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AN AFRICAN LEGAL PHILOSOPHY OF DISABILITY JUSTICE

Between Discovery and Recognition

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Global disability justice discourse is shaped by two leading approaches. The human-rights-based approach is not only more dominant but treats disability justice as a question of equality and individual autonomy requiring the application of existing human-rights norms to persons with disability. The second approach is influenced by diverse perspectives on 'justice' in the Western tradition of legal, political and social theory and philosophy, which variously respond to the neglect of disability in foundational writings. Because the literature proceeds from an abstract and universalist standpoint regarding disability and justice, it is unclear how it takes account of the particularities of non-Western political societies, or how – unlike the human-rights-based approach – it influences concrete national laws, institutions, policies, practices and activism in non-Western societies. Amartya Sen's¹ and Martha Nussbaum's² capability/capabilities approach is distinct regarding the philosophical underpinnings it provides to the concept of human development.³ Nevertheless, the impact of Sen's and Nussbaum's approach on national laws and policies should not be exaggerated as a result

1. Sen, A. (2001). *Development as freedom*. Oxford Paperbacks.

2. Nussbaum Martha, C. (2006). *Frontiers of justice: disability, nationality, species membership*.

3. Nussbaum, M. C. (2011). *Creating capabilities*. Harvard University Press.

of the prevalence of the neoliberal concept of development and its indifference to disability justice.

Despite its progressiveness, Sen's and Nussbaum's approach, like the human-rights approach, suffers from a local legitimacy deficit because it is developed mainly from Western cultural experiences and understandings of disability and justice, and the literature in general lacks a comprehensive non-Western response to disability justice. Through African legal philosophical and theoretical thought, I seek to remedy this in my ISRF research.

My project demonstrates the character that disability justice would take if it mirrored an African legal philosophy constituted by the most attractive African ethical and moral values of community. While there is some consensus that the concept of community is common among African societies⁴, there is no agreement on what the term 'community' means^{5,6}, the claim here is of neither the pre-existence nor the existence but rather the universalisability of these ethical and moral values of community across Africa. Universalisability is predicated on the ability to appreciate these ethical and moral values as the thread that can bind Africans together despite their differences, and this is further contingent on cross-cultural exchanges and processes of shared learning made possible by laws and legal and political institutions. Although there are several ethical and moral values commonly associated with community in Africa, human interdependence is discursively selected as a plausible way of defining and valuing community and of extrapolating foundational and evaluative principles of disability justice. The African concept of community, a framework that facilitates togetherness or sharing an ethical life, is best exemplified by human interdependence, which can link vast differences across Africa into a common project. Neither individual nor community takes precedence over the complex,

4. Metz, T. (2012). African conceptions of human dignity: Vitality and community as the ground of human rights. *Human Rights Review*, 13(1), 19-37.

5. Menkiti, I. A. (1979). *Person and community in traditional African thought. African philosophy. New York: University Press of America.*

6. Gyekye, K. (1997). *Tradition and modernity: Philosophical reflections on the African experience.* Oxford University Press.

interlocking processes of interaction and continuum between humans and communities. Human interdependence bears witness not to the uniform but to the complex ethical ways of sharing lives. It encompasses the ethical and moral literacy that is acquired through learning from and sharing, exchanging, experiencing and interacting with each person. Human interdependence is predisposed to and provides the grounding for other values, particularly compassionate dispositions of love, care and affection for the most vulnerable people, not only as the ultimate measure of a community, but also of society as a whole.

A legal philosophy of disability justice founded on these precepts will provide a criterion for establishing and evaluating laws and legal and political institutions and practices according to the degree to which they include persons with disability within the range of interdependent relationships characteristic of a given community. This, of course, will include recognising and protecting the human rights of persons with disability as not only passive recipients of habits of love, care, affection, compassion and friendship (although this will depend on the type of disability) but capable of providing such themselves. This is important because the emphasis on individual autonomy, despite its significance in mainstream disability justice discourse, risks contributing to the isolation and deprivation of persons with disabilities and to the failure to recognise them as beings worthy and capable of typical community relationships. The proposed legal philosophy of disability justice first underscores the obligations of citizens without disabilities to citizens with them. The greatest strength of the African legal philosophy of disability justice may be its potential impact on the cultural and social attitudes of citizens without disabilities, as it nurtures a public moral culture that underscores not just a better understanding of the orthodox vertical citizenship obligations but also of the stringent horizontal ethical and moral obligations of citizens without disabilities to citizens with them. This new public moral culture of obligations would be contingent on a political, educational and legislative reform agenda capable of helping

citizens without disabilities to better appreciate their special obligations to citizens with disabilities, among other vulnerable citizens. It arises from the awareness that the mistreatment of citizens with disabilities is the result not only of a failure to accord them with standards of equal citizenship but also of the failure of citizens without disabilities to treat citizens with disabilities with love, empathy and compassion as a basic requirement of morality and justice that binds members of any political community. An essential part and practical component of this proposed reform agenda should be performed by moral citizenship education supported by a bill of responsibilities, both of which will provide a vehicle to concretise the ethical and moral obligations that are foundational to African legal philosophy.

