical claims for which there is equivocal evidence and hence provide a shaky foundation for a conclusion that amnesty should have been granted in exchange for truth. For one, it is not obvious that closure and solace

[16] Considerations of the offender being able to contribute to society do not play a role in the present argument for amnesty.

on the part of victims had to come from hearing offenders speak openly about the way they harmed them (3). After all, many urban victims of serious crimes such as home invasion and rape come to terms with their lives even when the offenders are never seen again. And in many traditional sub-Saharan societies, people appear to accept things and to be able to move on, even when there is no systematic enquiry into precisely who is guilty and for what.[17] On the face of it, closure and solace can be expected to come from the support of family and friends, from therapeutic treatment, and from the healing of time; it is not obviously conditional upon an offender recounting in public the gory details of what he did to one or one's intimates. Indeed, such recounting can simply cause more anger and other negative feelings,[18] meaning there is again the threat of 'backfire' in the Court's reasoning.

Suppose, now, for the sake of argument, that the Court were correct about (3), namely, that emotions of solace and closure are most likely to be experienced consequent to the negative feelings that would naturally accompany hearing about the way oneself and one's loved ones were horribly wronged. Even if that were so, one would still have strong reason to question premise (2), the claim that closure and solace were necessary for reconciliation. If reconciliation is primarily, as per (1), a matter of the rule of law, peace and democracy, then it seems that reconciliation would be feasible despite victims continuing to feel unresolved about what was done to them. After all, reconciliation *in the Court's sense* has come about in places like Argentina and Chile, where amnesty was granted without requiring disclosure, and, chances are, with less closure and solace on the part of victims there, relative to those in South Africa.[19] Why think South Africa would be different, requiring more closure and solace for a stable political equality to be realised? Again, some

17 For just one example, consider the Tiv, a people in Nigeria who forgo a reliable truth-seeking process for the sake of 'repairing the *tar*', viz, re-establishing harmonious relationships of a certain kind. For a summary, see RW Miller *Moral differences* (1992) 21.

18 S Daley 'In apartheid inquiry, agony is relived but not put to rest' *New York Times* 7 July 1997.

19 Chile is well known for the 'self-pardon' or 'self-amnesty' law by which General Pinochet's military government absolved all those guilty of human rights violations done during the 1970s state of siege. In the last two years, high-ranking officials of the Pinochet regime have been arrested, but my point is that peace, democracy, basic justice and the rule of law were largely achieved prior to that unexpected turn of events. Similarly, Argentina adopted a law that absolved those below the rank of colonel for political crimes committed during the 'Dirty War' of the late 1970s and early 1980s, and those high-ranking officers who had been convicted were subsequently pardoned. In the late 1990s foreign governments began prosecuting high-ranking officers, but, again, my point is that by then Argentina had already realised peace, the rule of law and so on. For succinct overviews of these and other amnesties, see N Roht-Arriaza & L Gibson 'The developing jurisprudence on amnesty' (1998) 20 *Human Rights Quarterly* 843.

substantial social science must be undertaken in order to answer this question with confidence.

Before turning to the second argument the Court gives for the kind of amnesty it favours, I summarise by noting that the first one, at worst, provides reason to think that Du Toit was in fact legally entitled to his job back (as removing extra-legal burdens such as job loss probably would have fostered more truth), and, at best, provides no reason to think that he was not so entitled. If the argument were successful, the most it could demonstrate is that the right sort of amnesty to have offered offenders was one conditional on disclosure of political crimes. But, as I have argued, the premises that the Court invokes in favour of a truth-oriented amnesty are weak, relying on controversial empirical claims about people's psychologies. Below I will suggest that the Court, the drafters of the Constitution, and the first set of Parliamentarians were in fact correct to seek out a truth-oriented amnesty, but I shall suggest some principles that provide a less empirical and overall more solid ground for it.

2.3 An amnesty that does not favour the guilty

In *Du Toit*, the Court denies that a truth-oriented amnesty is sufficient to bring about the kind of reconciliation it prizes. In addition, the Court maintains, for there to have emerged peace, the rule of law, basic democratic procedures, etc, an amnesty was necessary that did not relieve the guilty of too many burdens. On the one hand, amnesty had to foster truth, as per the Court's first argument above, and so had to waive judicial liability in exchange for disclosure of political crimes, but, on the other hand, amnesty must not have given the guilty a disproportionately great share of relief. Why think so, and, more pertinently, why think a concern for a balance of burdens among the parties would entail the conclusion that Du Toit was not entitled to reinstatement with the SAPS?

Most of the Court's rationale for thinking that the right sort of amnesty required a balance of burdens is *instrumental*, that is, that an amnesty that does not grossly favour the guilty is more likely to *result* in reconciliation than one that does.[20] The Court unfortunately

[20] For talk of balance as needed to achieve 'goals' and 'aims', see *Du Toit* (n 2 above) paras 50, 52-53, 55. There is some evidence that the Court also has a different, non-instrumental argument for favouring a balance of burdens, when it says in *Du Toit* (n 2 above): 'This interplay of benefit and disadvantage is essential to the process and to the desired result, namely, the emergence of objectives fundamental to the ethos of the constitutional order' (para 29), and '[T]o grant disproportionate benefit to one party at the expense of the other would be unjust and would strike at the equilibrium envisaged by the Constitution' (para 30). These remarks suggest that, for the Court, there is *something intrinsically* right

does not provide any reason to believe that this is true, resting content with statements such as: '[I]t cannot be correct to say that the Reconciliation Act was enacted in order to ameliorate hardship for the perpetrators of human rights abuses ... To interpret the Reconciliation Act in this way would not be to ensure that it achieves its aims but would, in fact, be flouting those aims by extending too far the already delicate and difficult issue of amnesty.'[21] Presumably, though, the Court is relying on psychological claims of the sort it invokes in the prior argument, the suggestion being that the victims of apartheid would have continued to feel aggrieved and full of vengeance and hence would not have set aside violence and accommodated themselves to a democratic order, had the guilty received any relief beyond freedom from criminal and civil liability for political crimes.

