THE POLITICAL CONSTRUCTIONS OF JUSTICE: REVIEWING ANTJIE KROG'S *COUNTRY OF MY SKULL* AND THE APPLICATION OF AFRICAN JURISPRUDENCE

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1 Introduction

The South African legal sphere shows a deficit in applying a general jurisprudential approach to the law. In doing so, it neglects the general jurisprudential perspective that law and politics are inherently interrelated. General jurisprudence is the approach to the legal sphere that grants the law indulgence into its sociological, psychological, linguistic and political aspects in order to determine and lay down laws which ultimately embody a true sense of justice. I therefore define the main research problem of this article as an over emphasis of restricted jurisprudence in the South African legal sphere. Restricted jurisprudence is that approach to the legal sphere which, adhering to the positive law, aims in its continuous endeavour to rid the law of any and all ethical considerations, thereby excluding morality from the legal domain.[1] Restricted jurisprudence's operation and application are in contradiction to the South African context, where a remarkable combination of historical, cultural and legal pluralistic features create a unique legal atmosphere upon which restricted jurisprudence has limited effect. I argue that if South Africa is to allow for the adoption of African jurisprudence and the incorporation of the principle of *Ubuntu* into its legal domain, such legal reform will only be achieved through a general or critical[2] jurisprudential approach. General jurisprudence would allow for an increased recognition of legal pluralism and African jurisprudence. I further argue that African jurisprudence and *Ubuntu* cannot be

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1 C Douzinas & A Gearey *A critical jurisprudence: The political philosophy of justice* (2005) 7 (hereafter 'Douzinas & Gearey').

2 General jurisprudence and critical jurisprudence are synonymous. However, for the purposes of this article, I use the term 'general jurisprudence'.

directly incorporated into South Africa's legal sphere, but rather, must be adopted through the South African political landscape.[3] The executive authority of the state together with its legislature, while consciously drafting and promulgating laws adhering to and incorporating African philosophy, will result in a state governed by such a philosophy. Thus, I will show that restricted jurisprudence no longer holds a position within the South African legal context and that a general jurisprudence will aid in promulgating African jurisprudence and the principle of *Ubuntu*.

This research aims to prove that politics shapes the law and, as such, can act as a catalyst to shape the law in accordance with African jurisprudence and *Ubuntu*. I structure my approach by explaining the difference between general and restricted jurisprudence and their foundations with the natural and positive law, respectively. In addition, I attempt to show that law and politics are inherently interrelated and should be viewed through a general jurisprudential perspective. I will further elaborate on the character played by politics on the South African law, both pre-1994 and in the post-apartheid era. I direct my literature review to Antjie Krog's *Country of my skull*.[4] Krog's account of the Truth and Reconciliation Commission (hereinafter referred to as the TRC) provides a platform for observation and analysis of the influence politics exerted on the law (and law enforcement) during apartheid. Krog's account of the TRC also acts as a grounding for emphasising the particular African jurisprudence portrayed by the TRC itself and, finally, showing that a political atmosphere which incorporates African jurisprudence and *Ubuntu* into its political agenda will allow for the reflection of such a jurisprudence in the legal sphere. Krog's illustration of the political shaping of the law creates a clear perspective of the influence of politics over the law. Furthermore, in attempting to illustrate this inherent power politics holds, particularly focusing on apartheid policies shaping the law (pre-1994), I too aim to show the power that politics can still play in shaping the law today, in accordance with African philosophy.

2 The jurisprudential spectrum: natural law v positivism

General and restricted jurisprudence are two focal points of viewing the law: conflicting perspectives based on conflicting schools of thought founded on opposing ideas. The dominant type of legal

3 The politics I refer to here adheres to state authority with specific focus on the executive (political) authority.
4 A Krog *Country of my skull* (1998) (hereafter 'Krog') 5 -11, 29 – 89, 113 – 198, 204 – 231.

thinking currently seen can be referred to as restricted jurisprudence.[5] Restricted jurisprudence is the endless perception of the substance of law, in which the question of 'what is law?' is revolved around.[6] It is a 'law of the law' and predominantly focuses on adherence to the positive law.[7] It is this adherence to positive law in which the problem is situated. Positivism is both the cause and effect of the moral poverty within jurisprudence.[8] The positive law is more concerned with the authority to enact rather than its substance, as John Gardner puts it:

> [Positive law] in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.[9]

