

The Three Most Important Features of My Country South Africa's Legal System that Others Should Understand *

Martin Dednam, University of the Free State Faculty of Law, South Africa

Introduction

“The legal system of a country is one of the social controls that regulate the behaviour of man in society”¹ and, furthermore, the ultimate of those controls as “...the precepts of the law, which have behind them the authority of the State”².

As such the legal system implies not only the body of substantive laws recognised in the society, but also the process and procedures in place to enforce those laws. The law features the principle of order and regularity, and, as practical laws, the statement of what rational people in a society ‘ought’ or ‘ought not’ to do. These rules governing human conduct which are recognised as binding by the State, are also enforced by the organs of that State. Nevertheless, the State would need more than mere authority. “... In order to be readily obeyed law cannot rest on force alone, but must be supported by an accepted belief of the community in the legitimacy of the underlying authority”³, and also the ‘reality’ or ‘effectiveness’ element⁴.

South Africa as a country can in many respects be regarded as a young country. It thus had the advantage of inheriting and borrowing parts of its legal system from its predecessors and former constituents, as well as from other vested countries. Those predecessors and constituents represent different societies and even States in different stages of the young country’s birth and growth. Order and regularity did not always prevail, and sometimes only through excessive force and not supported by an accepted belief of the community as a whole in its legitimacy.

In my opinion the three most important features of South Africa’s legal system that others should understand can be related to the historical, comparative and new constitutional developments of the system.

Historically one-sided

“When Jan van Riebeeck occupied the Cape of Good Hope in 1652 for the Dutch East India Company the Roman-Dutch law came to South Africa ... Roman-Dutch law is our ‘common-law’ system. Absent governing legislation or an applicable binding judicial precedent (or, very occasionally, a modern custom) our courts apply the Roman-Dutch law, as found in the old texts and other sources of the law of Holland during the seventeenth and eighteenth centuries”⁵. The legal system, if any, of the indigenous inhabitants of the Cape, such as

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¹ Hahlo, H.R., & Kahn, Ellison, *The South African Legal System and its Background*, Juta & Co, Cape Town, 1968, p. 4

² Op. cit.

³ Op. cit.

⁴ Ibid., 5

⁵ Ibid., 330, 303

Hottentots and Bushmen, was irrelevant. This was probably in as much as the new settlers have brought with them their own law to regulate their own affairs or society, and they have to a large extent not met with or mixed with or understood yet the indigenous inhabitants.

The social order, philosophy, culture, ethics and positive morality in a country will invariably differ from society to society within the state, and even from time to time in the country. “Law and law enforcement do not take the same form in, say, a tribal community and the highly organized modern State”⁶. On the other hand, “In the legal process, as in all human affairs, there is a natural inclination to regard the decisions of the past as a guide to the actions of the future”⁷. It is commonly accepted, with reference to the sources of law, that “(r)egard would be had in South Africa, in the main, to the Roman law, the old Germanic customs, the treatises of the medieval scholars on the *Corpus Juris Civilis* of Justinian, canon law and the statutes, legal writings and opinions, and judicial decisions of the Netherlands up to the early nineteenth century”⁸. Legislation for the South African colonies before 1806 included statutes of the *Staten-Generaal* of the Netherlands and certain *placaaten* of the States of Holland received at the Cape⁹.

However, these colonies in their similar judicial structures of superior or higher and inferior or lower courts¹⁰, could hardly, in those pre-printing days where judgments were not freely available, apply the principle of *stare decisis*¹¹.

Comparatively divers and enriched

“When early in the nineteenth century the Cape passed under the British flag, the legal systems of South Africa and the Netherlands parted ways ... Modern South African law is Roman-Dutch law, modified to some extent by the influence of English law”¹². Later in the nineteenth century, even the indigenous customary law of the various Transkei independent Black states or principalities was given recognition by the colonial authorities¹³.

Roman-Dutch Law as the country’s major legal system was not replaced by but largely influenced by British Law. The British colonial governance over the former colonies and republics invariably led to English law training of many of its judges, and essentially English civil and criminal procedures and administration of justice. “The practice of South African judges looking at the legal decisions of other countries can be traced back to ... 1827 ... Similarly, recourse was sometimes had to English legal textbooks ... occasional reference has been made also to Scots law and more recently to Continental law”¹⁴.

⁶ Ibid., 28

⁷ Ibid., 214

⁸ Ibid., 139

⁹ See Ibid., 151

¹⁰ See Ibid., 237-8

¹¹ See Ibid., 240

¹² Ibid., 330

¹³ See Bekker, J. C., *Seymour’s Customary Law in Southern Africa*, fifth edition, Juta & Co, Cape Town, 1989, p. 3-4

¹⁴ Hahlo & Kahn, 324

The British Statute Book mostly governed the country's colonies and republics from 1806 to 1910. In the Cape Colony it included proclamations issued by the Governor, ordinances by the Governor in Council and later by the Legislative Council, and Acts by the legislative chambers during representative and responsible governments. Natal at first became subject to Cape ordinances as a dependent district, and later passed ordinances, Laws and Acts in its own right. The Volksraad of the Orange Free State legislated by *ordonnantie*, later consolidated into a *Wetboek*, and thereafter by passing *Wetten*, while still later on in the Orange River Colony proclamations were issued by the Commander-in-Chief of the British Forces, the High Commissioner, the Administrator or the Deputy Administrator; and even later on ordinances and Acts were passed under Crown colony government. Similar forms of legislation was found in the South African Republic (Transvaal).¹⁵

Upon annexation, one by one, in the 1880's of the various independent Black states or principalities across the Kei River special legislation dealing with these territories was immediately introduced by the Cape Colony. Courts of law of the Transkei were given the power to recognise and apply customary law as a system of law in specific circumstances as when all parties were Black¹⁶. Soon thereafter The Transvaal and Natal passed similar legislation. In the Union, later on, the Black Administration Act, 1927, brought uniformity in the four provinces regarding the constitution and jurisdiction of the special courts for hearing of suits and proceedings between, and a few other private law matters of, Blacks¹⁷. In the Republic the separate court system for Blacks was abolished, and at first magistrate's courts were given discretion to apply common law or, where the parties were Black, customary law, and later on all courts¹⁸.