In standard argumentative form, the present rationale is this:

(1) Reconciliation just is, in large part, a matter of establishing the rule of law, peace and democracy and of previous offenders contributing to society.

(2) Such reconciliation would not have (been as likely to) come about had the guilty received 'the lion's share of benefits'[22] from the amnesty process.

(3) Enabling those who received amnesty to be legally entitled not to be fired for having engaged in political crimes, on top of receiving freedom from judicial liability for them, would have been for them to have received 'the lion's share of benefits'.

(4) Therefore, the right sort of amnesty was one that did not allow those who had received amnesty to be legally entitled not to be fired for having engaged in political crimes.

Again referring to the argument's numbered elements, premises (2) and (3) are highly questionable. Insofar as reconciliation involves previous offenders doing what they can to rebuild society, that would on the face of it suggest, *contra* (2) and (3), allowing Du Toit and similar offenders to have kept their jobs. Supposing Du Toit was a good police officer, in the sense of able to enforce the law, whatever it may be, then he could have done good for South African society by enforcing more just and democratically formulated laws in the post-1994 era. There is, again, an element in the Court's reasoning that pulls in a direction away from its conclusion and that should be addressed.

about an amnesty providing a balance of burdens between victims and offenders, but, unfortunately, this is literally all the Court says on the matter, failing to elaborate on why an imbalance would in itself be an unjust process.

21 *Du Toit* (n 2 above) para 55.

22 *Du Toit* (n 2 above) para 53.

The Court could naturally reply that the facet of offender contribution to society is less important than the other facets of reconciliation such as peace and democracy. That point is fair. But it would also have to claim that these, more weighty facets of reconciliation were best fostered by not giving Du Toit any more benefits, such as legal protection from discharge from the SAPS for having been convicted of serious crimes. And this claim remains dubious. I again note that other societies such as Chile and Argentina have achieved peaceful and democratic societies with amnesties that were much more generous to those guilty of political crimes. Indeed, blanket amnesties were given, instead of having made amnesty conditional on truth-telling, and, furthermore, residents of both countries expected that a large majority of offenders in the military would keep their jobs.[23] And reconciliation in Iraq has been long in coming, in large part because members of the Ba'ath Party were not allowed to stay in the army.[24] What reason was there to think that South Africa would be different? It is true that South Africans were largely unhappy with the idea of previous offenders facing neither criminal nor civil liability for their political crimes, but what evidence is there to think that protecting them from job loss would have been the proverbial straw the broke the camel's back?

In addition, even if one grants (2), that the guilty must not benefit much more than the victims from an amnesty process in order for reconciliation to be likely, (3) is still doubtful. There are many different ways to balance the burdens and benefits of an amnesty. A major part of the Truth and Reconciliation Commission's (TRC's) mandate was supposed to include substantial reparations paid to immediate victims of human rights abuses. As is well known, the government rejected many of the TRC's recommendations in these respects. However, had it upheld them, might that benefit not have been comparable to protecting Du Toit from being fired for conviction?

The likely reply will be that, since, as a matter of historical fact, the government did not effect substantial compensation to those most wrongfully harmed under apartheid, the Court was right not to protect Du Toit in order to achieve the right balance. However, there was another path it could have taken. It could have protected Du Toit while instructing Parliament, or encouraging other elements of the government, to work to improve the lives of those most victimised by apartheid. In short, why 'level down' when the Court could have instead 'levelled up', *particularly when levelling up in this case might have enabled Du Toit and those like him to contribute to*

23 See n 19 above.
24 Often cited as one of the biggest mistakes of the Coalition Forces in the post-war period.

society, another facet of the Court's conception of reconciliation? The logic of balancing burdens and benefits yet again threatens to 'backfire', supporting a different ruling with regard to whether the SAPS was legally permitted to fire Du Toit for having been convicted of political crimes.

In sum, the present argument for an amnesty that balances burdens, like the first, rests on empirical claims that lack the requisite backing; it is far from clear that reconciliation would have been much less likely had the guilty received more relief from burdens than they did receive. Furthermore, it is far from clear that the only or even best way to balance burdens was to allow Du Toit to be fired for having been convicted of political crimes — indeed, there is some reason to think just the opposite. As with the first argument, I agree with the Court's conclusion that the right sort of amnesty would not have protected Du Toit from being discharged, but, in the rest of this article, I seek to provide a different foundation for that judgment, not one that rests on contingencies that doubtfully obtain or that might in fact give us reason to reject the Court's ruling.

3 *Ubuntu* as a moral theory

In the previous section, I laid out the Court's two reconciliation-based rationales for a truth-oriented amnesty that balances burdens between victims and offenders, which kind of amnesty the Court thinks supports the conclusion that the SAPS was permitted to fire Du Toit for having been convicted of political crimes. I have noted that I believe the Court's conclusion is correct, but I have indicated that I find its two major arguments to be inadequate. Both rest crucially on empirical claims that might well be false, and the logic of both in fact provides some reason to reject the Court's conclusion. In this section, I articulate a basic moral principle that, when applied to *Du Toit* in the following section, will be seen to avoid these two problems.

3.1 A philosophical interpretation of *ubuntu*

In other research I have, in effect, been working to make good on the Constitutional Court's suggestion that Southern African morality, often captured by the term '*ubuntu*', is the 'underlying motif of the Bill of Rights'[25], as well as former Constitutional Court Justice Albie Sachs' assertion that *ubuntu* is 'intrinsic to and constitutive of our

[25] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 37.

constitutional culture'.[26] I have sought to interpret the values commonly associated with talk of '*ubuntu*' (and cognate terms such as '*botho*' in Sotho-Tswnana and '*hunhu*' in Shona) in a way that jurists and other professionals could and plausibly should use to resolve contemporary problems.[27] I do not have the space here to demonstrate systematically that the following, moral-philosophical construal of Southern African ethics avoids the myriad objections that are routinely made to it, such as being too vague to apply with rigor by a judge, or too illiberal to apply with any plausibility in a pluralistic, Constitutional order. Instead, I simply lay out the principle and then apply it to the basic value of national reconciliation, hoping the reader will glean from the next two sections that it is attractive and can be fruitfully invoked to resolve jurisprudential disputes in South Africa.

