TOWARD AN ETHICALLY ORGANIC JURISPRUDENCE: A PARADIGMATIC RE-IMAGINING OF SOUTH AFRICAN CONSTITUTIONALISM*

*by Louis G. Hennop**

1 Introduction

The law is not a *holy cow* which rests upon an intellectual pedestal. In fact, this essay seeks to demonstrate that the law, by its very nature, is a paradigm of thought and social expression within the interconnected system of human society. The focus of this essay will be on jurisprudence, or 'legal philosophy', which concerns the nature, origins, scope and values of the law as a whole.[1] A discussion of these various elements of the law, when seen as a thought paradigm rather than an untouchable draconian system of control, will provide the substance of the argument to follow.

I have chosen to place my focus on jurisprudence for two reasons: First, it is precisely the emphasis on the many sub-disciplines of the law, as opposed to the underlying philosophy of the law, and their indisputable power in society that places the law on a pedestal in the minds of legal scholars, legal practitioners as well as society at large. Second, as argued by Douzinas and Gearey, jurisprudence can be seen as both the 'consciousness' and 'conscience' of the law and so may offer insight into its foundational assumptions and functioning.[2]

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** BA (cum laude), BsocSci, Final year LLB student, University of Pretoria.
1 J Webb 'Jurisprudence' in J Webb (ed) *Dictionary of Law* (2009) 296.
2 C Douzinas & A Gearey *Critical jurisprudence. The political philosophy of justice* (2005) 5.

The goal of this essay will be to posit an adapted conception of jurisprudence particular to the contemporary South African context and the needs incumbent on a post-apartheid transformative society. Constitutional jurisprudence has succeeded in many endeavours since the inception of the final constitution in 1996, taking great strides in the promotion of a fair, just and equal society. Through transformative adjudication [3] in the judiciary, see the decisions of the courts in cases like *Fourie*[4] and *Grootboom*[5] as examples of the judiciary intervening to promote the values of the constitution in the application of the law. As well as legislative practices like the enactment of the PAJA[6] and Employment Equity[7] acts, which endeavour to bring the wide values set out in the constitution into the ambit of everyday legal practice.

However as argued in the text by Zikode, considering the plight of the members of the Abahlali Mjondolo movement, the law on paper does not always translate to justice in practice.[8] The argument to follow will illustrate how an adapted conception of jurisprudence as an ethically organic entity functioning within contemporary South African society can offer the law a chance to grow and transition from an ethereal *holy cow* to a real world, adaptive system striving to achieve transformation in every facet of society. In this way, by addressing the underlying paradigmatic methodology of jurisprudence which itself forms the intellectual basis of the law, such a conception may well address the prevailing legal inadequacies as identified by Zikode and others.

This essay assumes the following structure: The first section considers the nature of jurisprudence as a social thought paradigm, considering its varying underlying methodological structures and values. It evaluates the limits of the law, its progression from a 'general' to a 'specific' jurisprudence and how a legal mentality based on a specific jurisprudence acts as a restraining force in the pursuit of justice and in fact creates the potential for the law to act as a tool of oppression and injustice. The second section considers the potential of the law to return to a general jurisprudence. I propose a re-imagining of jurisprudence itself, based on the model of an ethically driven, organically functioning organism, founded in the contemporary South African constitutional dispensation.

3 For a detailed description of the term 'transformative adjudication' consider the text by D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 209-221.
4 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
5 *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC).
6 Promotion of Administrative Justice Act 3 of 2000.
7 Employment Equity Act 55 of 1998.
8 S Zikode (2011) 'Poor people's movements and the law' http://abahlaliold.shackdwellers.org/?q=node8551 (accessed 10 September 2018).

2 From a general to a specific jurisprudence: the limitations and dangers of the law

2.1 Theoretical foundations

The term 'paradigm' will be used throughout this essay to refer to jurisprudence as well as other intellectual phenomena. When mentioning a thought paradigm, I refer to the following: a system of thinking, often but not necessarily exemplified in intellectual disciplines, deriving from certain basic epistemic assumptions and manifesting in a prevalent methodology within a human society at any particular time. Koons conceptualises this in terms of moral concerns by using the term 'moral language' and defines it as a means by which humanity seeks to understand itself, its place in existence, and the various questions of right and wrong and real and false that present themselves to the human mind in said contemplations.[9]

