
**HARMONISING THE LAW IN A MULTILINGUAL
ENVIRONMENT WITH DIFFERENT LEGAL SYSTEMS:
LESSONS TO BE DRAWN FROM THE LEGAL HISTORY OF
SOUTH AFRICA ***

Ph J Thomas **

1 General

The name South Africa clearly indicates the position of this country at the foot of the African continent. The Indian and Atlantic oceans form the eastern and western borders, while Namibia, Botswana, Zimbabwe and Mozambique are South Africa's northern neighbours. The country covers an area of 1 221 042 square kilometres and has a population of about forty eight million. A republic with a parliamentary democracy has Pretoria as administrative capital while Cape Town is the seat of parliament. The ethnic diversity finds expression in the fact that the Constitution recognises eleven official languages.¹ The country has important mineral wealth, produces enough food for its needs as well as exports and has developed manufacturing industries.

Written history of Southern Africa commences with the advent of European explorers and deals mainly with the upheavals caused by their presence and subsequent actions: the Portuguese were followed by the Dutch, whose commercial settlement gave way to English rule. The latter provided some of the reasons for the Great Trek and the wars concomitant with the creation of larger kingdoms. The resulting states, both Voortrekker republics and African kingdoms, soon disappeared as first diamonds and later gold were found. This led to British conquest. The rifts caused by the Boer War were to some extent addressed by the creation of the Union in 1910, but failure to include the total population in the political dispensation sowed the seeds for the introduction of Apartheid in 1948. However, international developments resulting from the Second World War, in particular the establishment of the United Nations and its objective to guarantee human rights and fundamental freedoms for all, contributed to the democratic change in 1994.

* Research for this paper was made possible by the financial assistance of the NRF.

** Professor, Department of Legal History, Comparative Law and Legal Philosophy, University of Pretoria (Mr (Erasmus University) LLD (University of South Africa)).

1 Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. S 6(1) of the Constitution of the Republic of South Africa, 1996.

2 Legal history

2.1 The Dutch East India Company

In 1652 the Southern tip of Africa was brought within the Dutch legal tradition when Jan van Riebeeck established a fortified refreshment station for the merchant ships of the Dutch East India Company, the Vereenigde Geocroyeerde Oost-Indische Compagnie (VOC)² on the Amsterdam-Batavia route.³ The Company was a commercial corporation and a prototype of the modern public company.⁴ In consequence, its aims were purely commercial and limited to run a secure station to provide its ships with water, meat, fruit, vegetables and so on at a minimum cost. This affected its policy towards the indigenous population, namely one of non-aggression and pro-trade.⁵

At this stage the Dutch legal system was still in its infancy.⁶ The law of Holland was neither codified nor uniform. Furthermore, the peculiar relationship between the VOC and the States General⁷ had as a consequence that the Cape did not become a Dutch colony, but a settlement of a Dutch international monopolistic trading company⁸ manned by employees of various nationalities. The research of Visagie⁹ and De Smidt¹⁰ has opened up the judicial records

