

# The status of indigenous law in the South African legal order: a new paradigm for the common law?

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*Sengwalwa se se nyakisiša maemo a molao wa seAfrika ka gare ga molao ya Afrika Borwa, kudu ge e ba molao wo wa seAfrika o ka tšeiwa bjalo ka legato la bone la magato a mararo a go nyamiša a molao wa Afrika Borwa wo o bopšago ke molao wa MaRoma, wa MaRoma-MaDutch gammogo le wa Maisimane. Sengwalwa se nyakisiša gape ge e ba molao wo o ka tšeiwa go ba wa setšō gomme wa tsenywa go molao wa sethwaedi goba go bohlokwa go nyaka karolo ya moswananoši ya mohuta wo wa molao.*

## 1 Introduction

More than a decade ago it was said that “[t]he concept of ‘common law’ in South Africa is uncertain because two systems of law, English law and Roman-Dutch law, compete for the position of common law”.<sup>1</sup> Today, this uncertainty still prevails – not because the status of English law is at issue, but because the introduction of the Constitution has steered critical thinking about the law in a new direction. In the spirit of equality and tolerance of diversity it is no longer possible to ignore the importance of laws other than the applicable



Western law. It has become necessary to reconsider the true meaning of the concept “common law” and the status of Roman-Dutch/English common law *vis-à-vis* “the other laws” which are applied in this country.

A superficial glance through the law reports and legal periodicals makes it clear that lawyers and judges alike are alive to the need to adapt the law to the changing needs of the multicultural South African society.<sup>2</sup>

1 DP Visser “Daedalus in the supreme court – the common law today” (1986) *THRHR* 127 at 138.

2 See eg *Moseneke v Master of the High Court* unpublished Constitutional Court case CCT 51/00; *Mthembu v Letsela* 2000 4 SA 867 (SCA); *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (SCA); *Mthembu v Letsela* 1998 2 SA 675 (T); *Ryland v Edros* 1997 2 SA 690 (C); See also DH van Zyl “Constitutional development of the common law” unpublished paper read at the “International Conference on Development in the Contemporary Constitutional State” held in Potchefstroom 2–3 November 2000.

Recent legislation<sup>3</sup> and the work of the South African Law Commission likewise evidence the State's awareness of the urgent need to adapt the legal system and give greater recognition to "the other laws".<sup>4</sup>

Although legal effect is given to certain institutions of, for example, the Hindu and Muslim communities, indigenous law is the law that was originally applicable in this country and the only legal system, other than the Western system, which is currently officially recognised.<sup>5</sup> However, it is not an easy task to establish exactly where indigenous law fits into the South African legal system. There are various possibilities that come to mind. The most obvious would be to see indigenous law as a fourth layer in the notorious "three-layered cake" of South African law which consists of Roman, Roman-Dutch and English law. Another would be to fit it into the customary-law slot. Or, would it be preferable to seek a completely new sources paradigm? To answer this question, it is necessary, on the one hand, to establish exactly what is meant by "common law" and, on the other hand, to trace, very briefly, the relationship between indigenous law and the Western law in this country – that is the history of legal pluralism.

## 2 Legal pluralism

The fact that a multiplicity of legal systems exist and are observed, gives rise to legal pluralism in South Africa. In a narrow sense, legal pluralism presupposes that various legal systems, which are officially recognised, apply in a territory – the relationship between the

systems of law being based on equality. In a wide sense, legal pluralism is the observation of several official and unofficial laws in a territory.

In South Africa, the relationship between indigenous law and the Western law has always been characterised by the dominance of the latter. Indigenous law has mostly been ignored or distorted by the courts and the legislature. The dominance of Western law dates back to the time when Roman-Dutch law was superimposed upon the indigenous legal systems of Southern Africa. Although it is generally believed that Roman-Dutch law was transplanted in the Cape (because it is erroneously assumed that there existed no sophisticated legal system in this country at that time), there was originally not a transplantation. There was also no reception, because there was no desire by the local people, nor any degree of consciousness and voluntariness on their part to receive foreign law. The only reception that took place in South Africa was the reception of English law into the existing Roman-Dutch law which started with the first occupation of the Cape by the British.