Douzinas and Geary introduce the terms 'general jurisprudence' and 'specific jurisprudence' in reference to legal thought paradigms and define them as follows: A 'general jurisprudence' is derived from and dependant on the process of intellectual reflection on the relationships and dynamics inherent in society as having begun with the early 'legal' philosophers, Plato, Aristotle and their contemporary moral philosophers, and their contemplation of the social bond between the sources of power in society and the subjects of that power.[10] They contend further that this initial contemplation of the rules and regulations relating to values and norms lead to the emergence of other disciplines of study related to human society and the functioning of said societies and the individuals within, which we now refer to as the 'humanities' disciplines.[11] A 'specific jurisprudence' is categorised by Douzinas and Geary as a legal paradigm concerned principally with contemplation of the law in and of itself, seeking an answer to questions like 'what is the law?', 'how can the law be categorised and sub-divided?' and 'how can the sub-divisions of the law be conceptualised and defined as specifically as possible?.[12] In short, general jurisprudence does not implicitly elevate the law above a contemplation of its interaction with society while the various historical reincarnations of specific jurisprudences tend to alienate the law from the dynamics of the societies it finds itself existing in.

9 J Koons 'Earth jurisprudence: The moral value of nature' (2008) 25 (2) *PACE Environmental Law Review* 265-266.
10 Douzinas (n 3) 3.
11 As above.
12 Douzinas (n 3) 10.

2.2 From general to specific

Throughout modernity the law has been commonly regarded as elevated above the status of the 'humanities'. Thus, the law is seen as separate, higher than or purer than, for example, the fields of psychology (the study of the human mind and behaviour), sociology (the study of the functioning of social structures and dynamics) or political science (the contemplation of the power dynamics within society and how they impact those beneath them) to say nothing of the study of art, literature and philosophy. Koons postulates the reason for this as being the rise of modernity, that is to say the paradigm of positivistic truth finding, determined by the scientific mentality of the 17th and 18th century Western enlightenment thinkers.[13]

Before contemplating the effect that modernity had on jurisprudence, let us first consider the nature of jurisprudence as outlined by Douzinas and Gearey and extrapolated on in this essay. They frame jurisprudence as both the consciousness and conscience of the law.[14] When referring to consciousness they contend that jurisprudence reflects the basic intellectual framework and contemplative elements of the law. As its conscience, jurisprudence assumes the role of moral guide, reflective of inherent values of society at a given time and mirrored by Koons' term, 'moral language' used above. The law can thus be said to not only be an intellectual paradigm, but also morally guided and determined, that is to say operating according to a moral mandate. Both these elements of jurisprudence are important in this essay as it faced challenges and evolved in manners detrimental to society along both these axes, and the proposed solution to the challenges of jurisprudence must consequently be addressed along both axes.

2.3 The law's consciousness

First in relation to the consciousness axis, I refer back to the influence of the enlightenment and scientific positivism, during modernity, on jurisprudence. The influence of the broader societal thought paradigms on the law, and its influence on them amounted the law being seen as a truth finding endeavour, dependant for its legitimacy on objectively determinable facts and systematic evaluation thereof akin to the methodological process witnessed in the sciences.[15] The human element was removed as far as possible form the law, and it was envisioned to be a technical discipline based on the dispassionate

13 Koons (n 4) 266.
14 Douzinas (n 3) 5.
15 Douzinas (n 3) 6, consider in particular the 'Science of the Law' as considered by Kelsen and Hart's *Positivism*.

application of codified and crystalised legal principles, narrowed and honed over time, to individual legal matters which according to Douzinas and Gearey critically impoverished jurisprudence.[16]

Such a change in the methodology of the law resulted in further impoverishment of the moral aspects of jurisprudence, its conscience, as will now be illustrated. The process entailed the rather straightforward logical inference that if the law was legitimate due to an evaluation of objectively verifiable facts, operating along the principles of dispassionate logic and reason in order to determine moral truth, then any result of the legal process must be regarded as both true and fair.[17] Such a manner of thinking, whereby notions of truth and fairness were determined in accordance with the principles of objective logic and reason, was not confined to the law but saw parallels in other intellectual paradigms occurring in the same general time period in Western thought. Philosophical examples may be found in the prevalent moral and ethical theories of the time, as seen in the Kantian *Critiques* of reason and morality,[18] and the utilitarian philosophies of Bentham and Mill.[19] The net effect of the prevalence of this positivistic paradigm can be seen in the fact that along with the human element being pushed to the side-lines, notions of pluralistic values and morals, stemming from the diverse elements within society were also marginalised and set aside in favour of pure logical principles.