-
- 2 The Company had received the monopoly of trade with the lands to the East of the Cape of Good Hope and the West of the Straits of Magellan when it received its charter in 1602 from the States-General of the United States of the Netherlands. Hahlo & Kahn *The South African Legal System and its Background* (1973) 534.
 - 3 Kilpin *Romance of a Colonial Parliament* (1930) 5; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *An Illustrated History of South Africa* (1986) 61ff. The original expedition force consisted of around ninety men, women and children.
 - 4 Its capital was in the form of shares. For further information see Hahlo & Kahn (n 2) 534ff; Welsh *A History of South Africa* (2000) 12f.
 - 5 Kennedy & Schlosberg *The Law and Custom of the South African Constitution* (1935) 5.
 - 6 The Dutch arrived shortly after the death of Grotius in 1645 and during the life of Leeuwen (1626-1682) and Groenewegen (1613-1652). The careers of Voet (1647-1713), Bynkershoek (1673-1743), Van der Linden (1756-1835) and Van der Keessel (1738-1816) were still to commence. Hugo de Groot may be considered the father of Roman-Dutch law or rather, as he called it himself, the "jurisprudence of Holland". His *Introduction to Dutch Jurisprudence* amalgamates into one institutional system, local and regional law, both statutory and customary with the contemporary practice of received Roman law in the new natural law tradition. This work forms the basis on which one of the pillars of Roman-Dutch law was erected, beginning with Groenewegen's notes. It culminates in the lectures of Van der Keessel at the end of the eighteenth century. Another pillar of the Dutch legal tradition is found in the work of the Leyden Professor Johannes Voet who represents the *usus modernus* which is the traditional Italian method of writing commentaries on the *Digest* and, where necessary, references to contemporary local law.
 - 7 Kennedy & Schlosberg (n 5) 6.
 - 8 The original nine free burghers, who were released from the service of the Company and allocated land to farm in 1657, remained subject to Company control, had no political rights and were required to sell their products at prices determined by the Company. By 1780 the free burghers numbered 10 500. The Company, however, remained in charge of land allocation, price fixing, the administration of justice, military service and all government functions. The Cape Patriot movement of 1778 endorsed citizen's rights and represented the hostility against the Company. In 1792 free trade was granted. See Boucher (n 3) 62, 65-70. For a detailed description of the development of the Cape under Company rule cf Welsh (n 4) 21-87.
 - 9 *Regspiegeling en Reg aan die Kaap van 1652 tot 1806* (1969); *Die Kaapse Regspraakprojek* (1992). See, too, Böeseken *Uit die Raad van Justitie 1652-1672* (1986) and Breytenbach

and law libraries and provided new insight into the cultural level of the lawyers at the Cape during the days of the Company reaching the conclusion that all three were higher than assumed until now.¹¹

During the seventeenth century the Dutch achieved the status of superpower and Dutch science including Dutch legal science ruled supreme. A Dutch legal tradition developed within which several paradigms established themselves.¹² In consequence, the main pillars of this legal tradition, which embraced both the institutional¹³ and the practical side of the law,¹⁴ found firm ground in the Cape and provided a basis for a legal tradition which worked within a coherent framework of rules and principles.

The remote and strategic position of the Cape was the reason that the shock waves of the French Revolution sweeping European legal culture arrived as ripples at the Cape during the 1803-1806 period. Nevertheless, the territory soon found itself in a different legal culture under a new colonial regime.

2.2 British occupation

In terms of the articles of capitulation in 1795 and in accordance with the rule of international law stating that the laws of a conquered country remain in force until they are altered by the conqueror,¹⁵ Roman-Dutch law remained the law of

Inventory of the Archives of the Court of Justice of the Cape Colony 1652-1843 (1945) at www.databasesw.tanap.net (28 November 2007).

10 "Roman-Dutch authorities at the Cape in the eighteenth century" 1996 (vol 2-2) *Fundamina* 175-181; *Old Law Books from the Libraries of the 'Raad van Justitie' and J N van Dessin* (1998); "Roman-Dutch Cape law" 1999 (vol 5) *Fundamina* 207-213. See also Botha "An 18th century law library" 1935 *SALJ* 169-182; Van der Merwe "Die reg aan die Kaap tydens die inwerkingtreding van die Regsoktrooie" 1995 *THRHR* 234-257; Du Plessis "Law of succession at the Cape 1806-1828" 1996 (vol 2-2) *Fundamina* 182-204.

