THE CONVERGENCE OF THE WESTERN LEGAL SYSTEM AND THE INDIGENOUS AFRICAN LEGAL SYSTEM IN SOUTH AFRICA WITH REFERENCE TO LEGAL DEVELOPMENT IN THE LAST FIVE YEARS

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1 Introductory

The classification of the South African legal system as mixed or hybrid has long been recognised,[1] furnishing as it does a prime example of what has been called the "classical definition of mixed jurisdictions".[2] In other words, like Zimbabwe and the other countries in what has been termed the South African Law Association[3] and together with Scotland, Louisiana and Sri Lanka, the "mix" relates to an intersection of the civilian and common law traditions.

In South Africa the system is comprised broadly speaking of a civilian-based, more specifically Roman-Dutch, common law[4] as interpreted by the courts as well as what may be regarded as an English overlay which since the beginning of the nineteenth century has been woven into the fabric of the system.[5] While the civilian component comprises mainly the field of private law, the common law component relates to a judicial and procedural framework that is English in origin. Although the system has been classified by some writers in accordance with a civilian tradition,[6] other writers hold that the elements of Roman-Dutch and English law are so intermixed that the system cannot "without distortion be put in one or other pigeon-hole".[7]

Despite the fact that indigenous or African customary law has long been, and it seems still is,[8] living law for the majority of the South African population it has not formed part of what is a decidedly western mix. This is so despite the fact that the application of indigenous law on a national basis has been sanctioned for more than half a century[9] and more recently[10] not only by special courts created for the purpose but by the ordinary courts of the land. However, while recognition has been given to the system, indigenous law has been applied only as a personal or special law in what has been termed legal dualism.[11] This has not been legal dualism in the true sense of the word, that is an interaction of two systems (here a western/European and an indigenous/African system) on the basis of equality. Instead the interaction has been based on the assumption that the western system is what has been termed the "dominant" system and the indigenous the "servient" system.[12] There are various reasons for this. As David Carey Miller points out, the fact that the determining factor was simply the assertion of power is a fact that is not always acknowledged.[13] Historians, legal or otherwise, have for many years displayed what has been termed "cultural chauvinism"[14] that denied Africa a place in world history. This "chauvinism", it seems, has led to statements such as the one that although South Africa forms part of the "Black continent, by history and culture it is an offshoot of western Europe"[15] and the view that historically, Blacks migrated to the South from Central

1 See eg David & Brierley *Major Legal Systems in the World Today* (1985) 77; Zweigert & Kötz *An Introduction to Comparative Law* (trans Weir) (1987) 74.
2 See Orücü *et al* (eds) *Studies in Legal Systems: Mixed and Mixing* (1996); Zimmermann & Visser (eds) *Civil Law and Common Law in South Africa* (1996).
3 The term was coined by Schreiner J in the Swaziland decision *Annah Lokudzinga Mathenjwa* 1970-1976 *SLR* 25 to refer to Botswana, Lesotho and Swaziland.
4 This includes not only legal rules of the province of Holland as set down in the writings of the "old authorities", or institutional writers, but also the universalist principles and doctrine of the western European *ius commune*.
5 See Erasmus "The interaction of substantive law and procedure" in Zimmermann & Visser 142 ff.
6 See Hosten "The permanence of Roman law concepts in South African law" 1969 *CILSA* 198.
7 Zweigert & Kötz 243.
8 Statements such as "customary law ... governs the domestic affairs of three quarters of the South African population" abound in the literature; see eg Bennett "The equality clause and customary law" 1994 *SAJHR* 122. However, there are no accurate statistics as to the present position. In 1986 the South African Law Commission found in its investigation on marriages and customary unions that adherence to customary law, at least with regard to marriage, was significant; see in general ch 10 of its report.
9 In terms of the Black Administration Act of 1927.
10 In terms of s 1 of the Law of Evidence Amendment Act 45 of 1988.
11 Writings on the dualistic approach in South Africa abound; see eg Church "Constitutional equality and the position of women in a multi-cultural society" 1995 *CILSA* 289.
12 Hooker *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975) 454 455.
13 See his contribution "South Africa: A mixed system subject to transcending forces" in Orücü *et al* 165 169.
14 See in general the LLD thesis of Van Niekerk "The Interaction of Indigenous and Western Law in South Africa: A Historical and Comparative Perspective" (1995) Unisa.
15 See eg Hahlo & Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 1.