However, the notion of individualism in interpretation of the law continued to be a problem for proponents of positivistic law. While the law may be codified in a manner so as to be consistent with the above principles, and thus 'fair', on a case by case basis. It remained down to an individual or group to make a substantive determination as to how the law applied to the facts. This lead inevitably to the intrusion of values, morals and individual or group perspectives and opinions on the *pure* evaluation of legal principles.[20] Additionally it remained a hypothetical exercise alone, that is to say an intellectual opinion contradicted by a common sense observation of society, to see the law as operating within a vacuum, unaffected by social and political realities, as protests and uprisings against established legal orders have been a constant throughout human co-existence and continued to be at the time.

16 As above.
17 Douzinas (n 3) 6.
18 Douzinas (n 3) see the discussion on pg 50.
19 Koons (n 4) discussed in footnote form by Koons on pg 268.
20 Douzinas (n 3) see the discussion on 'individual discretion' on pg 7.

2.4 The law's conscience

An attempt to acknowledge the contextual elements within the law came about in the form of jurisprudential hermeneutics, which saw the application of the law as an act of active interpretation, by an individual or group, existing within a specific context in space and time, based on a framework of textual interpretation.[21] This succeeded in introducing an element of plurality or multiplicity of potential meaning into the data being analysed by the law, allowed for differing systems of value deriving from social context and individual perspective, as well as offering a potential explanation for the problem of individual discretion.[22] However, this solution was not beyond reproach, the main point of contention coming in the form of post-modern notions of power dynamics. Beginning with philosophers like Nietzsche, and his notion of a 'Will to power'[23] and culminating in the work of the great existentialist philosophers such as Foucault in his critique of historicism.[24] The role of *power* came to the fore in both critical philosophy as well as critical legal theory, a trend that has persisted in the present day in the paradigms of Marxist critique,[25] the black consciousness movement[26] and feminist legal philosophy.[27]

In the above mentioned intellectual traditions, the emphasis was not placed on the methodology with which the law operated but rather on those who benefitted from its operation, in other words the law was brought down in a sense form its pedestal and opened to scrutiny. The heart of this endeavour lay in the exercise of regarding the law as not somehow above and separate to society but functioning as an element thereof, in this way it was possible to see the law as both a tool of oppression as well as a potential tool for liberation. The problem presented by such a hermeneutic jurisprudence was however that any critique of jurisprudence following such a methodology still fell into the same trap that claimed legal positivism, the quest for truth in law. Such a quest implied that if the values of society at any

21 Douzinas (n 3) 8.
22 As above.
23 Douzinas (n 3) discussed on pgs 49-50.
24 Whereby the notion of an emphasis on the recording of history necessarily created one coherent account of truth and several disputed accounts thereof see Douzinas (n 3) 53-56.
25 Establishing the power base in society as resting with those who control the economic means of production, which is contended to be the white minority in South Africa by Nash, see A Nash 'The double lives of South African marxism' in P Vale et al (eds) *Intellectual Traditions in South Africa* (2014) at 52-53.
26 As discussed by More, referring to the notion of the black 'other' forming a reactionary consciousness in response to oppression by the racial power elite, see MP More 'The Black Consciousness Movement' in P Vale et al (eds) *Intellectual traditions in South Africa* (2014) at 180.
27 Consider K van Marle 'Towards a politics of living' in K van Marle (ed) *Sex, gender, becoming: A post-apartheid reflections* (2006). For a detailed account of the difficult birth of the female identity in a society governed from a legal and political foundation of patriarchy.

given time were seen as the source of legitimacy of the law, and the law functioned according to a logically and rationally fair process stemming from a consideration of such values, then any determination made by the law must be both fair, logical and ethical.

The problem with this seemingly adept solution was that by creating such a view of the law, as having been subjected to critical evaluation, and thus producing ethically sound judgements, the impression was created that again legal truth could be obtained. The unintended consequence being that if only one legal truth existed, all other accounts must by definition be untrue or at the least, inferior. In her work on 'curating community' Douglas posits a similar argument regarding the way history is remembered in museums, to the way laws are enshrined in constitutions.[28] She makes the argument that by seeking to preserve or 'curate' history or knowledge, the ones doing so in effect advance the view that there exists an official version of history or law, and thus relegates any 'unofficial' accounts to the periphery, this destroys plurality of truth and furthers the construction of the 'other' i.e. that which exists outside the officially correct and thus occupies a lower status.[29]