Even though indigenous law is now recognised by the Constitution as a source of South African law, it is yet to be accorded equal status. Western law is still regarded as the dominant system – a perception which flows from an ethos of legal positivism which has directed jurisprudence in South Africa for many years. Throughout the history of our law, there have been many examples where the Western law and jurisprudence were given preference above indigenous or Islamic law. This domi-

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3 See eg The Recognition of Customary marriages Act, 120/1998.

4 See eg The South African Law Commission's Discussion Paper 95 "Customary law: An Administration of Estates" and their *Harmonisation of the Common Law and Indigenous Law: Report on Conflicts* (sic) of *Laws Project* 90 September 1999.

5 Fortunately, the South African Law Commission is now investigating the application of Islamic law of marriage with a view to integrating it into the South African legal system.

nance of the Western law has recently been illustrated again in two cases involving the personal laws of the Muslim community. In both *Ryland v Edros*<sup>6</sup> and *Amod v Multilateral Motor Vehicle Accident Fund*,<sup>7</sup> the courts were prepared to grant relief to the applicants because their marriages, which were in accordance with Islamic rites, were *de facto* monogamous.<sup>8</sup> In both cases the courts made it clear that had these marriages been polygynous<sup>9</sup> they would have come to a different conclusion. It has to be borne in mind that according to the prevailing law of the land, Islamic marriages are regarded to be against public policy because they are *potentially* polygynous. In the latter case the judge pointed out that because the marriage was *de facto* monogamous, it was, but for the underlying faith, the same as a civil or Christian marriage. Does that mean that the norm for a proper marriage is the civil or Christian marriage? In the former case the judge made the following remark: "... it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail* decision ..."<sup>10</sup> in which potentially polygynous marriages were declared to be against public policy. The "community" referred to is obviously the Western section of the South African community. After all, most South Africans cannot possibly regard polygynous, or, at least potentially polygynous, marriages as against

public policy because the majority of South African marriages (both indigenous and Muslim) are potentially polygynous.

In September 2000 the Recognition of Customary Marriages Act<sup>11</sup> came into force. In many respects this Act may be seen as a huge step forward. For the first time in South African legal history indigenous marriages and indirectly polygyny are recognised. Yet, the Western dominance is still apparent in the imposition of the antenuptial contract, Western concepts of divorce and division of property.<sup>12</sup> One should heed the warning that "a façade of legal pluralism may conceal a reality of monocultural legal domination".<sup>13</sup>

Indeed, due to the dominance of the Western law, one cannot speak of pluralism in the narrow sense of the word. But in a wider sense, various legal systems have always been observed in this country irrespective of State recognition and, thus, "deep" legal pluralism has always prevailed.<sup>14</sup>

### 3 Constitutional recognition

The Constitution put the supreme stamp of approval on the application of indigenous law. Yet its application is not unlimited. While it is to be expected that it should still be subject to the scrutiny of the Constitution, it is regrettable that its application is still severely restricted by the proviso that it be subject to existing legislation dealing with it. The

6 1997 2 SA 690 (C).

7 1999 4 SA 1319 (SCA).

8 Monogamy is the practice of being married to one person at a time.

9 Polygyny is where a man has more than one wife at the same time.

10 704 C-D.

11 120 of 1998.

12 See generally J Church "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" (1999) *Fundamina* 8 at 13.

13 Sheleff *The Future of Tradition. Customary Law Common Law and Legal Pluralism* (2000) 196.

14 Prinsloo "Regspluralisme" (1994) *Tydskrif vir die Suid-Afrikaanse Reg* 696; Reyntjens "The Future of Customary Law in Africa" in J Church (ed) *The future of Indigenous Law in Southern Africa* (1993) 5-7.

legislation which impacted most profoundly on the development and status of indigenous law are the Black Administration Act of 1927,<sup>15</sup> the Special Courts for Blacks Abolition Act<sup>16</sup> and the Law of Evidence Amendment Act.<sup>17</sup>

