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A JURISPRUDENCE OF RESPONSIBILITY

The case of a healer accused of preparing and dispensing medicine without a license in Uriel Orlow's film *The Crown against Mafavuke* powerfully portrays the epistemic violence that was part and parcel of conquest and many years of racist discrimination in South Africa. This episode underscores the tension between white/European "science" and African "tradition," and brings many epistemological and ontological issues to the fore.[1] One is reminded of another South African case, the 1962 Treason trial that played out in the Old Synagogue in Pretoria during which Nelson Mandela made his famous "Black man in a white man's court" speech. Mandela asked the court why it was that no African had ever been tried by another African in a court of law. He said that he felt "oppressed by the atmosphere of white domination that lurks all around in this courtroom."[2] Although decades have passed since both Mafavuke's and Mandela's trials, and South Africa underwent a shift from institutional apartheid to democracy in the mid-1990s, the legacy of colonialism endures.

Another of Orlow's films, *Imbizo Ka Mafavuke (Mafavuke's Tribunal)*, addresses the issue of local knowledge systems, and the extent to which Western/white epistemology fails to comprehend fully and respond justly to indigenous knowledge. A white man representing the Department of Science and Technology addresses the organizers of a tribunal on a new Bill to set up a central database on all available indigenous knowledge, and thereby regulate it. The implication of the Bill will be that everyone will have to go through the Department to obtain permission to trade in plants. He is challenged by a bearer of indigenous knowledge, who says: "It sounds good in theory, but shouldn't indigenous knowledge be protected by the people themselves? This again takes the rights to our own resources away. We don't have any agency to act directly." The official responds by saying that communities will be consulted, and that some sort of centralized system is needed to manage the process of "knowledge-sharing." In response, issues of trust, ownership, and ancestry are raised: "Our knowledge is at the same time ancestral, common and individual. If we give our knowledge without consulting with our ancestors or our fellow healers, our ancestors will be angered. And that will jeopardize the sacredness of our knowledge."

^ Production photograph. Uriel Orlow, *The Crown Against Mafavuke,* Palace of Justice, Pretoria, 2016.

These words capture what lies at the heart of the tension between Western and African conceptions of the law; in what follows, I expand on some epistemological and ontological aspects of this tension. Drawing from

1 [Eds.] For a reading of the trial against Mafavuke Ngcobo, see Karen Flint, "Compounding Traditions: From 'Untraditional' Healers to Modern Bioprospectors of South Africa's Medicinal Plants" in this volume, 137–44.

2 During the Treason Trial of 1956–61, more than 140 people were arrested on the charge of treason against the state, but the state failed to prove its case and everyone was acquitted. In 1962, the government singled out Nelson Mandela, charging him for incitement and leaving the country without a passport. Mandela acted in his own defense and entered the court dressed in a Xhosa leopard-skin *kaross* and a band of yellow and green beads. He explained that he chose to wear traditional dress to underscore the tension between the whiteness of the court and a black African being charged in this court. See Nelson Mandela, *Long Walk to Freedom* (New York: Little, Brown, 1994), and Allo Awol ed., *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial* (London: Routledge, 2015). For extracts from the transcript, see https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm.

the work of poet and journalist Antjie Krog, I reflect on the limits of any institutional process, court, tribunal, or commission to listen and respond fully to injustice. A haunting and pervasive question also underlies this exploration: How might jurisprudence respond to centuries of epistemic and ontological violence?

Plural jurisprudence

Jurisprudence as the "wisdom of law" is clearly law's knowledge, law's epistemology. But as legal theorists Costas Douzinas and Adam Gearey rightly insist, jurisprudence is also about law's conscience, its ethics.[3] They also invoke the significance of ontology, thoughts on being and existence for jurisprudence. It is my belief that ultimately it is not law in its formal guise—the trial, the tribunal—but rather considered as substance, as jurisprudence, that could begin to undermine, challenge, and maybe respond to such haunting injustice. Aesthetic and experimental engagements like the films of Uriel Orlow and the writings of Antjie Krog are crucial for developing law's conscience, and central to what Douzinas and Gearey refer to as a "general" jurisprudence.[4]

In her work on the South African Truth and Reconciliation Commission (TRC), *Country of My Skull*, Krog recalls the story of the shepherd Lekotse, and shows how the institutionalized legal process failed to address, listen, and be open to his experience, as well as his narrative account.[5] Lekotse attempted to explain how his family has been affected since the day security police came to his house, broke down the door, and violated the privacy of his home. Krog notes how the official attempted to assist him in his testimony, but how this very technique failed to respond to his story and how he chose to tell it. The process of the TRC, based on a certain rationality and following a specific technique, made it impossible to address the shepherd's story, to acknowledge his particular epistemology and ontology. I return to the story of Lekotse below.