11 De Smidt (n 10) 1999 (vol 5) *Fundamina* 212.

12 In the textbook-tradition the humanist research of the "Dutch school" is given extraordinary attention, with the result that the misnomer of "antiquarian school" is attached to all Dutch jurists from the United States of the Netherlands. The subsequent life of Roman-Dutch law proves this generalisation to have been erroneous. Albeit that erudite jurists such as Grotius and Bynkershoek devoted research to classical Roman law and legal and biblical history, the primary contribution of the Dutch jurists resides in scholarship in the field of public international law, private law, legal education and in the practice and adjudication of law. Furthermore, the Dutch jurists made an important contribution to the development of legal practice by publication of legal opinions, for example the *Hollandsche Consultatien*, the *Nieuwe Hollandsche Consultatien*, the *Vervolg op de Hollandsche Consultatien*, the *Advysen* collected by Van den Berg, De Haas, Barels and others. The whole spectrum of this branch of law was eventually digested into the register of Nassau la Leck, who published a collection consisting of four parts, between 1778 and 1789, with the obvious aim to facilitate access to this aspect of old Dutch law. The full title of this work makes mention of *advysen*, *consultatien*, *decisien*, *observatien* and *sententien*, which means that the content consisted of opinions by advocates or other practitioners and decisions by the courts. Roberts *A South African Legal Bibliography* (1942) mentions at 45 that a total of forty collections were entered into this compilation which contains a total of 10 991 opinions and decisions.

13 Both the *Introduction* of Grotius and Voet's *Commentary* were written for educational purposes.

14 Cf n 12.

15 This rule had become part of English law by the decision of Lord Mansfield in *Campbell v Hall* (1774) *Cowp* 204, 98 *E R* 1045 at 209, 1047; Hahlo & Kahn (n 2) 575.

the Cape.¹⁶ The same rule was re-applied in 1806¹⁷ and the *status quo* remained unchanged when in 1814 the British retained the Cape in terms of the Convention of London¹⁸ and the Cape became a British Crown Colony.

The consequent conundrum was exacerbated by the fact that in the mother country of Roman-Dutch law the new French codification had been introduced in 1811. Since English-educated practitioners had to apply a Roman-law based system, the development of Roman-Dutch law¹⁹ in the Cape Colony was entrusted to lawyers trained in another legal system, in another legal tradition, in another country and in another language.²⁰

The Charters of Justice of 1827 and 1832 changed the judicial organisation.²¹ The Council of Justice was replaced by an independent judiciary in the form of a Supreme Court with a professional bench and *landdroste* and *heemrade* by magistrates.²² The Privy Council became the highest court of appeal.²³ Only British and colonial advocates could be appointed as judges. Furthermore, all advocates had to be graduates of British universities, or had to be trained at the Inns of Court in England, Scotland or Ireland. English was the official language of all superior courts.²⁴

In the common law the engine of legal development had been the administration of justice. The old Dutch procedural law²⁵ was consequently replaced by the English law of criminal and civil procedure, while a jury system

16 For a description of the British occupation of Welsh (n 4) 88-116.

17 In 1803 the Cape was handed over to the Batavian Republic in terms of the Treaty of Amiens, but at the resumption of hostilities between Britain and France, British forces once again occupied the Cape. Welsh (n 4) 96ff.

18 Convention between Great Britain and the Netherlands relative to the Dutch Colonies; Trade with the East and West Indies; etc signed at London on 13 August 1814. The United Provinces of the Netherlands received five million pounds sterling in consideration, and in satisfaction thereof, the Prince Sovereign of the Netherlands ceded in full sovereignty to His Britannic Majesty, the Cape of Good Hope and the settlements of Demerara, Essequibo and Berbice. Cf *Larousse Encyclopedia of Modern History* (1968) 283.

19 This label developed during the nineteenth century and will be used to enhance consistency.

20 Thus lawyers trained in practice to reason from case to case, from concrete situation to precedent, were confronted with a legal science which had developed a coherent framework from principles and rules, and in which reasoning from legal principle and rule to the concrete case was the norm.