The starting point for understanding *ubuntu* in any form is the ubiquitous maxim, 'A person is a person through other persons', which is '*Umuntu ngumuntu ngabantu*' in the Nguni languages of Zulu, Xhosa and Ndebele. Far from merely expressing a sociological banality about the fact that an individual is always part of a community, this maxim is in the first instance a normative exhortation to individuals to develop their *ubuntu*, literally their *humanness, personhood* or *virtue*, through certain kinds of communal relationships. As Desmond Tutu sums up the way sub-Saharans characteristically conceive of morality:

> When we want to give high praise to someone we say, '*Yu, u nobuntu*'; 'Hey, so-and-so has *ubuntu*.' Then you are generous, you are hospitable, you are friendly and caring and compassionate. You share what you have ... Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* — the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good.[28]

Essentially, to have *ubuntu* is to be a *mensch*, where those who enter into a certain kind of communion with others thereby manifest human excellence, and where those who have not are lacking it. Just as 'an unjust law is no law at all' (Augustine), so sub-Saharans would typically say of one who does not relate communally that 'he is not a person', and, indeed, those who are downright anti-social are often labelled 'animals'.[29]

26 *Dikoko v Mokhatla* [2006] ZACC 10; 2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC) para 113.
27 See n 5 above.
28 D Tutu *No future without forgiveness* (1999) 31 35.
29 MJ Bhengu *Ubuntu: the essence of democracy* (1996) 27; M Letseka 'African philosophy and educational discourse' in P Higgs *et al* (eds) *African voices in education* (2000) 186.

This much about the ethic of *ubuntu* is fairly uncontroversial; nearly all those familiar with Southern African morality would accept that its core includes the general idea that one's basic aim should be to live a genuinely human way of life by entering into community with others. Things become contested upon specifying the relevant *others* and the relevant sort of *community* to seek out with them, which I now address. The reader should keep in mind that I am not trying to represent any traditional African belief system about morality in detail, but am rather drawing on a variety of them selectively in order to *create a plausible jurisprudence with a Southern African pedigree*. Given that constructive orientation, I submit that the following is a philosophically attractive way of understanding what it is to prize community with others that is grounded in *Mzanzi* moral thought.

As I have argued elsewhere, community as a fundamental moral value in African philosophy is best understood not as a collection of actual social norms, but rather as an ideal form of social interaction, one composed of two logically distinct relationships that I call 'identity' and 'solidarity'.[30] To identify with each other is largely for people to think of themselves as members of the same group, that is, to conceive of themselves as a 'we', for them to take pride or feel shame in the group's activities, as well as for them to engage in joint projects, coordinating their behaviour to realise shared ends. For people to fail to identify with each other could go beyond mere alienation and involve outright division between them, in other words people thinking of themselves as an 'I' in opposition to a 'you', and aiming to undermine one another's ends.

To exhibit solidarity with one another is for people to engage in mutual aid, to act in ways that are reasonably expected to benefit each other. Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathising with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be uninterested in each other's flourishing or to exhibit ill-will in the form of hostility and cruelty.

Identity and solidarity are conceptually separable, meaning that one could in principle exhibit one sort of relationship without the other. For instance, workers and management in a capitalist firm often identify with one another (as in 'We are Telkom'), but since typical workers neither labour for the sake of managers nor are sympathetic toward them, solidarity between them is lacking.

[30] Much of the following few paragraphs draw on Metz 'Human dignity' (n 5 above) 83-84.

Conversely, one could exhibit solidarity without identity, say, by helping someone anonymously.

Although identity and solidarity are logically and sociologically distinct, characteristic Southern African worldviews include the idea that, morally, they ought to be realised together. Communal relationship with others, of the sort that confers *ubuntu* on one, is well construed as the combination of identity and solidarity. To begin to see the appeal of this outlook, consider that identifying with others can be cashed out in terms of sharing a way of life and that exhibiting solidarity with others is naturally understood in terms of caring about their quality of life. Or, as former Constitutional Court Justice Mokgoro has put it, *ubuntu*'s key value is 'achieved through close and sympathetic social relations within the group'.[31] And the union of sharing a way of life, or being close, and caring about others' quality of life, or being sympathetic, is basically what people mean by a broad sense of 'love' or 'friendship'. Hence, one major strand of Southern African culture places loving or friendly relationships at the heart of morality, the present analysis having made explicit sense of Tutu's terse statement above.

Now, which are the others with whom one ought to identify and exhibit solidarity in order to develop *ubuntu*? With whom must one prize friendly relationships so as to live a genuinely human way of life? Traditionally speaking, the answer would include spiritual beings such as God and ancestors, wise progenitors of a clan who have survived the death of their bodies. However, I instead draw on another, less contested idea salient in Southern African moral thinking, namely, the view that humanity has a dignity, a non-instrumental value that exceeds anything else on the planet. If human beings are characteristically the most special beings, then it makes sense to think that we would obtain *ubuntu* by communing with them.

There is the further question of what it is that gives human beings a dignity. In virtue of what are they so special? Again, the traditional answer would be that they have a certain kind of vitality that has its source in God. However, I instead appeal to another Southern African idea, that human beings have a dignity in virtue of their capacity for community.[32] What makes us more important than other beings in the animal, vegetable and mineral kingdoms is, roughly, that we have a capacity to love that they do not. The way to treat people who are

31 Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 3.