Section 1 (1) of the Law of Evidence Amendment Act states that

Any court *may* take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty. [my emphasis];

while section 211(3) of the Constitution provides 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. [my emphasis]

In the absence of any explicit reference<sup>18</sup> in section 1(1) of the Law of Evidence Amendment Act it is assumed that this Act still confers a discretionary power on the courts to apply indigenous law.<sup>19</sup> This means that there is a conflict between that section and section 211(3) of the Constitution which makes it compulsory for the courts to apply indigenous law. It is assumed that the Constitution will prevail and that the courts no longer have a discretion whether to apply indigenous law. Section 211(3), further, makes no reference

to judicial notice and one suspects that the courts still have a discretion to take judicial notice of indigenous law. Thus, where it is not readily ascertainable and sufficiently certain it will still have to be proved in the same way custom has to be proved.

Ideally, it should not make a difference whether the courts are obliged, or have a discretion to apply indigenous law and to take judicial notice of it, as long as the discretion is judicially exercised. It must be borne in mind that in practise a court will not randomly refuse to apply indigenous law when it is readily ascertainable and sufficiently certain and not in conflict with the Constitution. Should a court's decision not to apply indigenous law be arbitrary, the decision could be upset on appeal.

In sum, the factual situation is then that subject to some limitations, all courts are obliged to apply indigenous law.

#### 4 Common law

As a rule, it is accepted that the common law is the *residual source* of law where there is no statute, judicial precedent or customary rule applicable and that it forms the substratum around which all law-generating sources revolve. It forms the framework within which legislation is interpreted. As such the common law

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15 Act 38 of 1927. This Act has been extensively amended and has often been scrutinised by the courts. One of the most recent cases dealing with this Act is *Moseneke v The Master of the High Court* referred to above.

16 Act 34 of 1986. This Act integrated the special courts into the hierarchy of ordinary courts through a system of appeal.

17 Act 45 of 1988. This Act entrenched the repugnancy clause but did not require that indigenous law be applied to blacks only. It conferred jurisdiction on all courts to apply indigenous law.

18 Former legislation explicitly provided that a court had a discretion to apply indigenous law. See generally Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 120.

19 Whether that includes a discretionary power to take judicial notice of indigenous law, is a matter of opinion. See generally Van Niekerk *The interaction of indigenous law and western law in South Africa: A historical and comparative perspective*, unpublished LLD thesis University of South Africa (1995) 87–88.

is one of the historical sources of our law, a source of origin.<sup>20</sup> Within the South African context, Roman-Dutch law as influenced by English law is generally accepted to be the common law. It applies *ipso iure*, unless a court has reason not to apply it. This would be the case, for example, where the relevant principle of Roman-Dutch law has fallen into disuse or where it is in conflict with the Constitution.<sup>21</sup>

By making its application obligatory, the Constitution extended the sources model of South African law to include indigenous law. But where exactly does indigenous law fit in within the hierarchy of sources? Although it is sometimes referred to as “customary law”, it is largely unwritten law and although custom is its primary source,<sup>22</sup> it should not be regarded as customary law. One reason is that indigenous law partly originates in legislation. Indigenous legislation took the form of oral decrees of the ruler acting in consultation with his council or in terms of a mandate from the general assembly.<sup>23</sup> Moreover, it does not have to meet with the general requirements set for a custom to be recognised as a legal rule. As indicated, the courts have a discretion to take judicial notice of indigenous law and it needs only be proved, in the same way custom has to be proved, if it is not

readily ascertainable with sufficient certainty.<sup>24</sup>

If indigenous law does not fit the custom or customary-law paragon, does that make it part of the common law – within the meaning of common law as set out above? A cursory perusal of writings on the South African legal system and case law makes it abundantly clear that indigenous law has not yet joined the ranks of the Roman-Dutch/English common law. The question, then, is whether it is possible, and desirable to adapt the common law to include indigenous African law. Two possibilities of incorporating indigenous law into the common law will briefly be considered. The first is a natural process of convergence, the second a forced or regulated process through doubling.