21 Already in 1807 the governor had constituted himself a court of appeal for civil cases and in 1808 the governor and two assessors became the same in criminal cases. In 1811 circuit courts were introduced; in 1813 court proceedings were conducted in public; from 1814 Dutch and English were the languages of judicial proceedings; in 1826 justices of the peace were created; in 1827 the jury system was adopted, which in turn led to the introduction of the English law of evidence in 1830.

22 Ordinance 33 of 1827, Ordinance for Creating Resident Magistrates and Clerks of the Peace in certain Districts and Places in this Colony.

23 For the judicial organisation of Hahlo & Kahn (n 2) 541.

24 S 32 of the Charter of Justice of 1832. In 1822 English had become the language of government and in 1828 the language of the inferior courts in terms of s 7 of Ordinance 33 of 1827.

25 Charter of Justice of 1832, His Majesty's Royal Charter for the Better and More Effectual Administration of Justice within the Colony of the Cape of Good Hope.

and the concomitant English law of evidence was introduced.²⁶ In view of the robust development of British commerce and the consequent legal development in England, English mercantile law was freely imported.²⁷ As a general rule the Supreme Court would, whenever Dutch law was silent, look for answers among English authorities. The possibility of appeal to the Privy Council led to the introduction of the English doctrine of *stare decisis*.

As indicated, English had become the language of the courts and to a large extent the language of business and commerce.²⁸ The consequent adaptations to the law of the Cape and the administration thereof – new judicial administration, new law of procedure, new legislation for business entities and their affairs – represented the new age of the world of industry and trade.²⁹ This new age was also found in the English law of contract, only recently developed and founded on the new economic theories of Adam Smith, in which the pursuit of self-interest was a desideratum in order to achieve optimum effect of the markets.³⁰

Furthermore, the Cape moved from the VOC mercantilism into the British imperial system of the first industrial nation in the world: the ideology of free trade and free labour³¹ did away with the monopolies and restrictions of the VOC as well as with slavery. The Cape benefited from the doctrine of imperial preference. Wine and later wool thus became the colony's main exports to Britain. Imports increased and the construction of roads created internal markets. The volume of shipping at the Cape rose sharply³² and the conversion to sterling in 1825 helped the economic development of the colony. The commercial exchange was established in 1822; insurance companies made their appearance in the 1830s and the Cape of Good Hope Bank was founded

26 Ordinance 72 of 1830, Ordinance for Altering, Amending, and Declaring in Certain Respects the Law of Evidence within this Colony.

27 Hahlo & Kahn (n 2) 577.

28 Cf *supra* n 24.

29 See Thomas "Did the Supreme Court of the Colony of the Cape of Good Hope have equity jurisdiction?" 2006 (vol 12-1) *Fundamina* 251-271.

30 See Thomas "The Roman law tradition" 2003 *De Jure* at 110ff.

31 The campaign against slavery, originally waged by humanitarians on moral and religious grounds, had been taken over during the late eighteenth century by business in the first industrial nation. The *Slave Trade Act* 1807 (47 Geo 3 c 36) came into effect in 1808 and prohibited the landing of slaves in British ports. Ordinance 50 of 1828, Ordinance for Improving the Condition of Hottentots and Other Free Persons of Colour at the Cape of Good Hope abolished all discriminatory measures applicable to the Khoi in terms of the Hottentot Code of 1809 and granted equality before the law. The *Slavery Abolition Act* 1833 (3&4 Will 4 c 73) abolished slave labour and took effect from 1 December 1834 at the Cape. An Ordinance (for the amending and consolidating of laws regulating the relative rights and duties of masters, servants and apprentices) of 1 March 1841 and the *Act to Amend the Laws Regulating the Relative Rights and Duties of Masters, Servants and Apprentices* 15 of 1856 regulated the labour market.

32 Butler "The dispersion and influence of the 1820 settlers" in Cameron & Spies (n 3) mentions at 100f that in 1826 the regulation in terms of which all ships importing or exporting from South Africa had to clear in Cape Town was abolished and that consequently Port Elizabeth, Port Frances and Port Natal grew in importance.

in 1837. The 1820 settlers transformed Grahamstown into a hub of trade and enterprise and opened up the frontier by trading. However, shortage of labour remained an endemic problem.