The application of restricted jurisprudence should therefore not be regarded as justful, but systematic. Ultimately, the law in place represents the dominant ideology of society — 'the canonical expressions of (among others) its … political power.'[10] Furthermore, as Derrida puts it, a restricted jurisprudential perception of law is not justice but a system of regulations which ensures the enduring possibility of the use of violence to enforce the law in future and is thankful to state monopoly for this.[11]

On the contrary, general jurisprudence is centred on the ideals of justice and, as such, places a broader focus upon the law and its inherent interrelatedness, in particular, with the humanities. General jurisprudence includes the political economy of the law, the legal constructions of subjectivity, and the ways in which gender, race or sexuality create forms of identity.[12] As such, general jurisprudence is grounded in the natural law. Natural law theorists such as Plato and Aristotle argue for legitimate and just laws which can only be achieved if they promote a common good.[13]

In light of the vast array of differences (and contradictions) between general and restricted jurisprudence, it should be clear that a legal perspective which is more concerned about the law of the law, rather than the law of the people, should be avoided. This warrants

5 Douzinas & Gearey (n 1 above) 10 put it that this legal perspective imposing such limitations on jurisprudence 'may be called restricted jurisprudence'.
6 Douzinas & Gearey (n 1 above) 7.
7 J Modiri 'The crisis in legal education' (2014) 46 (3) *Acta Academia* 1– 24.
8 Douzinas & Gearey (n 1 above) 5.
9 J Gardner 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199.
10 Douzinas & Gearey (n 1 above) 8.
11 J Derrida 'The force of law: The mystical foundation of authority' (1990) 11 *Cardozo Law Review* 911.
12 C Douzinas 'A short history of the British Critical Legal Conference or, the responsibility of the critic' (2014) 25 *Law and Critique* 189.
13 W Le Roux 'Natural law theories' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25 – 47.

that general or critical jurisprudence should be the norm for legal contemplation, both in legal education and adjudication.

3 General jurisprudence, Antjie Krog and the TRC

3.1 Antjie Krog's *The country of my skull*

Krog reflects on her intricate life during and post-apartheid and also focuses on her experiences of the TRC. The TRC was a body assembled after the fall of apartheid which dealt with restorative justice.[14] Instead of 'satisfying abstract legal principles' by punishing offenders, the TRC focused on the needs of victims, offenders and the community at large, bringing about much needed reconciliation among South Africans. *Country of my skull* can therefore be understood not only as a biographical account of Krog's experiences during the TRC, but also as a collection of testimonies during the TRC hearings and a portrayal of the influence politics played in the law (and law enforcement) during apartheid.

Although *Country of my skull* is a collection of direct testimonies of human rights violations from all sides of the struggle against apartheid, I place particular focus on the human rights violations committed by the apartheid government. I choose this as my focus in order to place it in context with the fact that it was the apartheid government that drafted and promulgated the law according to its own political agenda.

3.2 The TRC: a portrait of the political philosophy of 'justice'

A total of 21 800 testimonies were given and heard during the TRC, with roughly 1 800 perpetrators being granted amnesty for their actions. In order for a perpetrator to receive amnesty from the TRC, they had to tell the truth and prove that their actions were politically motivated — just as the law was politically-sided. As the Postamble to South African's Interim Constitution of 1993 described the TRC:

> In order to advance … reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past.[15]

14 The TRC was set up in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995.

15 Postamble to South Africa's 1993 'Interim' Constitution (the Constitution of the Republic of South Africa, Act 108 of 1993).

In this context, Krog's account of the TRC hearings can be viewed as a portrait depicting the political shaping of the law during the apartheid era. Throughout Krog's account of the testimonies heard during the TRC, it is made clear that the majority of those who sought amnesty relied on the assumption that their actions were indeed politically motivated.[16] A large number of Krog's accounts can be linked directly to apartheid era legislation, which in turn was created and enforced by the apartheid government.

Through her accounts, Krog clarifies that politics can completely shape the law in its favour, just as it did during apartheid. A simple reading of the testimonies and the corresponding legislation clearly shows the political shaping of the law in a way which best suited apartheid policies. Here follows a select few examples of such testimonies and the corresponding politically motivated legislation. It should be noted that this analysis is in line with a general or critical jurisprudential approach and allows for critical discussion surrounding the politics of law.

Krog subtly uses a metaphor to describe the TRC's dispensation of justice by saying that 'truth has become a woman, everybody knows her but nobody recognises her.'[17] This powerful statement can very well be applied to the politics of law. Law is a body of regulations known to everyone, yet the political landscape determines its recognition and its construction.