32 See, eg. H Russel Botman 'The OIKOS in a global economic era' in JR Cochrane & B Klein (eds) *Sameness and difference: problems and potentials in South African civil society* (2000) http://www.crvp.org/book/Series02/II-6/chapter_x.htm (accessed 31 January 2011); B Bujo *Foundations of an African ethic* (2001) 88; Metz 'Human dignity' (n 5 above).

special in virtue of their capacity for identity and solidarity is naturally to prize such relationships with them.

I began this moral-philosophical interpretation of *ubuntu* by noting the maxim widely taken to summarise Southern African morality, 'A person is a person through other persons.' Having provided some background to it, as well as proffered some definitions of terms, the reader now has a fairly rich understanding of what this initially opaque phrase means, at least for jurisprudential purposes. A less literal but more accurate and useful translation of the phrase would be: 'One should become a real person by respecting relationships of identity and solidarity with those able to do so in turn,' or 'One ought to develop one's humanness, which can be done only by honouring friendly relationships with those who have a dignity by virtue of being capable of friendliness themselves.'

3.2 Appeal of the principle

Before applying this ethical theory to issues of national reconciliation and amnesty, I note some of its *prima facie* attractiveness as a public morality. To begin, briefly consider what it is that makes actions wrong. What do murder, rape, kidnapping, assault, theft, promise-breaking, lying, insults and the like have in common? *Ubuntu*, interpreted as a moral philosophy, would capture their impermissibility roughly in terms of the fact that these acts are *unfriendly*, or, more carefully, that they fail to respect friendship or the capacity for it. Actions such as deception, coercion and exploitation fail to honour the value of communal relationships in that: the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is subordinating the other, as opposed to coordinating behaviour with her; the actor is failing to act for the good of the other, but rather for his own or someone else's interest; or the actor lacks positive attitudes toward the other's good, and is instead unconcerned or malevolent.

Also consider how the present interpretation of *ubuntu* is able to underwrite several of the key moral judgments that are often associated with it, particularly by the Constitutional Court. First, note that traditional African societies are well known for having been hospitable toward strangers. It was customary for a traveller to a foreign village to be welcomed with food and shelter, for a time, even to the point where choice morsels of meat would be given to the stranger rather than to family members. Such an understanding of the importance of *ubuntu*-based neighbourliness clearly motivates Justice Mokgoro, and the rest of the Constitutional Court following her lead, when she rules in *Khosa v Minister of Social Development* that permanent residents, and not citizens alone, are entitled to welfare

grants from the state.[33] A duty to be inclusive with respect to the distribution of social benefits is well explained by the idea that all human beings have a dignity that warrants respectful treatment by fostering communal relationships with them.

For another example, in the *State v Makwanyane* the Constitutional Court famously ruled that the death penalty is inconsistent with what an *ubuntu* ethic prescribes.[34] *Ubuntu*, as construed here, does entail that capital punishment is unjust.[35] Basically, if we are to prize friendly relationships, ones of identity and solidarity, we generally ought to avoid their unfriendly opposites, of division and ill-will. Unfriendly types of actions such as coercion can be morally justified, but most clearly on the present ethic when (and perhaps only when) necessary to counteract another's own proportionate unfriendliness. Being unfriendly when essential to stop someone else from being comparably unfriendly, or to protect the victims of his similar unfriendliness, does not degrade his capacity for friendliness, which he has elected to misuse. The key point, now, is that the death penalty does not serve the function of treating someone in an unfriendly way for the sake of preventing a comparable unfriendliness on his part. It is an extremely unfriendly behaviour that is unnecessary to rebut the offender's own proportionately unfriendly behaviour; his crime is over, and any good that his victims would receive from his execution now would be disproportionate to the severe unfriendliness inflicted on him.

For a final application in a judicial context, it is well known that a retributive approach to punishment is not the dominant theme in Southern African thinking about criminal justice, where retribution is understood to be a 'backward-looking' approach that bases penalties solely on facts about the nature of the crime committed in the past. This is to say neither that traditional Southern Africans have never acted on retributive or vengeful sentiments, nor that they have never thought of spirits as aptly meting out just deserts. However, the salient approaches to crime and conflict resolution in indigenous communities have tended to be 'forward-looking', basing penalties on facts about the future, such as whether they are likely to serve the functions of appeasing angry ancestors or mending broken ties between offenders and the rest of the community. So acknowledges the High Court in *S v Joyce Maluleke*, where it ruled that African customary law should be given consideration in its favouring

33 *Khosa v Minister of Social Development & Others* [2004] ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).
34 *State v Makwanyane & Mchunu* [1995] ZACC 3; 1995 6 BCLR 665; 1995 3 SA 391.
35 The following, compressed rationale is elaborated in more detail in Metz 'Human dignity' (n 5 above) 91-94.

restorative justice over retributive justice,[36] a ruling that Justice Sachs invokes in *Dikoko v Mokhatla*.[37] And, again, a moral-philosophical prescription to honour communal relationships neatly underwrites a strong interest in restorative justice; the right response to crime will be roughly what is likely to foster relationships in which people think of themselves as common members of a group and act for one another's sake.

This last example brings us to the topic of national reconciliation. As was noted in the epilogue to the interim Constitution, and as the Constitutional Court has recognised in *AZAPO v President of South Africa* and other places,[38] a natural interpretation of *ubuntu* indicates that reconciliation is a higher-order value to be sought out, if necessary at the expense of punishment that would ordinarily come with respect for the rule of law. In the following section, I articulate the sort of reconciliation that *ubuntu* as a moral philosophy prescribes, indicating how it encompasses the more limited idea of it articulated in *Du Toit*, and then I indicate how such reconciliation could not be achieved without the conception of amnesty the Court favours in *Du Toit*.