Thus the transfer to British rule changed the character of the Cape law; the law of the Cape Colony changed language, culture, economic and political ideology as well as legal tradition. The success of the nineteenth-century transformation is to be attributed to the introduction of the English system of administration of justice and adjudication. The accent shifted from legal concepts, institutions, principles and rules to the laws of procedure and evidence and the rules of court. Introduction of the precedent system and the consequent law reporting³³ and translation of the basic and systematic textbooks of old Dutch law³⁴ created the right ingredients for the developing South African common law.³⁵ Thus, for example, Chief Justice de Villiers in *Mills and Sons v Trustee of Benjamin Bros*³⁶ consulted the law of the Cape Colony, English law, Sande, Voet and Savigny, setting out the sources as well as their order of application.³⁷

The Cape Colony and its legal system gradually expanded as other territories were annexed. The first of the Voortrekker republics, Natalia, was occupied by the British during 1842.³⁸ The annexation of Natal was followed by the annexation of other territories such as Kaffraria,³⁹ Griqualand,⁴⁰ Basutoland⁴¹ and Bechuanaland.⁴² In all instances, the law found at the Cape continued to be applied in the newly annexed territories.

33 Law reports are a necessity in a legal system which relies on precedents. The oldest law reports are: *Menzies Cases Decided in the Supreme Court of the Cape of Good Hope 1828-1849*; *Searle Cases Decided in the Supreme Court of the Cape of Good Hope 1850-1867*; *Watermeyer Cases Decided in the Supreme Court of the Cape of Good Hope 1857*; *Roscoe Cases Decided in the Supreme Court of the Cape of Good Hope 1861-1878*; *Buchanan Cases Decided in the Supreme Court of the Cape of Good Hope 1868-1869, 1873-1879*; *Cape Supreme Court Reports 1880-1910*.

34 Kotzé translated Leeuwen's *Het Roomsche Hollandsch Recht* into English as *Commentaries of Roman-Dutch Law*; Juta translated Van der Linden's *Regtsgeleerd, Practicaal, en Koopmanshandboek* as *Institutes of Holland*; and Maasdorp translated Grotius's *Inleidinge tot de Hollandsche Rechtsgeleerdheid* as *Introduction to Dutch Jurisprudence*. Cf Hewett "Old wine in new bottles or the story of translations of the 'old authorities' produced by South Africans" 1998 *THRHR* 551-564.

35 Maasdorp's *Institutes of Cape Law* would in time become the *Institutes of South African Law*.
36 (1876) 6 *Buchanan* 115.

37 Thomas (n 29) 2006 (vol 12-1) *Fundamina* 259f.

38 Du Bruyn "The Great Trek" in Cameron & Spies (n 3) 134f.

39 During 1846-1847. Le Cordeur "The occupations of the Cape, 1795-1854" in Cameron & Spies (n 3) 89; Welsh (n 4) 239.

40 In 1871. Heydenrych "The Boer republics, 1852-1881" in Cameron & Spies (n 3) 155; Welsh (n 4) 240ff.

41 In 1868 by the British Governor in his capacity as High Commissioner. After his departure Basutoland was annexed to the Cape. Heydenrych (n 40) 149, 167. Also Welsh (n 4) 232, 239.