Several of Krog's testimonies deal with individuals being arrested on the basis of their support and/or involvement in communism and/or communist activities. On 26 June 1950, the then ruling National Party passed the Suppression of Communism Act[18] which banned the South African Communist Party and prohibited any such subscription to communist ideologies. The Act particularly restricted the lives and activities of political activists, just as the TRC's Final Report confirmed.[19] Krog inadvertently expresses the effect this law had on individuals and their families by emphasising the banishment and detention[20] of individuals based on their free will and political association.

Several testimonies relating to political crimes also sparked Krog's interest. She documented several cases where no warrant was given for the arrest of a person on the basis of being suspected of a political crime.[21] Political crimes, as Krog clarifies, are those acts that were

16 Krog (n 4 above) 5 – 11, 46 – 47, 48.
17 Krog (n 4 above) 58.
18 Act 44 of 1950. This Act was renamed in 1976 to the Internal Security Amendment Act 79 of 1976.
19 'Truth and Reconciliation Commission Final Report' Section 1, Chapter 3, Volume 2.
20 Krog (n 4 above) 65 – 68, 228 – 231.
21 Krog (n 4 above) 113 – 114, 138 – 139.

committed against the state and therefore against the ruling apartheid government.[22] The General Law Amendment Act,[23] which commenced on 2 May 1963, allowed a police officer to detain, without a warrant, any person suspected of such a political crime for a 90-day period.[24] Coupled with a legal principle referred to as the *Sobukwe* clause, any person detained for political crimes could be detained for a further twelve months.[25] The General Law Amendment Act also gave the president the power to declare certain organisations unlawful, such as the ANC's *Umkhonto we Sizwe*.[26]

Furthermore, upon the commencement of the Unlawful Organisations Act,[27] both the ANC and the Pan African Congress were immediately declared unlawful as they opposed the apartheid government. Notably, this piece of legislation was enacted just over a year after the Sharpeville Massacre. The Indemnity Act[28] was subsequently enacted to protect the apartheid government from any legal action for, among others, the Sharpeville massacre. The Act prevented the courts from hearing any criminal or civil cases against the government for actions taken from 21 March 1960 up until 5 July 1961.[29] Such intrusions into people's political involvement and affiliation are now extensively guarded in the post-apartheid South African democracy. The right to freedom of political association has been specifically enshrined in the Bill of Rights of the Constitution, with several provisions specifically protecting individual's rights to political affiliation.[30]

Krog also paid particular attention to documenting testimony from individuals and families whose members were arrested and detained without trial. Section 6 of the Terrorism Act[31] in particular allowed for such an occurrence.[32] According to this section, anyone suspected of involvement in terrorism, which was broadly defined as anything which might 'endanger the maintenance of law and order',[33] to be

22 As above.
23 Act 37 of 1963.
24 M Horrell 'Laws affecting race relations in South Africa 1948-1976' (1978) *South African Institute of Race Relations* 469 (hereafter 'Horrell').
25 Truth and Reconciliation Commission 'Human rights violations: question and answers' submission dated 12 May 1997.
26 Horrell (n 24 above) 416.
27 Act 34 of 1960.
28 Act 61 of 1961.
29 Act 61 of 1961 (sec 1(1)).
30 Section 19 of the Constitution of the Republic of South Africa, 1996 grants every citizen of the country the freedom to make political choices (sec 19(1)), which includes the freedom to form a political party (sec 19 (1)(a)), participate in political activities, recruit members for a political party (sec 19(1)(b)) and campaign for a political party or cause (sec 19(1)(c)).
31 Act 83 of 1967.
32 J Dugard *Human rights and the South African legal order* (1978) 118.
33 Notable is the broad definition of the word 'terrorism' as defined by the Act. This broad definition was a clear advantage to the apartheid government as it allowed for increased suppression of any acts against the government.

detained for a period of 60 days without trial. It further allowed for the renewal of detention without trial on the authority of a senior police officer.[34] This, as Krog illustrates, often resulted in the detained individual 'disappearing' completely.[35] More often than not, Krog allegorically explains that these disappearances resulted in the death of the detainees.[36]

In documenting these testimonies, Krog was able to capture the effects experienced by South Africans from laws which stemmed directly from the country's political authority. It is therefore possible to conclude that politics not only shapes the law and law enforcement, but also shapes legal and constitutional discourse.