The notion of "rationality," so embedded in legal modernity, underscores the tension between what can be seen as a "Western" and an "African" understanding of law. The National Movement of Rural Women in the 2009 case of *Shilubana & Others v Nwamitwa* illustrates something of this tension.[6] The case revolved around a dispute that arose in the Valoyi community in the province of Limpopo (in northern South Africa). Mr. Nwamitwa, who was the son of Hosi Richard Nwamitwa, challenged Ms. Shilubana's right to become chief after Hosi Richard's death. Hosi Richard was the younger brother of Hosi Fofoza and succeeded him after his death because he had no male heirs, and according to customary beliefs at the time, Ms. Shilubana as oldest daughter couldn't become Hosi. However, in 1996 the Royal family of the Valoyi decided to confer the chieftainship to Ms Shilubana, a decision that Richard's son then challenged. One of the questions the court had

3 Costas Douzinas and Adam Gearey, A *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005).

4 Ibid.

5 Antjie Krog, *Country of My Skull* (Cape Town: Random House, 1998), 210–20.

6 *Shilubana & Others v Nwamitwa*, 2009, 2 SA 66 (CC).

to consider was if in this instance the customary law was developed in light of the constitutional protection of equality. For our purposes here, the argument of the National Movement of Rural Women is important in showing that living customary law does not develop in the way Western law develops, which thereby questions the placing of customary law within the "hegemonic notion of positive law as rule-bound."[7] The Rural Women asserted that "customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community."[8] But why is this so important?

The National Movement of Rural Women exposed that customary law relies on a different epistemological basis than Western law. As Drucilla Cornell notes, customary law does not make the distinction between "interpreting law and making law" that is central to a Western concept of law.[9] She calls for further in-depth engagement with customary law in order to understand what it means if described as a "flexible set of practices."[10] She also invokes African philosopher John Murungi, who has argued that African jurisprudence as a whole differs from Western jurisprudence in the sense that it understands law as "the doing of justice."[11] The broader implication for Western law is to raise questions about the nature and reason for law itself.

The notion of *Ubuntu*, that a person is a person through others, is central to an understanding of African jurisprudence. Mogobe Ramose regards "*Ubuntu* as the fundamental ontological and epistemological category in the African thought of the Bantu-speaking people."[12] Linking with sentiments expressed in *Imbizo Ka Mafavuke,* he emphasizes the role that supernatural forces play in African communal life. Like Murungi, Ramose also underscores the centrality of justice in African jurisprudence based on *Ubuntu*, which involves a triadic structure between "the living, the living dead and the yet-to-be-born."[13] Similar to the conversation in *Imbizo Ka Mafavuke* about the way in which the impulse to regulate indigenous knowledge elides its fundamental epistemology and ontology, Ramose argues that the South African Constitution as based on a Western system of law misses what is fundamental in *Ubuntu* and African jurisprudence. But how should

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Production photograph, Uriel Orlow, *Imbizo Ka Mafavuke*. Klipriviersberg Nature Reserve, 2017.

7 Drucilla Cornell, "The Significance of the Living Customary Law for an Understanding of Law: Does Custom Allow for Hosi to Become Chief?" *Constitutional Court Review* 2 (2009): 396.

8 Ibid., 395.

9 Ibid., 404.

10 Ibid., 407.

11 Ibid.

12 Mogobe Ramose, "An African Perspective on Justice and Race," *Polylog: Forum for Intercultural Philosophy* 3 (2001): http://them.polylog.org.3/frm-en.htm.

13 Ibid.

one deal with the complexity of these tensions? Is a transformation of the current bifurcated system possible? Could there ever be only one dominant system that represses all others? Of what value could epistemological and ontological diversity be?