42 During 1884-85. Grundlingh "Prelude to the Anglo-Boer War, 1881-1899" in Cameron & Spies (n 3) 189.

2 3 Natal

The British annexed Natal to the Cape Colony by letter patent in 1844 and in 1845 the boundaries were proclaimed.⁴³ By virtue of Ordinance 12 of 1845, Roman-Dutch law, as administered by the tribunals at the Cape of Good Hope, would be applied in Natal.⁴⁴ Likewise the judicial organisation of the Cape was adopted. Thus a District Court of one judge administered Roman-Dutch law as applied in the Cape from 1846. In 1858 the Supreme Court of Natal was established.⁴⁵ Spiller's research⁴⁶ reveals that in the early years the court's shifting mix of Roman-Dutch and English law produced considerable confusion, but that by the 1880s a tradition had been established on a firm foundation in which the English law was used as an aid rather than a disruptive substitute. Of particular interest is the enactment of the Natal Native Code in 1891.⁴⁷

2 4 The Boer republics

The Great Trek during the 1830s⁴⁸ resulted in the establishment of new states, namely the Orange Free State and the Zuid Afrikaansche Republiek. The settlers laid the foundation for a new Afrikaner culture in these republics: Dutch was the official language, Roman-Dutch law the legal system and all efforts were directed at maintaining contact with the mother culture.⁴⁹

The independence of the Zuid Afrikaansche Republiek was formally accepted when the British signed the Sand River Convention in 1852. In terms of the first addendum to the Constitution of 1858⁵⁰ the law of the state was the law found

43 Edgecombe "Natal, 1854-1881" in Cameron & Spies (n 3) 172; Welsh (n 4) 209. Natal was a separate district of the Cape Colony.

44 Ordinance for Establishing the Roman-Dutch Law in and for the District of Natal. Spiller *A History of the District and Supreme Courts of Natal 1846-1910* (1986) 83, 100.

45 Spiller (n 44) 1, 19.

46 *Supra* n 44.

47 Kennedy & Schlosberg (n 5) 23f.

48 Land hunger and to a degree revolt against a government incapable of providing safety and security were the primary causes of the move to the north. Du Bruyn (n 38) 127ff; Welsh (n 4) 146ff.

49 Heydenrych (n 40) 183-199; Welsh (n 4) 221ff.

50 *Grondwet van de Zuid-Afrikaansche Republiek, 1858*. This *Grondwet* merged the small republics in the territory. In 1838 Potchefstroom was the only *boer* settlement in the Transvaal. On 9 April 1844 Potchefstroom and Winburg declared their independence. Potgieter went on to establish the towns Ohrigstad and Schoemansdal during 1845. The "Derdepoort Verdrag" in 1849 tried to establish a unified republic. In 1851 there were four Commander Generals in the Transvaal. Although the Republic was officially called the Zuid-Afrikaansche Republiek in September 1853, in fact there were three isolated white communities: Potchefstroom, Lydenburg and Zoutpansberg, each with its own leader. They had one communal state institution, namely the *Volksraad* (Council) which had the highest power in the state and met in different places every few months. Because of the large distances, these meetings were attended poorly. In March of 1856 a Council meeting was held in Rustenburg to draft a Constitution, without success. In October 1856, the Lydenburg group declared their independence and in December 1856 formed a separate council. A new Constitution was approved by Potchefstroom and Ohrigstad in 1856 but rejected by Soutpansberg. On 6 January 1857 Pretorius was inaugurated as President in Potchefstroom. In 1858 Soutpansberg returned to the fold and all were unified in 1860. In September 1859 Utrecht was declared a district of the ZAR and in April 1860 Lydenburg

in the code of Van der Linden. In the case of *lacunae*, the works of Leeuwen and Grotius were declared to be supplementary binding sources. Section 2 of the second addendum to the Constitution denied the courts the right to test whether a statute was in conflict with the Constitution or not.⁵¹ However, Chief Justice Kotzé held in two cases⁵² that the High Court had the power to test the validity of a resolution of the Volksraad against the Constitution. This resulted in the passing of a Volksraad resolution⁵³ threatening the judges with dismissal.