Africa only in recent times. Recent research has dispelled these myths,[16] and it is not necessary further to labour the point this morning. The question that arises is whether or not there has been a change in attitude and a change with regard to the legal position particularly in the light of a new constitutional dispensation in South Africa. In an effort to determine whether or not there has been a convergence of western and indigenous legal systems in recent times, I will focus on developments in the last five years. More particularly I would like to focus on developments reflected in legislation: primarily the Constitution Act 108 of 1996 and relevant case law as well as the report of the South African Law Commission on Customary Marriages and the subsequent enactment.

2 The legislation

With regard to legislative development the obvious starting-point would be the new Constitution of the Republic of South Africa,[17] the supreme law of the country that invalidates law or conduct which is inconsistent with its provisions.

2 1 The Constitution and indigenous law

Although there is no specific recognition of indigenous law embodied in the Constitution, its recognition is implicit in various provisions. In the first place in terms of the Bill of Rights[18] which binds the legislature, executive, judiciary and all organs of state, the cultural, religious and linguistic rights of all persons and communities are protected. Obviously this would apply not only with regard to the so-called western-European cultures, but also with regard to all the other cultures including, for example, the so-called African and Islamic cultures subject of course to the other provisions of the Bill of Rights,[19] notably the equality provisions.[20] Moreover, in accordance with the interpretation clause and development of the law in terms of the Bill of Rights,

16 See in general the contribution of Fagan "Roman-Dutch law in its South African historical context" in Zimmermann & Visser 33ff; Van Niekerk *op cit* 11 ff.
17 Act 108 of 1996.
18 Contained in ch 2 of the Act.
19 Ss 30 & 31.
20 S 9.

courts are enjoined to do this not only with regard to the common law but also customary law which obviously would include indigenous law.

More directly and specifically in the context of the provisions regarding traditional leaders, the Constitution determines that "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".[21]

2 2 Recognition of customary marriages

Under the general head of legislation, the recent report of the South African Law Commission and subsequent Act on the Recognition of Customary Marriages[22] may be considered; but first a brief background:

In accordance with the view that there was the need for harmonisation of the indigenous and common law of marriage, the project committee began its task with the aim of creating a uniform marriage code that would be applicable to all South Africans. It felt, correctly, that because marriage is an institution common to all cultures, all marriages, no matter what their particular forms might be, should exhibit certain broad similarities. Here the committee adopted the metaphor suggested in its consultations of a "house with many doors". However, the tensions between the concepts of uniformity and cultural diversity soon became apparent. On the one hand recognition of cultural diversity was necessary and realistic in a culturally diverse society. On the other hand, because of the policy of legal dualism as practised by colonial and apartheid governments (as already mentioned this was not legal dualism in the true sense), the recognition of cultural difference implied for many people the oppressive regime of the old Department of Native Affairs.[23] Nonetheless, there was also a need for uniformity for practical reasons. The old homelands policy had seen a proliferation of marriage laws in the former self-governing territories and this was problematical. Although most of these

21 S 211 (3).
22 See in general South African Law Commission Project 90 *Report on Customary Marriages* August 1998 and the Recognition of Customary Marriages Act 120 of 1998.
23 See too Iya "Culture as a tool of division and oppression: Towards a meaningful role for culture and customary law in a united South Africa" 1989 *CILSA* 232 ff.

laws had been repealed in 1996 by the Justice Laws Rationalisation Act there were still areas of uncertainty.