4 Applying *ubuntu* as a moral theory to *Du Toit*

I am seeking a more principled foundation for a truth-oriented amnesty that distributes burdens in such a way that apartheid-era offenders could still face extra-judicial harms such as losing a job. In the previous section, I spelled out a moral-theoretic interpretation of *ubuntu* that instructs agents to prize communal or friendly relationships, ones of sharing a way of life with others and of caring for their quality of life. I suggested that this philosophical construal of *ubuntu* is prima facie attractive for providing a promising explanation of what makes actions wrong and for underwriting a variety of particular Constitutional judgments associated with *ubuntu*, such as the importance of hospitality, the injustice of the death penalty and the insignificance of retribution. I now apply this ethical principle to issues of national reconciliation and the proper form that amnesty should take so as to facilitate it.

36 *State v Joyce Maluleke & Others*, Pretoria High Court, case number 83/04, 13 June 2006 per Bertelsmann J.

37 See n 26 above, para 115.

38 *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* [1996] ZACC 16; 1996 8 BCLR 1015; 1996 4 SA 672; see also Sachs J's comments in *Dikoko* (n 26 above) paras 105-121.

4.1 *Ubuntu*-based reconciliation

National reconciliation is a stage in a country's ethical development that can come consequent to a major breach between large segments of its population. For citizens to become reconciled to a political set up is not necessarily for it to ideally realise justice, or even for them to perceive it as doing such.[39] Instead, national reconciliation consists of certain minimal conditions that make it possible to progress in the right direction. For the Constitutional Court in *Du Toit*, as we have seen, reconciliation basically consists of the establishment of peace, the rule of law, some basic democratic norms and the contribution of offenders toward rebuilding society. Here, I maintain that, in light of *ubuntu*, national reconciliation can be seen to include these elements, as they are part of the relevant sort of community to build, but that it also includes more.

From the perspective of *ubuntu* as a moral theory, reconciliation should be seen as a substantial *step on the path* toward realising a society that fully respects communal relationships, ones of identity and solidarity. Respecting a value includes creating it, protecting it and fostering it. So, it will help at this point first to indicate what a society that has fully realised community in the relevant sense would look like, and then to 'work down' to something lesser, to a society that has partially realised it in a way that could realistically lead to something more robust in the future.

Above I noted that community of the sort that plausibly ought to exist, for much Southern African philosophy, consists of relationships of identity and solidarity. What would it be for members of a society to do their utmost to identify with one another? This would involve both behavioural and psychological elements. In terms of behaviour, it would involve what I have been abbreviating 'coordinated activities' or 'joint projects', which at their fullest include interaction that is done: on a transparent basis (rather than on a misinformed one); on a free basis (rather than out of coercion or exploitation); out of trust (rather than suspicion); for the sake of ends that are shared, or at least compatible (rather than conflicting); for the sake of ends that are higher-order and hence would involve substantial sacrifice to achieve (as opposed to a weak commitment); and for the sake of the end of identity itself, in other words, doing something because 'this is who we are'. With regard to the more purely psychological elements of identifying with others, people fully do so insofar as they: think of themselves primarily as a 'we', that is, as joint members of a group (as opposed to an 'us' and 'them'); and

[39] As D Moellendorf reminds us with clarity in 'Reconciliation as a political value' (2007) 38 *Journal of Social Philosophy* 205.

take pride in one another's accomplishments, and shame in their failures (rather than not feeling a part of what others do). When all these conditions are realised, then people fully belong, or genuinely share a way of life with each other.

Consider, now, what a robust form of solidarity would be, which would also include behavioural and psychological aspects. In terms of behaviour, it would include people: aiming to do what is good for others (as opposed to merely foreseeing benefit to them or accidentally effecting it); doing what is likely to be good for others (as opposed to likely to harm them or to have no effect); engaging in mutual aid over time (as opposed to not returning benefits); expressing gratitude for benefits received (rather than expecting tribute); and making the other's friendly character a benefit that one aims to confer on her. Focusing, now, on the more strictly mental dimensions of solidarity, this would include judging others to be worthy of help (rather than of mere indirect consideration); being motivated to help others for their own sake (as opposed to one's long-term self-interest); and exhibiting emotions such as sympathy, in other words, feeling good when others flourish and bad when they flounder (rather than being indifferent). Again, when all these conditions obtain, people fully exhibit good-will with regard to each other, or truly seek to care for others' quality of life.

It would be expecting too much from the concept of reconciliation for it to include the full realisation of identity and solidarity, as adumbrated above. Reconciliation must rather be understood to consist of only some of these elements. After a period of great social conflict, one cannot expect people's attitudes to change quickly, whereas their behaviour can. Although immediately after World War II many Germans continued to favour Hitler's policies, and even today anti-semitism remains a problem among them,[40] they nonetheless conformed to a constitutional order that was imposed by the Allies. What changes to mind-set there were came later. Similarly, if reconciliation is a stepping stone toward a society of genuine community, then it is plausible to think of it as consisting mainly of the behavioural facets of identity and solidarity, and not so much the purely attitudinal ones. Of course, people's hearts and minds would need to change to some degree in order to move from a conflict-ridden society, that is, one of division and ill-will, to one with the core, behavioural components of identity and solidarity as above. However, they would need to do so to a much lesser degree than they would in order to be, say, motivated by altruism, to have sympathetic

40 'New AJC survey finds negative attitudes towards Jews widespread in Germany' http://www.ajc.org/site/apps/nl/content2.asp?c=ijITI2PHKoG&b=837277&ct=871875 (accessed 31 January 2011).

emotional reactions toward others, and to think of themselves as a 'we'.

So, I suggest that the friend of *ubuntu* should construe national reconciliation as a condition in which:

> (a) residents in a country interact on a largely free, informed and trustworthy basis for the sake of ends that are compossible and the content of which largely includes not only doing what will help one another, but also doing so in a reciprocal fashion, where (a) is consequent to (b) serious social conflict that (c), when involving serious injustice, is disavowed by at least public institutions, if not also substantial numbers of offenders.