Only now these colonies in their similar judicial structures of superior or higher and inferior or lower courts, and later the Union in its converted judicial structure, including provincial and local divisions of the Supreme Court¹⁹, invoked the principle of *stare decisis*, though with voices of disapproval "as tending to block the Roman-Dutch fountains of the law"²⁰. In special circumstances, criminal and civil evidence rules and insurance law, English precedents referring to English law may even have governed²¹.

The Union of South Africa as a new country was constituted by the South Africa Act, 1909, an enactment of the British parliament, uniting the four colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony. Its legislature, however, to a certain extent through restraining entrenchments remained with limited powers or even subordinate to that of Britain until at least 1934²². Parliament of the Union was otherwise sovereign in the traditional sense. The independent Republic of South Africa was constituted only in 1962

¹⁵ See *Ibid.*, 152-4

¹⁶ See Bekker, 4

¹⁷ See *Ibid.*, 5-7

¹⁸ See the Special Courts for Blacks Abolition Act, 1986, section 54A of the Magistrate's Courts Act, 1944, and section 1 of the Law of Evidence Amendment Act, 1988.

¹⁹ See Hahlo & Kahn, 238

²⁰ See *Ibid.*, 240-1

²¹ See *Ibid.*, 258-9 and 576-8

²² See *Ibid.*, 150

through the passing of the Republic of South Africa Constitution Act, 1961, by parliament by the ordinary law-making process. “It is clear, then, that our Constitution is not home-grown, sprung from the people themselves, but directly traceable back to the British connection”²³.

In the “apartheid” Republic Acts of parliament were complemented by provincial ordinances, Acts of the “Bantustan” legislative assemblies, Laws of the Coloured Persons Representative Council, Statutes of South-West Africa, and other delegated legislation²⁴.

Constitutionally transforming

“Post-apartheid” South Africa’s interim 1993 Constitution had a revolutionary effect on the legal system, by fundamentally ending the racially-qualified constitutional order of the past, replacing the doctrine of parliamentary sovereignty by the doctrine of constitutional supremacy with a Bill of Rights as safeguard, and replacing the strong central government of the past with a system of government with federal elements. The Bill of Rights of the new 1996 Constitution is “a significant element of the Constitution’s project of transforming South African society and its political and legal systems”²⁵. Apart from the universality of the Bill of Rights, section 39(1) of the Bill of Rights call on courts, tribunals or other forums, when interpreting the Bill of Rights, to “(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law”. This probably opens the door to much more internationally inter-related development of the legal system.

“Legislation, by far the most important source of new law today, is often said to be characteristic of advanced legal systems,”²⁶ and “is the formulated opinion of the legislators, the product of the value judgments of their time and age and of the felt necessities of the contemporary scene”²⁷. With South Africa becoming a “new” South Africa in 1994, the legislators were new, democratically elected, and more representative; value judgments of their time and age have changed; and new necessities of the contemporary scene emerged.

Such new value judgments saw, for instance, the Black Administration Act, 1927, as repugnant to particularly section 1 of the new Constitution and Chapter 2 of the Bill of Rights. It led to the incremental repeal through a sunset clause of that Act by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005. On the other hand, The Constitution of the Republic of South Africa Act, 1996, recognises customary law more fully as a system of law (in contrast to religious legal systems not recognised), subject to the Constitution and its Bill of Rights²⁸. “The courts show greater tolerance towards unofficial laws. Moreover the South African Law Reform Commission’s work on the harmonisation of customary law and the common law, as well as the recognition of Islamic personal laws,

²³ Ibid., 151

²⁴ See Ibid., 155-167

²⁵ De Waal, Johan, Currie, Iain, & Erasmus, Gerhard, *The Bill of Rights Handbook*, fourth edition, Juta & Co, Lansdowne, 2001, p. 1

²⁶ Hahlo & Kahn, 144

²⁷ Ibid., 148

²⁸ See sections 30, 211 and 2 of the Act; Bekker, J. C., Rautenbach, C., & Goolam, N. M. I., *Introduction to Legal Pluralism in South Africa*, second edition, LexisNexis Butterworths, Durban, 2006, p. 11.

demonstrates the State's commitment to accommodating unofficial laws"²⁹.

Many more examples exist of the South African legal system being rapidly transformed by both legislation and judicial precedent³⁰.

Conclusion

Might it be that South Africa's legal system is ready for an even wider "Learning from Each Other", thereby also, or even because of, "Enriching the Law School Curriculum in an Interrelated World"?

²⁹ Bekker et al, 5

³⁰ See for instance Du Plessis, M. & Peté, S., *Kafka's African nightmare - bureaucracy and the law in pre- and post-apartheid South Africa*, 2006 *Journal for Juridical Science* 31(1): 39-60

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