The introduction of the Second Volksraad in 1890 to appease the large *uitlander* population was without success, as shown by the Boer War of 1899-1902.⁵⁴

Apart from the constitutional conflict between Chief Justice Kotzé and President Kruger, the legal history of the Zuid Afrikaansche Republiek is uncharted territory.⁵⁵

The Bloemfontein Convention of 1854 recognised the Orange Free State as an independent state.⁵⁶ The Orange Free State Constitution contained a Bill of Rights and provided for judicial power of review as well as separation of powers.⁵⁷ However, ownership of land and the franchise were restricted to whites.⁵⁸ Roman-Dutch law, as found in the works of Voet, Leeuwen, Grotius, Papegaaij, Merula, Lijbrecht, Van der Linden and Van der Keessel, applied.⁵⁹

was brought under central authority.

51 *Bijlage no 2 Art 2. Ieder Hof zal alle Volksraadsbesluiten als Wet eerbiedigen, geene aanmerking of beoordeling er over kunnen maken, en wat door den Volksraad is beslist of goedgekeurd zal niet meer aan de kennisneming van eenig Geregts Hof mogen onderworpen worden.* On several occasions the High Court had recognised that it had no power of testing the validity of a resolution of the Volksraad against the Constitution: *Executors of McCorkindale v Bok N O* (1884) 1 S A R 202; *Trustees of the Insolvent Estate of Theodore Dom v Bok N O* (1887) 2 S A R 189.

52 *Hess v the State* (1895) 2 O R 112; *Brown v Leyds N O* (1897) 4 O R 17.

53 Act 1 of 1897.

54 Grundlingh (n 42) 183-199; Pakenham "The Anglo-Boer War, 1899-1902" in Cameron & Spies (n 3) 200-218.

55 The only textbook appears to have been published in Gent, Belgium, in 1897: Josson *Schets van het Recht van de Zuid-Afrikaanse Afrikaansche Republiek*. For the administration of justice see Van der Westhuizen & Van der Merwe "Die geskiedenis van die regspleging in Transvaal (1835-1852) 1976 *De Jure* 250-269; "Die geskiedenis van die regspleging in Transvaal (1852-1877) 1977 *De Jure* 92-108; "Die geskiedenis van die regspleging in Transvaal (1877-1910)" 1977 *De Jure* 237-260.

56 Artikelen van Verdrag tusschen Sir George Russel Clerk en de Representanten van de Oranje Vrijstaat, 21 February 1854; Kennedy & Schlosberg (n 5) 27f.

57 Cf ss 5, 31, 44, 48, 22, 57, 59, 60, 61. The ideal of the first settlers in the territory had been to establish a community on the same principles of liberty as those adopted by the USA. For further information see Kennedy & Schlosberg (n 5) 27-32; Welsh (n 4) 209.

58 Heydenrych (n 40) 146; Welsh (n 4) 298.

59 OFS Constitution s 56; Ordinance 1 of 1856.

The indigenous population resided in native districts under their own private law, administered by their own chiefs under the authority of a commandant.⁶⁰

Although the Supreme Courts in both republics were influenced by the decisions of the Cape Supreme Court, the independent republics developed their own brand of Roman-Dutch law.⁶¹ Thus at the close of the Boer War the four colonies in South Africa shared their common law, albeit that judicial interpretation had led to important differences and four different legislatures had enacted four different sets of statute law.

3 Indirect rule and recognition of indigenous law

The first traces of the policy of indirect rule which contained the implicit recognition of indigenous law is found in Natal Ordinance 3 of 1849 which preserved the power of native chiefs to examine and decide cases between members of their tribes according to indigenous law. The Lieutenant-Governor later assumed the title of supreme chief of the native tribes. In 1875 the *Native Administration Law*⁶² provided that the Governor could appoint administrators of native law as well as African chiefs to adjudicate African civil matters according to native African laws, customs and usages so far as these shall not be repugnant to the settled principles and policy of natural equity.⁶³ Appeal from these decisions was to the Native High Court.⁶⁴ In 1891 the Code of Native Law as known and administered in the Colony of Natal was promulgated⁶⁵ which vested absolute power over all natives in Natal in the supreme chief (the Governor).⁶⁶

The Natal Native Trust created in 1864⁶⁷ and the Zululand Native Trust of 1909⁶⁸ introduced the principle of reserves which were managed by co-optation of indigenous leaders and recognition of indigenous law and courts.