The (b) condition is uncontroversial, an indication merely that the concept of reconciliation implies a prior condition of discord. The (c) condition is more controversial than (b), indicating that reconciliation is properly understood to be a condition that follows from societal recognition of a serious *wrong* having been done. Although sometimes people who have fought and some of whom have been treated wrongly are able to come together and repair the relationship without thinking in terms of wrongdoing, or at least expressing themselves in those terms, the suggestion here is that, in cases of gross injustice, such 'reconciliation' is not particularly desirable. To honour community means acknowledging when it has been seriously undermined in wrongful ways, and to treat people as special in virtue of their capacity for community means responding to them in light of the way they have greatly misused this capacity. The (a) condition, of course, is more controversial, and, as I demonstrate below, takes us beyond the Court's construal of reconciliation, while including it.

Before considering the kind of amnesty that would be essential for attaining this *ubuntu*-based conception of reconciliation, I compare it with the Constitutional Court's understanding of reconciliation in *Du Toit*. First, the Afro-communal notion obviously underwrites the intuition that essential to reconciliation is a state of peace that follows a state of violence. Violence is a condition in which, in part, parties seek to undermine one another's ends and to harm each other. That is ruled out, by definition, insofar as reconciliation involves seeking ends that are compatible with those of others and engaging in mutual aid.

Second, less obviously, this account of reconciliation can make sense of it partially consisting of the rule of law, something that of course is not entailed by a peaceful condition alone (viz, something that a Hobbesian sovereign could ensure). Rule by law, and not of men (people), centrally consists of a condition in which all in society, including those who make the laws, are subject to them, and in which an independent judiciary exists to interpret and enforce the laws,

again, if necessary against those who have made the law but subsequently broken it. It is a condition that serves the function of preventing an arbitrary exercise of power on the part of those who control the state, where arbitrariness is plausibly understood to be inconsistent with a state that acts to benefits its legal residents, that treats them in a transparent way, that seeks to foster trust between it and them, and that seeks their voluntary compliance.

Third, the above construal of reconciliation can account for the Court's notion that certain fundamental democratic values are a part of it (which are not entailed solely by the concept of rule of law). Democracy is a type of state with a fair distribution of political power, well captured by the norm that those who are subject to laws have an equal opportunity to influence their adoption. It is fairly common among democratic theorists, from John Stuart Mill[41] onwards, to think that democratic governments are more likely than autocratic ones to adopt laws that will benefit the citizenry. In addition, the more democratic a state, the more free and informed the collective decision-making process is.

Fourth, and finally, recall that the Court includes among the elements of reconciliation the idea that offenders help to rebuild the society they were responsible for helping to break apart. Remember that this condition seems distinct from the first three; however, in light of the *ubuntu*-based conception of reconciliation above, it can be seen to have its proper place alongside them. Part of what community ideally involves, for an African philosophy, is a condition in which people are working to help one another. And truly valuing mutual aid would mean that those who have worked against this condition in the past take extra measure to realise it in the future.

So far, I have argued that the various features of reconciliation that the Court appeals to in *Du Toit*, which appear to be a grab bag in that judgment, can be unified under a single, attractive heading of behaviourally prizing community *qua* the combination of identity and solidarity in the context of disavowing serious wrongdoing. As I show in the next section, however, an *ubuntu*-based conception of reconciliation includes more elements than what the Court discusses, and these extra facets of reconciliation help to facilitate a firmer, more principled foundation for the sort of amnesty the Court conceives as just.

41 JS Mill *Considerations on representative government* (1861).

4.2 *Ubuntu*-based reconciliation and a truth-oriented amnesty

The conception of national reconciliation grounded in the philosophical interpretation of *ubuntu* that I have proffered provides strong reason to believe that only a truth-oriented amnesty would be appropriate. Note that reconciliation is conceived as one that includes social interaction that is by and large *informed*. Community, of the ideal sort, consists of a relationship between people that is (among other things) transparent. In order to *genuinely share* a way of life with others, one needs to know the way that they have treated you, and the decision to engage with them must be consequent to that awareness. Hence, national reconciliation of the kind advocated here would be impossible without a substantial disclosure of political crimes undertaken in the past. Put roughly, blacks and whites could not reconcile in the sense of truly living together, as opposed to merely inhabiting space and enjoying legal rights nearby one another, without an accurate awareness of what had transpired between them.

Consider, now, how this argument for a truth-oriented amnesty improves on the one that the Court gives. The Court's reasoning, recall, was premised on the ideas that reconciliation, roughly conceived as peace, the rule of law and democratic procedures, would be achieved only upon victims feeling substantial solace and closure, something they could experience only upon substantial awareness of truth about the past. This argument relies on contested empirical contingencies about people's psychological reactions and resulting behaviours. In contrast, the present rationale for the desirability of a truth-oriented amnesty does not, instead pointing out that truth is partially *constitutive* (as opposed to *effective*) of reconciliation, conceived as a kind of communal or friendly relationship.

Note some implications of this *ubuntu*-based argument for the disclosure of political crimes. For one, it underwrites the widespread call for a TRC that did not address merely the worst human rights violations that individuals suffered. Truly sharing a way of life would have also required spreading the truth about collective wrongs done to black people, such as inferior education, exploitive mining and forced relocations. For another, it explains the common claim that reconciliation has not been achieved in South Africa. If the Court's understanding of reconciliation were correct, that claim would make no sense, for peace, democratic procedures, rule of law and the like have indeed been advanced. However, if reconciliation is something more, including elements such as interacting on a substantially informed basis and engaging in mutual aid in a way that transcends

racial categories, then reconciliation is sensibly deemed to be an on-going process in South Africa.

Furthermore, the present argument employs a different strategy to avoid the troublesome implication noted in section 2, that the more truth an amnesty should produce, the more reason there is to relieve the guilty of burdens they might face upon revealing it, and hence to give *Du Toit* his job back. The natural way for the Court to deal with this problem, recall, was to suggest that relieving too many burdens on the guilty would fail to produce solace and closure, the point of seeking out truth. That reasoning, again, relies on highly contestable empirical claims. In the following, I sketch an alternative resolution of the conundrum.

