

## Three aspects of South African law

**Gerhard Lubbe**  
**University of Stellenbosch**

### **I. Introduction**

This contribution addresses three aspects of South African law and its legal system pertinent to a legal academic understanding of it.

South African law is often regarded as the paradigmatic mixed legal system, its legal tradition having been shaped both in substance and methodology by a fusion of influences deriving from periods of Dutch and British colonial domination at the Cape of Good Hope. A predilection for the instrumental use of law and the legal system to engineer or structure societal relations is a second feature worthy of note. This tendency may be attributed to the interplay of between racist ideologies and the subjugative tendencies of colonialism and processes of urbanization and industrialization driven by the economic imperatives of nineteenth century capitalism. A pattern of racial segregation was laid down which eventually found expression in the legally structured policy of Apartheid. Attempts to maintain the vested interests of the dominant minority group eventually resulted in a perversion of legal system by means of security legislation. The tendency towards social engineering by means of law has persisted after the first democratic election in 1994. A primary concern in the new South Africa has been the transformation of society by means of a process of transformative constitutionalism on the basis of fundamental values enshrined in Bill of Rights. A third perspective addressed here relates to legal education in South Africa and how it has been shaped in form and substance by the mixed legal heritage, the imposition of Apartheid and the transformation of society in the democratic South Africa.

### **II. The mixed character of South African law<sup>1</sup>**

The establishment of Dutch colonial presence at the Cape of Good Hope saw the introduction to South Africa of the Roman Dutch law of Holland, ie the version of the broader European Jus Commune applied in Holland, one of the United Provinces of the Netherlands. The British occupation did not result in the Roman Dutch law being supplanted formally. It did bring a reform of the structure of the courts and legal profession along the British model, the introduction of the English law of civil procedure and evidence as well as the doctrine of precedent (Du Bois 2004:10). The introduction of liberal economic policies to replace the monopolistic practices of the Dutch East India Company inspired legislative reforms to introduce English law in, for instance, the areas of company law, insolvency and negotiable instruments. In Private law on the other hand, legislative intervention was limited, so that the mixed system was fashioned by judicial lawmaking in judgments of the Superior courts of the various jurisdictions since 1828. The intermingling of systems accordingly

---

<sup>1</sup> Although the development of a mixed system resulted in the subjugation of indigenous peoples and their law, it is important to note that customary laws remain relevant, albeit in truncated and attenuated way (Du Bois 2004:14). A further element of legal pluralism results from the recognition of the Sharia law in the Muslim community.

encompassed not only matters of substance, but also the adoption of the casuistry of a case-law culture. The twentieth century saw the development of a tradition of academic teaching and commentary which has contributed a distinct civilian flavour to the treatment of the accumulated case-law. The academic tradition reinforced the tendency evident in the judgments of the Appellate Division of the Supreme Court after its constitution in 1910 to refocus attention on Roman-Dutch and modern civilian sources and also introduced the systematization and close conceptual analysis of legal materials typical of civilian legal systems. This enabled the transformation of a body of law which at the turn of the nineteenth century resembled a pidgin language, into one of relative sophistication with a powerful Creole identity of its own. The case law since the 1960's is, from a methodological perspective, characterized by both attempts to impose an academically based historical method on the citation of Roman Dutch sources and a concern for a more ordered and restricted resort to comparative references. This represents the final triumph of the so-called Purist school of thought in South African legal thinking (Fagan 1996: 60-64). Although a resort to English and other common law authorities in argument and judgments is not excluded, the casual reliance of former days on such materials has diminished. Furthermore, although the classic texts of Roman Dutch authors, and even the Digest of Justinian, in theory remain relevant as subsidiary sources of law, the elaboration by the courts of the body of accrued precedents has diminished the reliance on the so-called "old authorities".

It is accordingly arguable that South African law has developed a distinct character by moving beyond its traditional sources of inspiration. There are, however, indications that this might have come at a price. Recent difficulties on the part of the courts to develop the law of contract to reflect positions long accepted in modern jurisdictions – for example in relation to the problems of unconscionability – belie a long held view of the South African incarnation of Roman Dutch law as 'a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society' (per Lord Tomlin in the decision of the English House of Lords in *Pearl Assurance Co v Union Government* 1934 AD 560 at 563). Such indications of judicial stultification require a regard to the possibility that the constitutionalisation of Private law as a result of the Bill of Rights enshrined in the Constitution of 1996 might serve as a force for renewal. This brings to the fore the second theme referred to above.