#### 4.1 Convergence

Convergence of legal systems takes place when their legal institutions, ideologies, techniques and methods approach one another. The outcome may be radical, to the extent that the legal systems become reasonably identical or it may be a gradual disappearance of distinction between the two systems.<sup>25</sup> To what extent, one may ask, would it be possible for the current common law and indigenous law to converge to become a single common law, a single residual source on which

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20 See generally Edwards “Sources of South African law” in Hosten et al (eds) *Introduction to South African Law and Legal Theory* (1995) 381–386. See also Hahlo & Kahn *The South African Legal System and its Background* (1968) 132–133.

21 There is support for the view that Roman-Dutch law can only be considered as law when it has been declared as such by the courts. This positivistic view is very restrictive and relegates Roman-Dutch law, to a mere material source of law. See generally the discussion Edwards (n 20) 383–384.

22 M’baye “The African conception of law” 1975 (vol II) *International Encyclopaedia of Comparative Law* 138 at 150–151; Allott “The people as law-makers: custom, practice and public opinion as sources of law in Africa and England” (1977) *Journal of African Law* 1 at 5ff.

23 Myburgh *Papers on Indigenous Law* (1985) 50–51.

24 Section 1(2) of the Law of Evidence amendment Act provides that in such cases the parties may lead evidence of the substance of the rule in contention. See Bennett 140ff for a detailed discussion of proof of indigenous law.

25 See generally Erst *Comparative (civil) private law* (1979) 365; Tamm “Convergence of legal systems? – The legal historian in a changing world” (1999) *Fundamina* 1.

the courts may rely when there is no legislation or judicial precedent?

To date, there has been little evidence of a natural convergence.<sup>26</sup> What little convergence has taken place, has been forced from above. One such an example is through the application of the repugnancy clause which determines that indigenous law is only applicable in as far as it is in line with the Western principles of public policy and natural justice.<sup>27</sup> In this way some indigenous-law rules have been relegated and substituted with the rules of the common law. Another example is the Recognition of Customary Marriages Act, referred to above, which effected certain changes to the indigenous law of marriage to bring it closer to the Western law.

The reason why a natural convergence has, so far, not taken place may be the fact that, on a macro-comparative level the differences between the two systems are just too great. The common-law technique in dispute resolution, process and general approach to law and legal reasoning is fundamentally specialised,<sup>28</sup> whilst that of indigenous law is non-specialised.<sup>29</sup> Specialisation, or the lack of it seems to be a very real obstacle in the path of a natural convergence of these two legal systems.<sup>30</sup>

From an ideological point of view indigenous law is communal and fo-

cuses on social solidarity, whilst the common law is individualistic.<sup>31</sup> To do justice is regarded as one of the basic axioms which underpin the Western legal system. The various theories of justice, which have been developed over the years, are all directed at the primacy of the individual and the concept of equality.<sup>32</sup> In fact, section 173 of the Constitution enjoins the Constitutional Court, Supreme Court of Appeal and the High Court "to develop the common law, taking account of the interests of justice". According to Van Zyl<sup>33</sup> justice, together with equity, reasonableness, good faith and good morals, are firmly embedded in our common law and are the basic values which underlie an open and democratic society based on human dignity, equality and freedom. The pre-eminence of the individual and individual human rights have dominated legal philosophy in the west and prevailing liberal concepts of justice focus on the maximisation of individual liberty.<sup>34</sup>

At a first glance, it appears that also on this score the two systems of law are too far removed for a natural convergence. Yet, the supremacy of the individual in Western legal thinking is nowadays more and more countered through the application of the principles of public policy, public interest, *boni mores* and equity. The position of the individual is increasingly viewed as part

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26 See Church (n 12) 19.

27 See Van Niekerk "Indigenous law, public policy and narrative in the courts" (2000) *THRHR* 403ff for a survey of the courts' application of the repugnancy clause.

28 Specialisation in Western law gives rise to individualism, legalism and conceptualism.

29 The non-specialised character of indigenous law is evidenced by the lack of separation, differentiation, classification and individualisation with regard to all aspect of social ordering.

30 See Van Niekerk "Law in South Africa: The roots of specialisation in the Greco-Roman and Christian-Judaic tradition" (2000) *Fundamina* 116–18, for a more detailed discussion of the differences in legal technique of these two systems of law.