One could argue that post-constitutional South African legality falls into this same trap. The effect of the entrenchment of the Constitution as the supreme law of the Republic along with the supremacy of the rights contained in the Bill of Rights in matters of legal interpretation,[30] creates the impression that any ruling shown to be in line with the Constitution is by inference also in line with the multiplicity of values in existence in South Africa. Such a view has been consistently criticised by legal academics as limited, in that the Constitution is accepted as the protector of all South African groups and furthering the use of the law as a tool of oppression. Any jurisprudence which could be so criticised, could be said to fall within a specific jurisprudence, limited as were the positivistic jurisprudences of the 'modern' period. The goal in contemporary jurisprudential theory seems to be a move away from this and back to a view of general jurisprudence, where the law itself is seen as not higher than but stemming from the interconnected system that is society. When the law is seen as elevated above other fields of study contemplating the nature and dynamics of society and those within it, it fails to learn from them. In short when the current constitutional dispensation is lauded as inherently representative, then by extension any legal ruling stemming from it is also seen as both fair and representative.

28 S Douglas *Curating community. Museums, constitutionalism and the taming of the political* (2017) 5-7.
29 As above.
30 Section 39(2) of the Constitution of the Republic of South Africa, 1996.

3 The way forward: An ethical and organic general jurisprudence

As explained by Douzinas and Gearey, original 'general' jurisprudential thought was not seen as higher than or separate from thought regarding other aspects of society and the relations of individuals therein. As such, jurisprudence often learned and borrowed from other systems of thought. It is contended here that such a view of jurisprudence must be as possible now as it was then, and that the move towards such a general jurisprudence is the key to avoiding the trap outlined above. It must be stated that any such attempt to rethink the methodology of jurisprudence must be done with a substantive goal in mind; that is to say with the intention to attain justice. This is because jurisprudence, unlike other fields of intellectual enquiry, does not seek simply to generate knowledge and understand a subject matter but seeks to protect those whom it seeks to understand. In other words, jurisprudence must operate with a moral mandate - it must serve as conscience.

Despite the highly refined and patently value based Constitution of South Africa, there seems to be a clear gap between the protection promised and that enjoyed by the proverbial 'man on the street'.[31] As to how jurisprudence may move closer to such a general and inclusive structure, we can have regard to the following sources for a potential answer: Manderson mentions the reading of a novel and literary analysis as a potential avenue from which the law can learn.[32] It is theorised that when a novel is read it is constantly recreated, that the impression of the novel is formed by a complex interplay between the work, the intention of the author, the reader and the context within which each of the above occur, and that meaning is recreated each time that an attempt at meaning is sought.[33] This allows for both an active process of meaning formation, as well as an attitude that embraces the plurality and interconnectedness of society.[34]

While providing an avenue as to the potential methodological changes required of the law in relations to its functioning, this hermeneutically derived approach does not address the trap set by the inherent *will to power* in the law, and so a further perspective is required. This may be found in the perspectives of Barr,[35]

31 Zikode (n 9).
32 D Manderson 'Michael Bakhtin and the field of law and literature' (2016) *Law, culture and the humanities* 12.
33 Manderson (n 25) 25-26.
34 As above.
35 O Barr 'Legal footprints' (2017) *Law Text Culture* 21 at 217.

Van Marle,[36] and Koons.[37] Each author posits a slightly different critique of jurisprudence, however they each focus on the purpose behind jurisprudence, that is to say its *aim* or methodological focus, and emphasise how an awareness and thus an adaptation thereof can direct jurisprudence toward a state better able to function as a conscience of the law that leads it towards justice. Barr conceptualises a minor jurisprudence which regards the law in the same way that those exposed to it regard art, that is to say with an emphasis on the fact that art invokes the emotions of its viewer, and also acts as a reminder of the history of its subject, it must be interpreted in the moment and when seen after the time of its creation, in relation to the subsequent context of the viewer and the subject. In this way it serves as a 'memory' of the social context in which it is viewed.[38]

Van Marle stresses the 'slowness' of legal interpretation, referring to the ideal that an emphasis should be placed on the present and past, so as not to lose sight thereof in a relentless pursuit of the goals of the future or a fixation upon an achievement at the expense of a continual endeavour.[39] Koons states that humanity must not be assumed to be at the heart of any question of morality, as both the sole subject matter and arbiter of the moral questions inherent to the law, but must acknowledge the nature of humanity as but one part of the 'earth' as an interrelated and interconnected whole.[40]

Each of the above thinkers emphasises a basic problematic assumption or tendency of contemporary jurisprudence and offers potential solutions, I would tie them together in the following: an ethically organic South African jurisprudence, as general jurisprudence and way forward. I propose a conception of the *consciousness* of jurisprudence as modelled on an organic entity, functioning according to the *conscience* provided by a post-modern idea of ethical inclusivity.