Plural knowledge, plural being

Antjie Krog has been struggling with the complexity of change since her work on the Truth and Reconciliation Commission. In the book following *Country of My Skull*, titled *A Change of Tongue* (2003), she reflects on what fundamental change entails, not only of a system but also of the self. Questions of language and identity—and for my purpose here, the underlying epistemologies and ontologies of our lifeworlds, and the difficulties in communicating them to each other—lie at the heart of both these works. A later book, titled *There Was This Goat* (2009) and co-authored with Nosisi Mpolwenie and Kopano Ratele, explores the ways in which the TRC commissioners could not make sense of the testimony of Mrs. Konile during the hearings.[14] Krog mentions that unlike the other mothers of the seven young men killed at Gugulethu, Mrs. Konile is presented without a first name. She delivered her testimony quickly, and her words after being translated into in English seemed "incoherent."[15] Also, her testimony did not appear on the TRC website, and her name was spelled wrongly. Instead of accepting the rendering of her testimony as illegible and non-sensical, Krog, Mpolweni, and Ratele chose to revisit it. Krog's *Begging to be Black* (2009) can be understood as an ethical response to the complexities of living in South Africa, consisting of a number of stories and philosophical conversations that took place over centuries in various spaces. As in her other books, themes of change, becoming, and relationality are foregrounded. Krog's most recent volume, a book of poetry titled *Synapse* (2014), pursues the themes of co-responsibility, the relation between self and other, co-existence, and also conscience. The Afrikaans title of the same volume, *Medewete*, meaning "to know with others", also draws attention to what it means to know, to know with others, to have a shared knowledge.[16]

^ Production photograph. Uriel Orlow, *The Crown Against Mafavuke,* Palace of Justice, Pretoria, 2016.

But let's return to the story of Lekotse, the shepherd. He recalls the day on which his life was changed when the security police entered his home —his being as such, but also the underlying knowledge according to which he conducted his life, was affected by the invasion of his private home.

14 Antjie Krog, Nosisi Mpolweni, and Kopano Rawele, *There Was This Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile* (Pietermaritzburg: University of Natal Press), 2009.

15 Ibid., 1.

16 See Marlies Taljaard, "Medewete deur Antjie Krog," *Versindaba*, 2014, http://versindaba.co.za/2-14/12/08/resensie-mede-wete-antjie-krog.

In *Country of My Skull*, Krog identifies a leitmotif in his account: the fact that the police refused to answer his questions. She notes that "This kind of questioning is the foundation of all philosophy. How do I understand the world around me? What is just and right in this world?"[17] Krog explains how Lekotse in his imagination situates himself in the place of others as an attempt to understand. He desperately wants them to understand where he comes from, and says: "It's a pity I don't have a stepladder. I will take you to my home to investigate." Krog continues: "A ladder would give the Truth and Reconciliation Commission insight, it would raise his story from one place to another, from the unreal to the real, from incomprehension to full understanding."[18] She invokes remarks made by Zulu poet Mazisi Kunene, in which he explains the extent to which African ontology accepts diversity. He says: "When the first white men came [...] the elders went to those men and said: tell us about your world. There isn't one world, there are many worlds [...] in the African system there is diversity. The ideal is diversity, not symmetry."[19] Krog interprets the shepherd's account in light of diversity: he tried to show his world to the TRC, for them to understand that there are diverse worlds.

Krog has been criticized for appropriating the voice of others, for trying to fill a gap in communication that is not possible to fill; for attempting to translate the impossible. In an analysis of Krog's work on the poetry of the Khoi, Dan Wylie raises the problem of gaining understanding without one's own agenda influencing the testimony, and asks how it is possible to find a mode of writing that is "ethically sound, that will honour rather than appropriate, and that will contribute to [...] a 'workable world'."[20] Although my own reading of Krog is that her attempt at understanding, by addressing the lack of communication, is always tentative, ambiguous, and self-conscious of its inevitable failure, the problems raised by Wylie and others are also important for reflecting on diverse epistemologies and ontologies. Cornell's call for further engagement with customary law and the possible tensions between it and "Western" law must be answered. Precisely because of the dynamic and flexible nature of African law, any attempt to define it once and for all would already fail in its attempt to make sense. For many years, critical legal scholars have argued that "Western" law is in fact indeterminate and contingent, and not as fixed as it is commonly portrayed, and Wylie emphasizes the "interdependence between conceptualisations of difference *and* of similarity" between "Western" and "non-Western" life worlds.[21]