31 Diverse factors determine and direct legal ideology, eg politics, religion, social structure and philosophy. See generally Zweigert & Kötz *Introduction to comparative law* Translated by Weir (1992) 64.

32 See generally Van Niekerk "A common law for Southern Africa: Roman law or indigenous African law?" (1998) *Comparative and International Law Journal of Southern Africa* 158 at 162–163, 172–173.

33 See Van Zyl (n 2) above.

34 Freeman *Lloyd's Introduction to Jurisprudence* (1994) 748–749.

of a larger whole. Section 8 (2) of the Constitution determines that a natural person is bound by the Bill of Rights "to the extent that it is applicable, and taking into account the *duty* imposed by the right" (my emphasis). The concept of duties has a definitive African orientation, as has the Constitutional protection of group rights, such as the right to cultural, religious and linguistic communities. It may well be that the western idea of individual freedom is evolving to encompass more than the satisfaction of individual desires and to include solidarity with others through participation. Might one regard this as the first tentative movement towards convergence? Or, is this merely a reversion to the community-based approach of the Romans? Van Zyl<sup>35</sup> states that "Cicero himself took due cognisance of community interests (*utilitas communis*) when he stated that justice recognises that to each person should be assigned that which is forthcoming to him (*suum cuique tribuere*)". Another way of incorporating indigenous law into the common-law paradigm, is through a conscious regulated process. An interesting process of adapting a legal system to the changing needs of society is though doubling.

#### 4.2 Doubling

Doubling is the refining or active adaptation of law in response to changing circumstances or the changing needs of society. It occurs where a more equitable law is added to the existing strict law. The result is that two systems of law, underscored by different legal-political concepts, are in force in the national legal system. Eventually the old law disappears, either through legislative

intervention, or because it is no longer applied by the courts. The outcome is the blending of the two systems into a new unified law.

The fact that the "new" law must be an equitable law, may lead to the conclusion that in the South African scenario doubling would not be possible, since, in some respects, indigenous law is perceived to be less equitable than the existing common law. One should, however, view the strictness of the existing law widely. It has been said that "[e]quitable law can just as well be strict law; the *rigor iuris* does not mean contentual rigidity but the rigid enforcement of a strict or non-strict rule".<sup>36</sup>

Moreover, both the imposition of Roman-Dutch/English law upon the indigenous African system during colonisation, and, generally, the modernisation of law after independence may have led to doubling.<sup>37</sup> Thus may be argued that the law of South Africa in its present form is already a result of a process of doubling. This is if indigenous law is viewed as the original law and the Roman-Dutch/English law is viewed as the more equitable law which was imposed upon the indigenous community. The introduction of English law at the Cape may serve as an example. The British administrators left the indigenous administration of justice, as well as indigenous personal laws largely to itself, but introduced English courts and procedure to comply with their own needs and serve their own interests. In this way a doubling of both substantive and procedural law took place.<sup>38</sup>

In the case of doubling, the existing law is manipulated or adapted only in certain areas and not in its entirety. For example, in the law of marriage and

35 Van Zyl *Justice and Equity in Cicero* (1991) 232.

36 Eörsi (n 25) 480ff.

37 Eörsi (n 25) 461.

38 See generally Eörsi (n 25) 5834ff on the duality of tribal law and modern law.

succession, two systems of law operate within the national legal system. With regard to marriage there is a movement towards a unified law, with the Western law dominating the rules that regulate marriage. With regard to succession, the movement is rather towards the eradication of indigenous law. If one looks at the comments in recent court decisions and the proposals of the Law Commission, it seems that the indigenous law of succession is in danger of being usurped by the Western law.<sup>39</sup>

The administration of justice (procedural law, evidence and generally the court system) may also appear to be the product of doubling in the South African legal system. However, the chances seem slight that the indigenous administration of justice will be displaced by western administration to form a unified system. History has taught that indigenous courts are tenacious and will continue to operate unofficially. The same applies to substantive indigenous law.