In terms of the consciousness or functioning of jurisprudence, organic here refers to the dynamic, constantly evolving nature of any living entity. In order to remain in existence any living organism must pass the twofold test of evolutionary biology: it must constantly adapt to the environment in which it finds itself, retaining the qualities that aid its survival and discarding the elements that would endanger it. Furthermore, it must function as part of an interconnected whole, in harmony with the environment in which it exists. Jurisprudence must thus function in a constant state of adaptation, responding to the

36 K Van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* at 255.
37 Koons (n 4).
38 Barr (n 28) 234.
39 Van Marle (n 29) 240-242.
40 Koons (n 4) 264.

needs and context of society, and being revaluated in terms of any potential weaknesses discovered within it. This process of evaluation could only occur by an acknowledgment of the necessarily dynamic nature of jurisprudence and a commitment to its constant and endless review and reconstruction (by both legal academics, members of the public and other interdisciplinary thinkers). Furthermore, such a jurisprudence must function as part of a paradigmatic whole, taking from other systems of thought (including all those identified above) and in that way better reflecting the changing needs of society as well as its own shortcomings.

By functioning in the way envisioned above, an organic jurisprudence might better acknowledge any inherent biases or stagnation within itself and adapt accordingly. However, a revision of the functioning of jurisprudence is not enough, as stated above it must always exist with a moral goal in mind. Thus, the next step is to consider the conscienc*e* aspect to jurisprudence, as it cannot simply understand and act retrospectively, but must also act proactively. The law must function in the interests of those entities it concerns. This is possible through the integral incorporation within the nature of the newly conceived jurisprudence or an ethical orientation. I look here to the theorists above and conceive of a jurisprudence exemplified by a constant regard for the plurality of voice within South African society; that is to say that avoids the trap above by not seeking truth but rather seeking representativeness.

While the law cannot function in an endless state of contemplation and must at some point act and reach conclusions in order to function in the interests of society. The constant emphasis on the need to slow down and consider the events of the past and the needs of the plurality of voices found in the present, would ensure that the act of legal implementation not fall into the trap outlined above. This is done by entrenching the need for representative inclusivity of all stakeholders in legal matters, and where this is impractical, a constant emphasis on the accountability of the law to society. This will be best assured with regard to the interconnected intellectual paradigmatic environment present in society. If such an approach is to be followed, its representative value i for the South African society and its needs should be an acceptable endeavour not only in a piece of legal scholarship such as this but in any court of law.

4 Conclusion

The progression of jurisprudence as contemplated by Douzinas and Gearey was considered, beginning from the general jurisprudence which emerged in the early philosophical contemplation of society. Such a jurisprudence differs from that seen in modernity in several crucial respects, most importantly in the sense that jurisprudence and

legal thinking is not seen as separate to, or more pure than other forms of social or aesthetic thought and so can learn from these fields. Jurisprudence however changed to what may be seen as a specific jurisprudence when it split substantively from other paradigms and adopted an essentially narrow positivistic methodology. The result of this was the creation of the jurisprudential 'other' and the use of the law as a tool of oppression rather than a tool for justice.

The law itself stagnated and was often behind the times as far as meeting the needs of society, a situation not improved by the emergence if jurisprudential hermeneutics. While this advent may have addressed the methodological shortcomings of the law it did not pay sufficient heed to the inherent power dynamics at play whenever legal codification and interpretation occurred. I refer in this context to the trap placed on jurisprudence by the very fact that legal protection and the centrality of a value based system, in the absence of constant scrutiny and evaluation, still amounts to the emphasis of a higher or more pure legal truth.

The result of this perceived legitimacy is a tendency to miss potential omissions and thus potentially divergent voices and so to continue the process of legal 'othering'. As a solution I proposed a general jurisprudence as an ethically organic South African jurisprudence, modelled on the constantly evolving and adaptive living organism, subject to constant ethically inclusive scrutiny. The utilisation of such a model is not only in keeping with the notion of transformative constitutionalism as a never-ending bridge[41] but does not require abandoning the Constitution as supreme law either. Rather, it requires constant vigilance of the potential trap of complacency and arrogance, and the necessity of listening to the voices of the society in which the law operates.

41 The metaphor in play here, featuring the constitution as a historic bridge moving from a past founded on abuses of equality, freedom and human dignity to a transformed future is taken from the 'Epilogue' or 'Post-amble' of the Interim Constitution, Constitution of the republic of South Africa, act 200 of 1993.