Drawing on a piece by Martin Hall on the difference in how philologist Wilhelm Bleek and //Kabbo—a captured member of the Khoi tribe—experience spatiality, language, and memory, I have attempted to think about one of many possible starting points to think a jurisprudence after 1994, after institutional apartheid.[22] Bleek's disembodied and abstract way of engagement can be linked to the epistemology

17 Krog, *Country of my Skull*, 218.

18 Ibid., 219.

19 Ibid.

20 Dan Wylie, "'Now Strangers Walk in that Place': Antjie Krog, Modernity, and the Making of //Kabbo's story," in *Antjie Krog: An Ethics of Body and Otherness*, ed. Judith Lutge Coullie and Andries Visagoe (Pietermaritzburg: University of KwaZulu-Natal Press, 2014), 219.

21 Ibid., 223.

22 Karin van Marle, "Law's Time, Particularity and Slowness," *South African Journal on Human Rights* 19, no. 2 (2003): 246.

and ontology of legal modernity. //Kabbo's material and embodied engagement, his attentiveness to complexity and polyvalence, echoes the notion of diversity also emphasized in Lekotse's account. Similarly, within the context of an analysis of post-1994 land reform, André van der Walt has noted the absence of a "broader philosophical evaluation of land reform with reference to its ideological, conceptual and rhetorical codes."[23] Commenting on the metaphor of the bridge as illustrative of the transformation from past to present—invoked in the 1994 Constitution and relied on by a number of commentators—he argues that the notion of a linear shift from one side to the next is far too simplistic, and that a more complex and nuanced approach to understanding transformation is needed. In his view, post-1994 law will have to deconstruct the tropes of apartheid law for it to be able to play a substantive role in the transformation. Following van der Walt, Wessel le Roux refers to the "grid-like aesthetics of private law science" that not only precludes but actively suppresses any sense of materiality and embodiedness, calling for a "gothic and labyrinthian" notion of jurisprudence.[24] I am completing this essay a few days after the death of Winnie Madikizela Mandela, an icon of struggle in South Africa who for me embodied exactly the kind of jurisprudence required now. Different from the late Nelson Mandela's "long walk to freedom"—echoed by the notion of the bridge and recalling the tropes of the Bildungsroman—Winnie's path was messy, her life story one of contingency, rupture, and what Gillian Rose calls "double equivocation."[25] Winnie's life, however, was also one of embodiedness, relationality, and interconnectedness. Another way of formulating van der Walt and le Roux's description of private law science is to say that Western law emphasizes *what* someone is rather than *who* someone is. Remembering Winnie Madikizela Mandela, it is who she was that will stand out. I have previously contemplated what jurisprudence following the path of Winnie's story would look like: a jurisprudence that does not rely on linear progression or a preconceived plan/design, but one that is open to contingency and double equivocation, flexible and dynamic as the National Movement of Rural Women describes the living customary law.[26]

23 André van der Walt, "Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State," *South African Law Journal* 118 (2001): 283.

24 Wessel le Roux, "Bridges, Clearings and Labyrinths: The Architectural Framing of post-Apartheid Constitutionalism," *South African Public Law* 19 (2004): 661.

25 Gillian Rose, *The Broken Middle* (Oxford: Blackwell, 1992).

26 Karin van Marle, "Post-1994 Jurisprudence and South African Coming-of-Age Stories," *No Foundations* 12 (2015): 45–66.

Conclusion

As a way of ending, let's return to the final scene of *Imbizo Ka Mafavuke*, where the diverse experiences of relating to plants and the protection of biodiversity come to the fore. The representative of the Department of Trade and Industry explains why legislation to protect indigenous plants and biodiversity is necessary. The representative of local communities responds by saying that such legislation will prevent local healers and gatherers from acquiring the plants they need. In response to a question on how local communities protect biodiversity, she says:

"Our harvesting of our plants is guided by our spiritual beliefs. When we harvest, we ask our ancestors to ensure that the medicine will take its full effect. We also believe that only plants harvested to ensure the survival of the plant will heal the patient." The problem of the land is raised, namely that much of what used to be common land is now privately owned, underscoring the interrelatedness between spatial and epistemic (in)justice. The final words of the film raise a central aspect of the conversation between plural understandings of law, indicating how legal reform often only continues the problem: "Preservation becomes oppression. We have to talk about this cycle." And for now that is perhaps the most pertinent—and possibly only—"ethical" response: that we have to keep on talking, writing, drawing, and filming.