3.3 The TRC: an embodiment of African jurisprudence

The TRC's focus, placed on restorative justice and justice at large, particularly links to the aims of natural law. The natural law, which seeks to critically analyse the content of the law and address and administer justice, is what the TRC was able to implement.[37] The TRC, however, embraces a further aspect — African philosophy of community and the notion of *Ubuntu*. Krog illustrates African jurisprudence and the role that forgiveness and *Ubuntu* play in African legal philosophy. Krog explicitly places *Ubuntu* within the context of the TRC to illustrate that the TRC is in itself a reflection of *Ubuntu* and truly embodies the meaning of forgiveness. However, it is the ideals of African jurisprudence and the African notion of 'forgiveness', 'restoration' and 'humanness' which allowed for the TRC to implement restorative justice as it did.

Natural law theorists' arguments for legitimate and just laws, which can only be achieved if they promote the common good, are embodied by the TRC. African jurisprudence, particularly the notion of *Ubuntu*, compliments this with its view on justice, fairness and equality. If the matter of justice and fairness are to be spoken of, then it must be borne in mind that law is not an abstract set of rules or a set of institutional arrangements, but rather, inherently an unstable structure of thought and expression — a form of life and a process of renewal.[38]

34 Terrorism Act 83 of 1967 sec 6(1).
35 In international human rights, the term disappear refers to a person being abducted or imprisoned by a state or political organisation with the knowledge of that state or political organisation.
36 Krog (n 4 above) 60, 147 – 151, 197 – 198, 200 – 204.
37 The TRC may not have completely or successfully achieved restorative justice, as Wessel Le Roux & Karin van Marle (eds) critically note in their *Law, memory and the legacy of Apartheid: Ten years after AZAPO v President of South Africa* paras 17, 24, 27 – 28, 45, 74, 107 – 108, 172. However, to an extent, the TRC was a clear attempt at administering restorative justice.
38 J Boyd White 'Justice in tension: An expression of law and the legal mind' (2012) 9 *No Foundations* 1 - 17.

4 General jurisprudence and African Jurisprudence — the Golden Thread

4.1 African Jurisprudence: toward justice as law

I begin here by laying out the groundwork for African jurisprudence by explaining its perspective on justice and restoration. The *Ubuntu* understanding of justice is seen as the restoration of equilibrium.[39] *Ubuntu* views the law as a continuous and living feature of humanity, and thus it can never be finalised.[40] *Ubuntu* law is both flexible and not formalised and is always linked to morality. The *Ubuntu* perspective on justice is ultimately one of harmony and balance which seeks restoration[41] while being inclusive of the importance of forgiveness and fairness.

Through the clever and logical use of the narrative in a chronological order, Krog allows for an important aspect to be realised — memory and the fostering of justice through African philosophy. Krog writes that:

> If its [the TRC's] interest in truth is linked only to amnesty and compensation, then it will have chosen not truth, but justice. If it sees truth as the widest possible compilation of people's perceptions, stories, myths and experiences, it will have chosen to restore memory and foster a new humanity, and perhaps that is justice in its deepest sense.[42]

It is clear that African jurisprudence focuses on restoration by using truth and forgiveness as a tool for achieving justice. Hence, it is possible to say that African jurisprudence contradicts Leviathan's stance on the power of authority — *Auctoritas, non veritas, facit legem* (authority, not truth, makes law).[43] This contradiction is exactly what general jurisprudence entails: a critical and extensive analysis of the content and reasoning behind the law, and an investigation into justice and truth as not being part of the law, but being the law.

4.2 Through the looking glass: the application of African jurisprudence through the political arena

Ever since South Africa's new constitutional dispensation in 1994, the legislature has taken an active stance on the incorporation of African

39 MB Ramose 'An African perspective on justice and race' (2001) 2 *Forum for Intercultural Philosophizing* 7.
40 Ramose (n 39 above) 6.
41 Ramose (n 39 above) 1.
42 Krog (n 4 above) 21.
43 T Hobbes & JCA Gaskin *Leviathan* (1998) 9, 13, 38, 161, 170, 200.

jurisprudence into the legal sphere.[44] However, this process of incorporation has been rather ineffective as South Africa's legal structure is still predominantly shadowed by that of the Roman-Dutch and English common law.