### **III. The instrumental use of law and the legal system**

While the attitude towards indigenous groups during Dutch period oscillated between "quasi-assimilation and extermination" (Du Bois 2004:13), the legacy of British rule is ambivalent, with the abolition of slavery and the regulation of the master and servant relationship being counterbalanced by the strengthening of the state and the regulation of the supply of labour to mines which resulted in the creation of a subclass of labourers along racial lines (Du Bois 2004:13). In respect of larger indigenous groups which resisted the encroachment of colonial power, a policy of assimilation was replaced by that of "indirect rule". This entailed the geographical separation of such groups from the colonial territory by the recognition of indigenous institutions and laws and the extension of colonial power by the co-option of tribal

leaders into an administrative bureaucracy (Du Bois 2004:14). This system was “exported southwards and inland” late in the nineteenth century as a basis for the legal regulation of black inhabitants of the colonial territory (Du Bois 2004:14; Bennet (1985)). After the Union of South Africa was established in 1910, these patterns found formal expression in the Natives Land Act, 1913 which allocated only 13% of land for black ownership and the Native Administration Act, 1927, which applied the model of indirect rule over blacks to the country as a whole (Du Bois 2004:14). These measures provided a foundation for the policy of Apartheid, characterized by an extensive statutory framework for the enforcement of racial separation over the spectrum of societal relations.

The so-called postamble to the Interim Constitution of 1993 stated that it “provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex” (cf *Holomisa v Khumalo* 2002 3 SA 38 (T) at 55). This image expresses a continued belief in the capacity of law and the legal system to achieve a fundamental transformation of society, albeit in the opposite direction to that adopted under Apartheid and in order to redress its inequitable consequences. To this end the Bill of Rights of the final Constitution of 1996 entrenches a set of fundamental rights - both the traditional rights of the individual as well as so-called socio-economic rights - not merely as a corrective to abuses of state power, but also to serve as a template for the transformation of society. Two features of this instrumentalist tendency invite comment.

Important first of all, is the express recognition that the differentiated treatment of individuals (positive discrimination or affirmative action) may be justified in respect of the application of fundamental rights and enacting legislation in order to redress inequities of the past (article 9 of the Constitution). The Broad Based Black Economic Empowerment Act, 2004 provides an interesting example. The act and attendant regulatory instruments track the progress of business entities towards black economic empowerment with a view to determining decisions by state organs regarding the conclusion of business relations with public corporations. By means of scorecards, Black Economic Empowerment is measured with reference to indicators such as the extent of black shareholding in companies, the degree to which management control is vested in black persons, the performance of companies in respect of employment equity targets, skills development and the extent to which procurement needs are sourced from black owned businesses. Codes of practice lay down standards for various business sectors and are binding on all state bodies and public companies. It is with some irony that one notes the continued relevance of race based standards in the democratic context.

A second aspect has a bearing on the future development of the mixed system of Private law. Section 8(1) of the constitution provides that fundamental rights are applicable to all kinds of law and bind the legislature, the executive, the judiciary and all organs of state. According to section 8(2) certain fundamental rights may apply horizontally to natural and juristic persons. Apart from the possible direct application of fundamental rights, they may also be realized indirectly through the application of legislation enacted to implement the right (section 8(3)). In the absence of such

legislation, section 8(3) further enjoins a court seeking to apply a provision of the Bill of Rights to a private agency to apply, or if necessary, develop the common law to give effect to the right. This means that the common law, thus reinterpreted, becomes the instrument for the realization of fundamental rights. Although this approach does not imply a total revision of South African Private Law, it establishes a mechanism for legal renewal. Rather than being at the culmination of its growth, the mixed system of Private Law in South Africa stands at beginning of further development informed by the impulses emanating from the Bill of Rights. This will inevitably require borrowing not only from the legal traditions that inspired its development in the first place, but also from other legal cultures. The Constitution, by expressly providing that when interpreting the Bill of Rights, a court 'may consider foreign law' (Section 39(1)) provides a constitutional basis for doing so.