4.3 *Ubuntu*-based reconciliation and an amnesty that does not favour the guilty

From the perspective of an *ubuntu*-inspired understanding of reconciliation, there are several reasons for the Court not to prohibit non-judicial institutions from firing someone who has received amnesty for serious political crimes, even supposing that so prohibiting would result in greater disclosure from offenders. Truth about the past is one value essential to reconciliation, but it is only one, and it must be traded off to some degree for the sake of its other elements.

First, then, there is the value of interaction among citizens that is *free*, and not merely informed. Suppose that if the state forbade organisations from firing those convicted of political crimes, more truth about the past would emerge. Even so, the benefit of disclosure would come at the cost of a restriction, and one placed on innocent employers. Another aspect of *genuinely sharing* a way of life means having the liberty to choose the terms of interaction, particularly with those who have done a grievous injustice to you or to those with whom you identify. An institutional agent is not truly reconciled with someone who has committed political crimes if the Court forces it to continue to associate with him, when it otherwise would elect not to. Of course, refusing to reinstate someone discharged for having committed a crime is hardly a way to reconcile with him, but an employer would have a greater opportunity to forge real ties were the space of the job opened up for a new employee, one with whom the employer could identify and engage in solidarity to a much greater extent.

Second, there is the value of interaction between residents that is based on *trust*, rather than suspicion, fear or some other *modus vivendi*. The reality is that, upon hearing that high-ranking and visible

current members of the police force have been convicted of murder — as residents *should*, given the need for informed interaction — their faith in the criminal justice system would likely decline. Concretely, how is a population realistically supposed to trust a police officer who has admitted to unjustifiably killing four people?[42] Note that the distrust would appear likely to obtain, even if the police force were to tell the public it thinks that it is justified in reinstating a convicted murderer.

On a related matter, third, a person's having been convicted of political crimes might give an institution such as the police force good reason to suspect he is not particularly well qualified to remain a part of it. Beyond exhibiting the kind of temperament that is not conducive to protecting the innocent and more generally upholding human rights, the bare fact that the populace is less likely to trust him would reasonably count as a serious disqualification. Hence, if community in the relevant sense includes the idea of people doing is what likely to help others, and particularly in the form of *mutual aid*, remaining on the police force would probably not be a way for Du Toit to do that.

Fourth, and finally, there is that part of reconciliation that involves public institutions *disavowing* seriously unjust behaviour. Supposing that granting amnesty from criminal and civil liability were necessary in order to obtain substantial disclosure about apartheid-era crimes, the state should do no more for the guilty than is necessary for that, lest it fail to express the requisite negative judgment and attitude toward what they have done. When serious injustice has been committed, it is important for victims to be acknowledged. Ideally, that should be done by the offenders themselves, with an apology and restitution. However, at least when that is absent, the political community has these duties: to listen to how victims were affected; to say that this was not how they should have been treated and that their dignity entitled them to better; to go out of its way to help them rebuild their lives; and, above all, not to impose any more burdens on them in a way that would benefit their oppressors, such as forcing them to interact with someone in authority who is an apartheid-era killer.

Before concluding, I respond to a likely objection to this argument for denying Du Toit his job, and then bring out how this rationale improves on that provided by the Court. As for the objection, many will be tempted to suggest that an *ubuntu* ethic would recommend

[42] A plain reading here suggests an empirical claim about the effects of truth about political crimes on people's inclinations to trust the criminals. If the evidence for that were questionable, I could move to a more principled claim about when residents would have *good reason* to be distrusting, as opposed to when they would be likely to be distrusting.

that the police force, as well as residents, forgive Du Toit. Supposing that were correct, would it not tell against the alleged *ubuntu*-based ideals of disavowal of injustice and of giving employers the freedom to disassociate from convicted murderers?

The objection raises some thorny issues about the nature of forgiveness and what it properly involves. However, I can say at least the following in reply. First, there need not be inconsistency between disavowal of a political crime and forgiveness for it, at least over time. To forgive injustice without *first* disavowing it would, for many, be an inappropriate form of forgiveness. Distance is needed before reintegration becomes morally attractive, for a variety of reasons, ranging from giving offenders incentive to make up for harm they have done, to giving victims their due, as explained above.

Second, even assuming, for the sake of argument, that *ubuntu* would recommend that citizens and the police force forgive Du Toit immediately, it would not follow that the Court may rightly *force* them to do so or to act as though they have. The legal issue at stake is whether the Court may legally *prohibit* non-judicial institutions from discharging someone who has received amnesty for serious political crimes. The issue of when coercion may be used against an agent differs from the issue of what the agent is morally obligated to do, with not every moral obligation being rightly enforceable, according to common sense and moral principle. Hence, even if the police force and citizens were failing to do what they ought in continuing to resent Du Toit, it would not obviously follow from *ubuntu* that the Court may intervene.

Now compare the present argument for the conclusion in *Du Toit* with the Court's. The Court argues that reconciliation, *qua* peace, rule of law, etc, would be much less likely to result if were offenders were given the 'lion's share of the benefits'. That argument, I contended, rests on an empirical claim that is far from obvious. In addition, I pointed out that, for all the Court says, there is just as much reason to 'level up' and force the SAPS to reinstate Du Toit, so long as the government provided equalising benefits to victims. The *ubuntu*-based rationale is more principled and less vulnerable to empirical contingency, and also provides a more intuitive reason not to require the police force to rehire Du Toit. It does not really invoke the idea that burdens must be 'balanced' so that 'to grant disproportionate benefit to one party at the expense of the other would be unjust and would strike at the equilibrium envisaged by the Constitution'.[43] I have not appealed to any notion that victims and offenders must be comparably burdened for the sake of some sort of

[43] *Du Toit* (n 2 above) para 30.

equilibrium. If anything, I have suggested, among other things, that, in order for the state to distance itself from what offenders have done, it must do all it can to refrain from burdening victims, and should rather allow institutions to fire offenders. Since the notion of balancing or equilibrium is not involved, there is no concern about levelling up rather than down.