While this was so, it was also true that cultural pluralism was guaranteed in terms of the Constitution. Furthermore, not only this but the fact that comparative research had shown that whatever the dictates of state law might be, any authentic "living" customary regime would, by definition, persist. A measure of legal dualism was inevitable and the committee was forced to compromise; no matter how worthy the cause of unifying marriage law might be, a single code would entail the assimilation and possible loss of customary law. However, while the maintaining of at least a degree of cultural pluralism was necessary (this the committee found, was a step that had enjoyed overwhelming public support) the committee obviously had to defer to the overriding requirements of the Bill of Rights and to South Africa's obligations to implement the international human rights conventions it had ratified.[24]

It is not possible to discuss the report and subsequent Act in detail. However, against the background sketched, some of the recommendations and measures for law reform will be highlighted, particularly as this relates to the question of convergence.

In the first place the Commission determined that the immediate recognition of all customary marriages was necessary. This had in fact been envisaged by the erstwhile project committee some fifteen years ago.[25] However, in the light of uncertainty in this regard, the measures embodied in section 2 of the Act[26] are to be welcomed. Here it seems, at least formally, a convergence of the two systems is effected. The formal requirements for the conclusion of a customary marriage, namely registration and the related procedures, show a western bias but that is neither here nor there. More problematical, however, is the fact that registration is not compulsory for the validity of the marriage although the Act determines that "the spouses of a customary

24 See generally ch 2 of the South African Law Commission *Report on Customary Marriages*, Report 90, August 1998.
25 See Church (1995) 294.
26 Act 120 of 1998.

marriage have a 'duty' to ensure that their marriage is registered and provision is made for a court to order that the marriage be registered".

What may be termed material requirements for the validity of marriages show a measure of compromise rather than convergence. Thus while the provisions regarding the minimum age, consent and the requirement that the "marriage must be negotiated and entered into or celebrated in accordance with customary law" would accord with indigenous law, the subsequent provisions regarding the question of consent in the case of minors either by the "guardian" or a minister of state, is clearly western.

One of the Commission's problems was the difficulty in determining the authenticity of "official" customary law. As many writers have recognised there has been a distortion of customary law by the superimposition of western concepts. Very often the recording of indigenous law in the language of western law has led to distortion.[27] However, the Commission recognised that the "official" version cannot be dismissed out of hand and a pragmatic approach was followed.

While the Commission made useful recommendations in its report,[28] a western bias remains in much of the subsequent legislation. Thus though the institution of polygyny (indirectly) and of *lobolo* (specifically) are recognised, the western individualist ethos is evident in the fact that the concept of the antenuptial contract is embodied in the legislation as are western concepts regarding divorce and division of property.

With regard to convergence it is interesting to note the background to and final determination of the proprietary consequences of marriages in terms of

27 See in general Church *ibid*. Eg, the use of the terms "guardian" and "guardianship" with the individualistic western connotation of inequality of status would be a distortion regarding the legal position of members of the group in indigenous law.
28 Regarding divorce the recommendation reads: "Only one ground of divorce should be available: irretrievable breakdown of marriage. In exercising their discretion under this principle courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives" — 129 of the report. This recommendation is embodied in s 8 of the Act. The present general ground in terms of s 4 of the Divorce Act 70 of 1979 regarding the civil marriage is now formally the same as it is with regard to the dissolution of the customary marriage.

the new Act.

In its initial Issue Paper[29] the Project Committee recommended that customary marriages should be "deemed to be out of community (unless the parties chose otherwise by an antenuptial contract)". This was in accordance with the "tendency in the past" to assume that in the case of African marriages, spouses would be more likely to accept a separation of estates.[30] Long before this time, the fallacious assumption and one which led to section 22(6) of the Black Administration Act[31] regarding the civil marriages of Africans, was criticised particularly on account of the hardship suffered by black women in consequence.[32]

It was therefore surprising that the "Commission was quite unprepared for the strength of opposition to its proposal", opposition which came not only from the National Human Rights Trust and Gender Research Project (CALS) but also from the Home of Traditional Leaders (Eastern Cape). Not only would the separation of estates contradict the communal ethic of customary law, but such a regime in the context of the customary law would signal a shift in values and responsibilities (especially for men) and thus perpetuate hardship for women.