#### **IV. Legal Education**

The academic teaching of law commenced in Cape Town in 1859 but the first faculties of law were established only in 1918 at the University of Cape Town and at Stellenbosch University in 1921. Other universities followed down this road and by 1994, law was being taught at twenty universities. The system was marked by Apartheid in so far as the Extension of Universities Education Act, 1959 prescribed separation along racial lines in the educational sector. The English language universities nevertheless succeeded in remaining relatively open, albeit on a limited scale and within certain constraints. Afrikaans universities fell in with the policy of segregation whilst universities for the various ethnic groups were established in the so-called native homelands.

The degree structure during the Apartheid era typically comprised three years of study for a Bachelor of Arts (BA) or Commerce (BComm) degree the curriculum of which contained courses in a number of legal subjects. This enabled students to obtain a Bachelor of Laws (LLB) degree after two further years of study. Some, but not all, universities also offered a four year B Proc course for those intending to qualify themselves as attorneys and a three year B Juris degree aimed at lawyers in the civil service or as a foundational program for an eventual Bachelor of laws degree. Academic legal training was, and still is, supplemented by practical legal training organized by the legal professional bodies. Those intending to practice as advocates have to pass an admissions examination administered by the Bar Council after a period of practical legal training (pupillage). Admission as an attorney depends on the completion of a two year period of practical training in a law firm as a candidate attorney and success in an admission examination. Democratization brought calls for the transformation of the legal profession from various sources, inter alia the National Association of Democratic Lawyers (NADEL) and the black Lawyers Association (BLA). The Department of Justice has since 1995 been concerned with increasing the number of black graduates entering the profession. Discussions with universities resulted in the introduction in 1998 of a four year LLB degree program intended to be basic academic qualification for lawyers. Although this degree is at present offered by all law faculties, a number of institutions have opted to retain the combined BA and B Comm degree programs referred to above as alternatives to the four year program. A recent initiative of the Department of Justice is the Legal Services Charter, which, in draft form, seeks to achieve meaningful transformation in the legal

services sector (which is stated to include “Academia”) by eradicating the inequalities of the past and promoting access to justice by addressing obstacles to entry into the profession for blacks such as “high failure rates amongst black candidates” (article 5.6(d)) and “unaffordable fees for practical legal training at institutions” (article 5.6(e)) and the lengthy pupillage period. The four year LLB degree is proposed as a single entry qualification for admission to legal practice law and academic institutions are enjoined to promote the interest of historically disadvantaged groups, community service and employment equity. As was the position prior to 1994, the legal professional bodies enjoy no power to accredit law schools. Academic institutions generally are subject to quality control under the aegis of the Higher Education Quality Committee (HECQ). The National Research Foundation (NRF) is tasked with the promotion of research in all academic disciplines by funding research projects and a voluntary rating system for individual researchers. Although academic lawyers and faculties enjoy academic freedom, legal education is therefore shaped by the fundamental values entrenched in the Constitution.

Latin as a requirement for admission as a legal practitioner was abolished in 1995. In consequence, courses in Roman law have withered significantly. The civilian strand of the mixed system is nevertheless reflected in the formal structure of curricula, the systematic arrangement of the contents of courses and the tendency still to elaborate this by means of formal lectures. The English heritage is especially evident in the emphasis in course work on decided cases, with students being required to read and analyze leading decisions with a view to relating these to legal doctrine and to evaluate the results achieved and the reasoning employed, often in tutorial sessions. To a greater or lesser degree, students have the opportunity to obtain academic credit by taking courses in practical legal work in clinics associated with the various faculties which are supported by the Law Society of South Africa.

## **REFERENCES**

Du Bois (2004)

Du Bois F ‘Introduction: History, System en Sources’ in CG van der Merwe & JE du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1.

Fagan (1996)

Fagan E ‘Roman-Dutch Law in its South African Historical Context in: Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33.

Bennet (1985)

Bennet TW *The Application of Customary Law in Southern Africa, the Conflict of Personal Laws* (1985).