My project invokes two unique but related questions of 'discovery' and 'recognition', although the latter is more apparent than the former. The question of what constitutes (or should constitute) a discovery can be preceded only by an ethical question of how to recognise 'who' or 'what' remains unrecognised, or for the purposes of my project, how to recognise 'alterity' or 'otherness'. African ethical and moral values of community have traditionally not been articulated inclusively enough to recognise persons with disabilities, just as there is a failure to recognise African legal philosophy as a valid discipline capable of contributing to the understanding of laws and legal concepts and institutions that are relied upon to solve African and non-African problems. Certainly, the first and second question are related by the fact that the failure to recognise persons with disabilities is partly fuelled by concerns of the existence, identity and significance of African legal thought due to this denial to recognise it.

In both cases, recognition is analogous to an intersubjective reciprocal claim for the affirmation of identity, consciousness and respect between humans, rooted in a tradition of legal, social and political philosophy^{7,8} that dates back to Georg Wilhelm

7. Honneth, A. (1996). *The struggle for recognition: The moral grammar of social conflicts*. Mit Press.

8. Taylor, C. (1995). *Philosophical arguments*. Harvard University Press.

Friedrich Hegel (1770–1831). A comprehensive response to the first question is contingent on understanding the nature of, and possible solutions to, the second question. African legal philosophy is beleaguered with claims for recognition within legal philosophy. Another Hegelian legacy, namely the denial of the capacity for legal consciousness, which is a fundamental human essence⁹, is difficult for African legal philosophy to surmount and continues to deny it the ability to contribute to decisive debates about legal and social problems. On the one hand, Hegel proposed the concept of recognition¹⁰, but on the other, he grounded a destructive legacy of denial of African legal philosophy, a denial which has become a microcosm for the broader rejection of African knowledge and humanity.¹¹ Not only does this point towards some of the issues at stake, it also reveals the unequal power relationships and processes of domination that produce, determine and shape the aspiration for and the outcome of recognition.

Implicit in both of the above claims for recognition is an essentialism about the defining character of being human or of law and legal philosophy, both of which demand a further response because they are additional hallmarks of Hegel, who subsumed both essentialist questions by equating human consciousness with the capacity for legal consciousness. Hegel's overt bigotry detracts from a significant analytical point that may be deduced from it, namely that a comprehensive account of law cannot be successfully achieved without a background notion of human nature.¹² This has been neglected in contemporary legal philosophy, but it explains why the legal field supplies the adjudicatory standards for determining a variety of claims for recognition.¹³ A preliminary response to both questions of recognition may first entail working within the disciplinary standards of 'African' legal philosophy and 'legal philosophy' in

9. Murungi, J. (2013). *An introduction to African legal philosophy*. Lexington Books.

10. Hegel, G. W. F. (1976) *Phenomenology of the Spirit*. New York, Oxford University Press.

11. Hegel, G. W. F., & Sibree, J. trans.(2001) *The Philosophy of History*.

12. Murungi, J. (2013). *op. cit.*

13. Douzinas, C. (2000). *End of human rights*. Hart Publishing (UK).

general, to demonstrate how claims for the recognition of persons with disabilities on the one hand, and African legal philosophical perspectives on the other, conform to the respective standards of these disciplines, or simply to show the novelty and originality of these claims in discovering previously unrecognised ways of thinking about and valuing humans and legal philosophy, respectively.

The problem remains that this leaves the terms (or who determines the terms and outcomes) of recognition unquestioned. Persons with disability, for example, will still be judged by socio-cultural standards of normalcy, whereas African legal philosophy will be judged by a universalism that eschews diversity and difference. An alternative or more disruptive response is therefore necessary to amplify the subjectivities, terms of recognition, disciplinary parameters and internal standards against which such claims should be judged. It is only on this condition that the precise novelty or disruptive nature of the various claims, and the benefits from human and disciplinary interdependence, can be fully recognised.

This will allow a process of critical introspection that is necessary to question the inclusive nature of African ethical and moral ideals of community, to discover not only alterity or otherness, but also how its founding precepts can be expanded beyond its original formulations to increase its capacity for recognition. This demand for recognition by persons with disability requires not just the application of African ethical and moral precepts to novel and contemporary problems, but also the revisiting and redefining of the structural, conceptual and foundational precepts in ways that disrupt existing categories of recognition. It is unclear whether African values of community and human ontology recognise persons with disability. Therefore, new concepts, conceptual structures and foundations – yielding new laws and legal and political institutions – are required.