In the result a community regime was recommended and embodied in the Act.[33] This is a clear example of convergence. However, whether the "equal powers of administration" in respect of the common estate which the law now allows to spouses whether they be married by civil or customary rites, will become reality, remains to be seen.[34]

Be that as it may, it seems clear that in order to better effect convergence or reconciliation, it is necessary to look at the ethos or value system of a

29 Published in August 1996 with an April 1997 deadline.
30 Cf 115 of the South African Law Commission *Report on Customary Marriages* of August 1998.
31 38 of 1927.
32 See *inter alios* Joan Church "The legal position of African women" 1975 *Codicillus* 22.
33 S 7 of Act 120 of 1998.
34 It is quite possible as is already the case, that commercial practice will demand of women rather than men to show that they had their spouses' consent when entering into simple transactions.

particular legal system rather than the legal rule itself. It is especially in the context of judicial interpretation that such an approach is recommended. This brings me to the discussion of relevant judicial decisions.

3 The cases

The first case to be considered is the 1993 decision in *Kewana v Santam Insurance* decided in the then Transkei Appellate Division.[35] Briefly the facts were as follows: An unmarried woman N had, following indigenous-law procedures, adopted Andile, her cousin's child as her son. After N was killed in a bus accident, Andile, duly assisted, claimed against the third-party insurer for loss of support. The question was first, whether in indigenous law an unmarried woman was competent to adopt the child of another. If this were so the next question was whether in terms of such adoption there was a legally enforceable right to support that would be recognised in terms of the Transkei Compulsory Motor Vehicle Insurance Act. The court answered both questions in the affirmative. It seems clear that here was a case of the convergence of the two legal systems; as Du Plessis so rightly points out:[36]

> Die ... saak het getoon dat die gewoontereg en die gemenereg nie net naas mekaar bestaan nie, maar dat dit deel van die Suid-Afrikaanse regstelsel vorm. Indien 'n regsreël volgens die een stelsel bestaan, behoort dit nie as 'n rede beskou te word om 'n eis kragtens die ander regstelsel te laat vaar nie. Die gewoontereg is inherent deel van die Suid-Afrikaanse reg en daarom moet die twee stelsels eerder met mekaar versoen word as om in konflik tot mekaar beskou te word ...

Two interesting features of the decision may be highlighted. First, although there was conflicting evidence regarding the question of whether adoption of a child by an unmarried woman in terms of indigenous law was indeed possible, the court relied on Transkeian experts to hold that such adoption

35 *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA).
36 Du Plessis "Gewoonteregtelike aanneming en die eis van die afhanklike" 1994 *TSAR* 842.

was acceptable practice. Coincidentally this also accords with the position in western law. Secondly, while as Van Niekerk[37] correctly points out, the western notion of an enforceable right to support within the same agnatic group (for example that of a child against his father) is foreign to indigenous law, the court recognising that there was an obligation of familial support in indigenous law, was prepared to equate this to the adoptive parent/child relationship of western law. Be that as it may, the decision satisfies one's sense of justice. In this regard the explanation of Van Niekerk is interesting. She explains with regard to the question of support that the underlying jural postulate in indigenous law is that the extended family should be continued by its members. The family idea dictates that members of the family should be supported emotionally and physically by the group. Thus while the decision is perhaps not in line with the indigenous-law rule it is consonant with the underlying jural postulate. Not only is this an interesting approach but one which deserves further consideration and I shall return to the idea of jural postulates later.

A further interesting aspect relates to the evidence of Professor Richard Mqeke of the University of Transkei who specialises in customary law.[38] Agreeing that adoption by women was not in conflict with customary law as it had developed in Transkei, the learned Professor declared that he knew of cases where young unmarried women had adopted the children of relatives. He further states that

> since self-rule up to the time of independence there has been a gradual emancipation of women ... with the result that females have got a right to establish their own homesteads.