I argue that this failure to incorporate was due to the political anatomy of the legislature by the executive as well as the reliance and inclination towards a restricted jurisprudence approach.[45] If it is to be accepted that politics does in fact shape the law, then it must be considered that any alteration to the law will best be done through a political arena. Coupled with a general jurisprudential perspective as a legal 'looking glass' through which such a proposal can be viewed, African jurisprudence can be adopted through an indirect route in South African law. It should also warrant no further elaboration that African jurisprudence stems from the African native population which was suppressed during apartheid.[46]

It is therefore crucial that, as part of the adoption of African jurisprudence, black consciousness be mentioned here. Black consciousness seeks to unify all black people and, in doing so, rid every individual of their perceived limitations and their perceived life of servitude.[47] I argue that in order to allow for black consciousness to become more than something merely reduced to writing, the aspect of education needs to be mentioned as well. Although I do not wish to delve into legal and philosophical education more than necessary, a brief point from one of the Anti-Racism Forum's sittings[48] must be made here. There is a paramount need for the

44 A strong example of this is the Law of Evidence Amendment Act 4 of 1988, which empowered courts to take notice of indigenous South African law. However, as JY Mokgoro points out in her '*Ubuntu* and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 4 not much has come of this law.

45 The doctrine of separation of powers focuses on the different spheres of authority between the executive, the legislative and the judicial authority. This doctrine can, however, also be seen as a product of positivism because of its predominant concern with authority and placement thereof, rather than substantive law making. It should also be noted that the doctrine of separation of powers is based on Western legal development and not African legal thinking – it therefore clearly illustrates the subordinate position that African philosophy holds in relation to western rooted laws, such as those of the Roman-Dutch laws in South Africa. As Judge Phineas M Mojapelo in his The Doctrine of Separation of Powers: a South African perspective [37] explains it, the 'modern design of the doctrine of separation of powers is to be found in the theory of John Locke.' Mojapelo further explains that it was the French philosopher Montesquieu who is usually credited for the first formulation of the doctrine and based his exposition on the British Constitution.

46 I do not find it necessary to elaborate on the degradation and dehumanisation of non-whites during apartheid as there is no debate or contest to this fact.

47 S Biko *I write what I like* (2004) 52 – 53.

48 T Delport 'Rhodes falling and UP: last monuments to racism?' unpublished paper presented at University of Pretoria (23 April 2015).

adoption of African philosophy and African legal philosophy in tertiary education.[49] In order for a political atmosphere conducive to African philosophy and jurisprudence to be realised, a change in current tertiary curriculums is needed to encompass the teaching of African jurisprudence and African philosophy. Once such an understanding among South Africans has been reached, the political arena will play a more pivotal part in developing African jurisprudence.

5 Concluding remarks

In conclusion, restricted jurisprudence limits any given legal system, and its limitations extend not only to legal development and construction but to legal education and adjudication. Restricted jurisprudence falls short of justifying its lack of morality and disconnect with justice, and its concern with the absence of morality in law is the centre of the problem.[50]

A general jurisprudential paradigm is a strong pursuit needed in the adaptation of law in South Africa. It allows for the true meaning of justice to be realised and applied proportionally and consistently with society and morality. Law is inevitably built on morals and values, and therefore, must function within a higher and broader scope. A widening of this scope allows for a radical rethinking of the nature of rights, justice, sovereignty and judgment.[51] In returning back to a general jurisprudential approach, we are required to re-assess the substantive form of the law and to re-assess its purpose in an evolving society with evolving perceptions. This re-assessment, coupled with a justful political agenda and one in the spirit of African jurisprudence and the principle of *Ubuntu*, will allow for the reflection of such jurisprudence in the legal sphere. Douzinas and Gearey phrase the returning to a general jurisprudential approach — as a reminder to ourselves that law without a spirit is like a body without a soul: at best a corpse, at worst a zombie.[52]

49 Here I must give credit to the Anti-Racism Forum and the Society for Global and Current Affairs. It is because of these bodies as well as the 'Rhodes Falling and UP: Last monuments to racism?' presentation that I have gained the incredibly important understanding of the need for the incorporation of African philosophy in tertiary education curriculums. I choose to add this as paramount importance, because without this African philosophical education, I do not believe there will be any shift toward the incorporation of African jurisprudence in South Africa's political sphere. This incorporation is, however, an extensive debate on its own and involves, among others, the decolonisation of tertiary curriculums, an increase in black consciousness, an increase in feminist activism, an increase in constitutional criticism, and an increase in legal pluralism education.

50 Douzinas & Gearey (n 1 above) 4 – 7.

51 Douzinas & Gearey (n 1 above) 1.

52 Douzinas & Gearey (n 1 above) 19.