Doubling further implies that one of the two systems of law exclusively covers a whole legal field, while the other covers only certain contentious areas and does not necessarily form a coherent whole. The "old" law still extends to the entire legal scope and is still regarded as the general law, whilst the "new" law is regarded as the exception. While it may be said that the Western law, generally, or the common law, specifically, as residual source, is regarded as the general law; it could not be said that indigenous law does not form a coherent whole. It is only when those parts of indigenous

law, that are officially recognised, are taken out of the context of the indigenous system as a whole (which is applied, yet not officially recognised) that they do not form a coherent whole.

It is only if legal pluralism is narrowly viewed as official legal pluralism, if the indigenous law which is not officially recognised is ignored, that doubling, and, thus, a regulated convergence in the true sense of the word may be possible in this country. It is not the fact that indigenous law is perceived by some to be less equitable than the existing common law which makes doubling impossible. It is the fact that deep legal pluralism prevails, the fact that irrespective of State recognition, indigenous law is observed by a large section of the South African community. The official legal system does not reflect the reality of legal ordering in this country.<sup>40</sup>

## 5 Conclusion

Finally, a forced convergence of indigenous law and the common law does not appear to be attainable. The outcome of doubling is a blending of the two systems of law. But indigenous law and the Roman-Dutch/English common law are underscored by such divergent values that the interaction of the two systems, ostensibly, will never result in a converged single system, a single common law.

Another paradigm should be sought. Currently, the Western and indigenous African laws which are officially recognised, exist as independent systems alongside each other. Consequently, in

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39 See for example the Amendment of Customary Law of Succession Bill B109-98 which provides that when a person in an indigenous-law marriage dies intestate, succession takes place in accordance with the general (western) rules regulating intestate succession. See also the South African Law Commission "Customary Law: Administration of Estates" Discussion Paper 95 December 2000.

40 To this attests the notorious people's courts which are now called community courts. See Makgampi "The need for community courts and their role in South Africa" (2000) *Codicillus* 36 for a discussion of State initiatives to legitimise these courts.



practice, there are two official legal systems potentially applicable in certain legal fields and the conflict-of-laws rules would indicate which law should take preference. Might one argue that in those cases there are two separate residual sources of law, two independent systems of “common law”? The answer may be, perhaps, that in this country, where deep legal pluralism prevails, there is more than one residual source of law and that there is in reality no such thing as one exclusive common law. Thus, where there is no statutory law or judicial precedent the courts will, in certain fields of the law, sometimes have to choose which law is applicable, namely Roman-Dutch law as influenced by English law, or indigenous African law.<sup>41</sup>



Different legal systems in our country can co-exist peacefully

Some may argue that should there be no single common law to form the core around which the other law-generating

sources revolve and to form the framework within which the legal system should develop, coherence and certainty would disappear. This is not necessarily so. The courts should not have a free hand to “pick and choose” which system of law to apply. The conflict-of-laws rules which ought to guide the courts in their choice of law, ultimately, provide legal certainty and coherence. Currently the application of indigenous law is a matter of discretion for the courts. Each case is decided on merit, which may result in individual justice, but, at the cost of legal certainty. In September 1999 a report on the regulation of the internal conflict of laws was issued by the Law Commission.<sup>42</sup> Their goal is “[t]o create separate legislation in order to disentangle choice of law from the two statutes in which it is currently regulated: the Black Administration Act (which has unhappy associations with policies of segregation and apartheid) and the Law of Evidence Amendment Act (which, as the title suggests, is principally concerned with ways of proving foreign and customary systems of law)”.<sup>43</sup>

The Roman-Dutch core of our legal system will never fall away. But our multicultural community demands a system of law which accommodates the needs of all sectors of the community. A core consisting of parallel, yet different residual sources may be envisaged. But both should be accorded equal status. Thus our legal system may revolve around, and develop within parallel legal frameworks. It is not impossible for the different legal systems which currently apply unofficially in this country, to co-exist peacefully.

41 And soon Islamic law will be added.

42 South African Law Commission *Harmonisation of the Common Law and Indigenous Law: Report on Conflicts (sic) of Laws Project 90* September 1999.

43 See pages 2–3 of the Report.