Now, the Court could also invoke the claim I made above that there is good reason to doubt that someone convicted of political crimes would make for a well-qualified police officer, or at least one with a high status, and hence the Court could plausibly suggest that levelling up is not an apt way to enable Du Toit to contribute to society. However, the balancing rationale on which this argument ultimately rests is implausible, at least in comparison with the *ubuntu*-based argument. Instead of the view that burdens must be balanced as a means to achieve a reconciled society *qua* one that is peaceful, democratic, based on the rule of law, etc, it is more attractive to argue that reconciliation itself includes the idea of the state expressing concern for victims along with doing what is likely to make victims and offenders interact on the basis of transparency, voluntariness, trust and mutual aid.

5 Conclusion: Further applications

I close this article by applying the *ubuntu*-based rationale for a truth-oriented amnesty that minimises benefit to the guilty to two additional Constitutional Court cases. One is the (currently) continuing case of *McBride*,[44] in which the Court must decide whether a newspaper was guilty of defamation for calling Robert McBride, who had received amnesty for political killings of innocents, a 'murderer', given section 20(10) of the Reconciliation Act, which says that amnesty implies that such actions 'shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place…'. The Supreme Court of Appeal ruled in favour of McBride, claiming that part of the Reconciliation Act's purpose was to ensure that apartheid-era offenders 'could be reintegrated into society'[45] and that they would have been much less likely to disclose their political crimes if they 'could never ever rid themselves of the stigma and moral opprobrium of their deeds'.[46] Since calling an apartheid-era killer a 'murderer' would have frustrated the aims of reintegration and truth-telling, so the argument went, the Supreme Court concluded that the newspaper was wrong to do so. The

44 See n 4 above.
45 *The Citizen v McBride* [2010] ZASCA 5; 2010 4 SA 148 (SCA) ; [2010] 3 All SA 46 (SCA) para 30.
46 *Citizen* (n 45 above) para 91.

Constitutional Court is now deciding whether the Supreme Court ruled correctly.

The above *ubuntu*-based conception of reconciliation entails that the Constitutional Court should overturn the Supreme Court's decision. First, the latter rests on the dubious empirical claim that offenders would not have made substantial disclosures about political crimes had they still faced the prospect of people giving them unflattering labels. Strong reason to doubt this claim is that offenders would have faced criminal and civil prosecution had they not agreed to exchange truth for amnesty. Surely, the threat of prosecution was likely to have been sufficient to prompt offenders to robustly reveal their misdeeds.

Second, as has often been suggested, it would be counter to an interest in fostering truth about the past to forbid a newspaper, and others in society, from naming someone who culpably committed unjustified killings of innocent people a 'murderer'.

Third, as noted above, truth is one part of reconciliation, but there are several other facets of it that entail that it would be wrong to pursue *maximal* disclosure from offenders by means of relieving them of more than judicial burdens. Specifically, recall the idea that part of reconciliation involves major segments of society disavowing seriously unjust behaviour. To reconcile, in the way *ubuntu* recommends, is to acknowledge when people have wrongfully dishonoured communal relationships.

This point is relevant to the other purpose the Supreme Court mentions, that of reintegrating the offender. When reintegration is understood along the lines of *ubuntu*, as suggested above, one sees that it would actually be promoted upon the moralised judgment of offenders. An Afro-communal conception of reconciliation, recall, is the idea of residents by and large disavowing serious injustice that had taken place and interacting on a substantially voluntary, informed and trustworthy basis for the sake of shareable ends that involve mutual aid. Since disavowal is central to reconciliation, properly understood, it actually requires going beyond merely 'neutral' descriptions when characterising past misdeeds. Indeed, it entails that offenders themselves ought to be willing to take responsibility for their political crimes and be willing to judge themselves as having done wrong. And reconciliation, insofar as it involves voluntary interaction, would be *pro tanto* hindered were the press and others in society legally muzzled from naming people the way they see fit to name them, particularly when such names are accurate.

Finally, and more quickly, I apply the logic of the rationale proffered in this article to the case of *Albutt v the Centre for the*

Study of Violence and Reconciliation and Others.[47] The issue, here, is whether the President of South Africa was required to take victim impact statements into consideration upon deciding whether to pardon those who had not received amnesty for political crimes and had been convicted for them. The President was disinclined to do so, and several victims'-rights organisations sued, citing, among other things, irrationality in that disposition, given the President's own intention to uphold the Reconciliation Act. The Constitutional Court unanimously ruled in favour of the victims, claiming that the 'objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.'[48]

The *ubuntu*-based conception of reconciliation naturally supports the Court's judgment that reconciliation includes not only victims receiving 'public recognition that they had been wronged,'[49] but also the widespread revelation of truth about past misdeeds.[50] Reconciliation, understood as (partially) comprised of public disavowal of injustice and social interaction based on an informed understanding of history, provides strong reason for a President to listen to the ways victims were wronged by those convicted of political crimes, before making a decision about whether to the pardon the latter. Hence, the moral philosophy articulated and applied to the issue of reconciliation in this article provides the resources to justify two of the Constitutional Court's recent judgments and indicates how it ought to resolve a further, outstanding one. The appeal to moral philosophy facilitates unity in law.

47 *Albutt v the Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4; 2010 3 SA 293 (CC); 2010 (5) BCLR 391 (CC).
48 *Albutt* (n 47 above) 37.
49 *Albutt* (n 47 above) 32, citing The Truth and Reconciliation Commission *Truth and reconciliation commission report, volume 1* (1998) 128.
50 *Albutt* (n 47 above) 31 34.