The concomitant development with regard to adoption in terms of indigenous law he sees as a "healthy development". This recognition of the dynamic nature of indigenous law is to be welcomed.

A case similar to *Kewana* but decided some two years later was that of

37 Van Niekerk 290.
38 See 773-774 of the report.

Thibela v Minister van Wet en Orde.[39] There the issue was the relationship between a husband in a customary marriage and his wife's child that had been born of an earlier relationship between the mother and another man. On the evidence presented by an expert witness, the court found that in the circumstances and in accordance with indigenous law, the child was a child of the husband who was thus obliged to support him. Accordingly, where the man died as a result of police brutality, the dependent child would have an action for loss of support against the perpetrator. The comment already made above with regard to the *Kewana* case is also applicable here.

The second instructive and by now famous decision to which I would like to refer is that delivered by the Constitutional Court in the *Makwanyane*[40] case. Here the constitutionality of the death penalty was considered. The judgment of the court is well known. However, for purposes of this address, the various dicta on the values sought to be protected by the Constitution[41] are important. In the first instance Mahomed J, presently the Chief Justice, emphasised in characteristic style the court's decisive and ringing rejection of a repressive past: The constitution heralded a commitment to an ethos of egalitarianism, opening a new chapter in the history of the country and articulating the need for a culture of *ubuntu*. Several of the judges developed this theme referring to the need to interpret the provisions of the Bill of Rights in terms of this African value system. In this regard words from the judgments of Justices Langa and Mokgoro on the culture of *ubuntu* bear repeating. While Justice Langa declared that[42]

> [i]t is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from ... the community ... . It also entails the converse ... . The person has a corresponding duty to give the same respect,

39 1995 (3) SA 147 (T).
40 *S v Makwanyane* 1995 (3) SA 391 (CC). There have been many comments written on this case; see especially the comprehensive discussion by Carpenter 1995 *THRHR* 145-165.
41 At that time still in terms of the interim Constitution Act 200 of 1993.
42 At 481 of the report.

> dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In similar vein Justice Mokgoro writes of *ubuntu* as a shared value and ideal that runs like a golden thread across cultural lines. She states that

> metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[43]

The interpretation of the constitutional provisions particularly as these relate to the Bill of Rights in accordance with an African value system is to be welcomed. As Justice Mokgoro points out, the African ethos of *ubuntu* converges with the all-embracing concepts of "humanity" and "menswaardigheid" in the western cultural heritage. I shall return to the question of what may be termed interpretative strategy later but suffice it to say here that in the *Makwanyane* case, at least in the judgments of Justices Mahomed, Madala, Mokgoro, Langa and Sachs there is clear evidence of the convergence of African and western jurisprudence.[44]

The last case to which reference may be made is that of *Mthembu v Letsela and another*.[45] The case will be discussed in another paper this morning and I will therefore not go into a detailed discussion. Suffice it to say here that at issue was the effect which the Constitution has on the indigenous law of

43 At 501 of the report.
44 See too Mqeke "Customary law and human rights" 1996 *SALJ* 364 ff.
45 1997 (2) SA 936 (T); 1998 (2) SA 675 (T).

succession. It was contended that the indigenous law in this regard was in conflict with the Bill of Rights and should therefore be struck down. The court, however, determined that to declare the indigenous law of succession which excluded African women from succession invalid because it offends public policy, would be applying western norms to a rule of customary law still applied and adhered to by many African people. Such a declaration would also effect the family law rules of the indigenous system. Neither public policy nor the Constitution required the court to make such a declaration. The court indicated that the legislature rather than the courts should develop indigenous law.

