

Three Most Important Features of the South African Legal System that Others Should Understand.

**Professor Obeng Mireku, Dean: School of Law
University Venda, South Africa**

Three most important features of the South African legal system which I would like to draw your attention to are that: (1) It is a hybrid legal system; (2) Constitutional Supremacy with an entrenched Bill of Rights is a defining attribute; and, (3) Legal education makes the LLB the basic qualification into the profession which is divided into advocates and attorneys.

1. A Hybrid Legal System

The first distinguishing feature of the South African legal system is that it is a hybrid because it has two formal legal systems existing in harmony within the national legal system. In other words, South Africa promotes legal pluralism.

South African common law largely comprises a mixture of the Roman-Dutch variant of the civil law tradition and the English common law tradition. Roman-Dutch common law was brought into South Africa by Jan van Riebeck and other explorers from Holland who colonized South Africa in the mid-17th century. Later, English settlers introduced the English common law tradition in many parts of the country. Today, principles of Roman-Dutch law dominate private law subjects such as contract, delict and family law as well as criminal law and a few public law subjects. English common law principles dominate the law of evidence and a few other public law subjects.

Besides the above two legal traditions, South Africa has customary law as an additional system of law. Section 211(3) of the South African Constitution enjoins courts to ‘apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’. Principles of African customary law determine the personal law of the majority of black African population especially those living in traditional (rural) communities. Even the few urbanized black Africans regulate their personal lives such as marital relationship and inheritance by a dual system of customary law and civil law or common law. Black Africans constitute about 75% of the entire population of the country.

2. Constitutional Supremacy and Bill of Rights

The second characteristic of the South African legal system is the overreaching doctrine of constitutional supremacy and an entrenched Bill of Rights. With the demise of the apartheid regime which sustained itself through the legal construct of parliamentary sovereignty, the new constitutional democracy established in 1994 was founded on the bedrock of constitutional supremacy. Constitutional supremacy is reinforced *inter alia* by an entrenched Bill of Rights and a supreme specialized constitutional court.

Sitting at the apex of the judicial hierarchy, the South African Constitutional Court is the highest court in the land. Its jurisdiction is limited to constitutional matters and

issues connected with decisions on constitutional matters. The Constitutional Court is the final court in all matters concerning the interpretation, protection and enforcement of the constitution. Other courts below the Constitutional Court are:

The Supreme Court of Appeal;
The High Courts;
The Magistrates' Courts; and,
Any other court established or recognized by an Act of Parliament.

The judiciary in South Africa has professional judges and not juries. The judicial process is based on an adversarial system rather than an inquisitorial system.

2.1 Constitutional Jurisprudence

The constitutional jurisprudence of the Constitutional Court has put the South African legal system on the global map of adjudicating bodies. At least three landmark judgments of the Constitutional Court mark it as a bold, progressive and activist court. First in *S v Makwanyane* 1995 (6) BCLR 665 (CC) the court described the death penalty as a cruel, inhuman or degrading punishment and thereby ruled that capital punishment violated the constitutional rights to human dignity, life and equality. In the event, the court struck down as unconstitutional a provision in the penal code which permitted the sentence of death on conviction for murder.

Second, in the celebrated case of *Government of the Republic of South Africa and Others v Irene Grootboom and Others* (11) BCLR 1169 (CC) the court noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. The court ordered the state to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The court stressed that all the rights in the Bill of Rights are interrelated and mutually supporting. Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their potential.

Third in *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) the Constitutional Court once again criticized the state for its failure to provide antiretroviral treatment to persons living with HIV/Aids. According to the court, the constitutional right to health care imposed a positive obligation on the state to provide antiretroviral drugs to HIV/Aids patients.

3. Legal Education and the Legal Profession

The third distinguishing feature of the South African legal system relates to legal education and the practice of law as a profession.

The Qualification of Legal Practitioners Amendment Act 78 of 1997 provides that the LLB is the universal legal qualification for admission and enrolment to practise as an

advocate or an attorney. Normally those who wish to enter private practice as advocates are required to become members of a Bar Association by undergoing a period of training in pupillage with a practising member of the Bar and by sitting an admission examination. Before admission as an attorney, an LLB graduate must serve articles of clerkship as a candidate attorney with a practising attorney. Attendance at a practical legal training course or performance of community service may reduce the period required to serve articles. Thereafter candidates write a professional examination set by the relevant provincial Law Society.

The legal profession in South Africa is divided into advocates (barristers) and attorneys (solicitors). No dual practice is permitted.

The advocates' profession in South Africa is a referral profession. This means that a client approaches an attorney who, in turn, instructs an advocate. Advocates appear in most major cases in South African courts including the Constitutional Court, the Supreme Court of Appeal, provincial High Courts, the Labour and Labour Appeal Courts, Land Claims and Tax Courts and the Magistrates' courts. Advocates appear in appeals in all superior courts in South Africa. They also appear in trials and application in the High Courts and other superior courts situated in the nine provinces of the country. In addition, advocates appear in arbitrations such as commercial, building, engineering and employment arbitrations. Advocates are also instructed to provide written or oral opinions on matters involving southern African law.

Advocates are sole practitioners. The independence of advocates is a source of professional pride to the Bar and a guarantee against conflict of interest. Advocates' status as sole practitioners enables them to market their professional service without additional administration costs.

On the other hand, attorneys are the business managers of cases and they decide when an advocate is or is not necessary to be engaged to act for the clients. Advocates have no direct contact with clients. For this reason advocates are said to be in a referral profession.

Ordinarily, attorneys are the lawyers that clients see first with their problems. Attorneys give general advice in the law. Attorneys (also called counsel) get briefed to take on cases by attorneys when a specialized skill is needed in a court case or in research into the law. While attorneys may form professional companies and firms and practise in partnership with each other, advocates are individual practitioners and are not permitted to form partnerships. Advocates however, may become members of 'the Bar' (which is the name traditionally used for the ten Societies of Advocates affiliated to the General Council of the Bar of South Africa).