Clearly in this case there is no evidence of convergence. The legislature subsequently intervened in the form of a proposed draft bill namely the Amendment of Customary Law of Succession Bill which was published some months ago.[46] The main object of the bill as stated in its memorandum is to extend the South African law of testate and intestate succession to all persons; to repeal the relevant section of the Black Administration Act which provides for the application of indigenous law and to enact new provisions which will be consistent with the Constitution. The predilection here is obviously for western law.

4 Conclusion and comments

From what has been said thus far, with the notable exception of the *Makwanyane* decision and to some extent in the case of *Kewana v Santam*, there has been only scant evidence of convergence. What is needed, it is suggested, is the development of a new jurisprudence which would reflect the values of our rainbow nation. An important first step is to re-affirm our African heritage as part of what has been aptly termed the African renaissance.[47] Not only would the experience of a national renaissance include the "struggle of the larger community to free itself from the shackles of political oppression, socio-economic deprivation, illiteracy and cultural under

46 B109 - 98.
47 See in general *Africa — the time has come* Selected speeches of Thabo Mbeki (1999).

development",[48] but also I believe a restoration of the African ethos in the focus on the dignity of all peoples.[49]

In developing an African jurisprudence, guidelines and useful comparisons may be drawn with the philosophies of what has been termed post-modernism.[50] This would include aspects of deconstruction,[51] feminism and communitarianism. The latter, which in the views of some writers includes a strong challenge to liberalism, focusses on the community rather than the individual. Most communitarians would agree that the human agent is not merely an autonomous and freely choosing subject but part of and participant in the life of the community. Others hold, moreover, that normative values grow out of particular settings of community life and that therefore the community is the source of value. Others are more aggressive in their views and hold that the communal way of life and endorsement of its values are more fulfilling than that offered by individualistic liberalism.

Be that as it may, I believe that while it is important to restore the African heritage and to focus on community rather than individual in what may be termed an holistic approach, what is needed is to find the common bonds. Rather than focus on the apparent conflict in the legal rule, it is necessary to search for the underpinning common value, the jural postulate as Van Niekerk puts it.

This I believe can open up new horisons for us all. In a recent article on the ethical foundations of affirmative action, Dibodu highlights the need to recognise common values in our diverse society.[52] He explains that rather than follow an individualistic approach of regarding affirmative action as the advancement of one person at the expense of another, we should see this in

48 P 38.
49 Cf Mbeki (1999) *passim*.
50 For a broad discussion of the writings of legal philosophies in this regard see Van Blerk *Jurisprudence: An Introduction* (1996) ch 8 ff.
51 The term first used by the French philosopher Jacques Derrida may be used to describe an interpretative strategy whereby *inter alia* existing doctrine may be criticised and shown to be inconsistent and contradictory as well as a strategy enabling us to see how often doctrinal arguments are informed by and disguise ideological thinking — see in general Balkin "Deconstructive practice and legal theory" 1987 *Yale Law Journal* 743.
52 Dibodu "Ethical foundation of affirmative action" 1995 *Codicillus* 18.

a broader context, premised on a shared value of human dignity. Interpreted thus, affirmative action programmes will be seen as the method of achieving equality and social harmony.

I believe this holds true with regard to the interpretative strategy embodied in a renaissance jurisprudence. In this regard the words of a colleague albeit in another context and jurisdiction,[53] bear repeating:

> [H]uman rights doctrines, although often couched in highly abstract phraseology, are rooted in concrete moral insights into our relations with others. ... they draw on our ability to empathize with other people, including those who may traditionally have been viewed as alien or unworthy. So, human rights doctrines are essentially other-directed. ... concerned with what we are to others by reason of the fact that they are human ... Rights do not precede communal ties, they presuppose them.

I believe that there is now a need to progress to a common law that is truly common, reflecting the values of a rainbow nation. It is this unity in diversity with the framework of a new jurisprudence and against the back-ground of a hard-won Constitution, that we need to strive for.

53 Slattery "Rights, communities and tradition" 1991 *University of Toronto Law Journal* 447 451. The discussions on the topic are interspersed with hard-hitting, illustrative stories.