60 Ordinance 2 of 1866 *De Occupatiewet* s 8; also ss 43-50; Ordinance 3 of 1866 s 6 and also ss 8, 9, 11; Ordinance 6 of 1866 s 36.

61 Schulze "Chief Justice Melius de Villiers: A Cape liberal with a Roman-Dutch heart" 2006 (vol 12-1) *Fundamina* 222-235.

62 Ordinance 26 of 1875 which was amended by Ordinance 44 of 1887.

63 S 5 of Ordinance 26 of 1875.

64 This court also had original jurisdiction in certain civil cases as well as for specified crimes. See Spiller (n 44) 3f. Appeals from the Native High Court were heard by a newly created Court of Appeal which was seen as a branch of the Supreme Court. The same statute granted the Supreme Court jurisdiction in African transactions in trade, ownership and succession matters and the other non-specified crimes. From 1896 to 1899 the Native High Court was abolished and its jurisdiction taken over by the Supreme Court, but in 1899 a new Native High Court with extended jurisdiction took office. Cf Spiller (n 44) 5ff.

65 Law 19 of 1891. Kennedy & Schlosberg (n 5) 23.

66 Ss 32-40. See Kennedy & Schlosberg (n 5) 461.

67 Kennedy & Schlosberg (n 5) 471. In 1864 there were forty two locations comprising 800 000 ha and twenty mission reserves (70 700 ha) demarcated for blacks. Edgecombe (n 43) 173.

68 Kennedy & Schlosberg (n 5) at 472.

The introduction and usurpation of the supreme chieftainship introduced in Natal was taken over in the Zuid Afrikaansche Republiek in 1885 and continued in the *Native Administration Act* 38 of 1927.⁶⁹

As stated above, indigenous law was explicitly recognised and codified in Natal by Law 19 of 1891. Official recognition was granted to it in the Transvaal by Act 4 of 1885,⁷⁰ in 1885 in the Bechuanaland districts of the Cape Colony,⁷¹ and in the Transkeian Territories of the Cape Colony in 1897.⁷² In the Orange Free State in the native reserve Witzieshoek the chief was authorised to hear civil cases according to indigenous law.⁷³ Consolidation of the above colonial legislation took place in the *Native Administration Act* 38 of 1927 which also provided for the reshaping of the indigenous legal systems.⁷⁴

The *Native Administration Act* 38 of 1927 gave indigenous law a separate, albeit unequal, existence by establishing a separate system of courts, chief's courts, native commissioner's courts and the native appeal court. These courts applied indigenous law provided that it was not in conflict with the principles of public policy or natural justice. In 1951 the *Bantu Authorities Act*⁷⁵ established traditional authorities at local government level. These local traditional authorities were granted limited jurisdiction over civil disputes. Chapter 12 of the Constitution dealing with traditional leaders makes no reference to traditional courts.⁷⁶

The above shows the separate but unequal status of indigenous law, which has primarily been utilised as a tool of colonialism and Apartheid. As a result the existing codifications and case law of indigenous law present a twisted version of the same.⁷⁷

4 Constitutional development

English colonial rule introduced the seeds of democratic government. In 1828

69 S 1.

70 Supplemented by ss 70 and 71 of Proclamation 28 of 1902. However, a marriage according to indigenous law was held to be invalid in *Rex v Nalana* 1907 TS 407 and in *Rex v Mboko* 1910 TS 445. In *Kaba v Ntela* 1910 TS 964 it was held that *lobola* was not recoverable and that a mother is entitled to guardianship of the children of customary marriages; *Meesedoosa v Links* 1915 TPD 357 decided that the custom under which a native woman remains a minor in indigenous law cannot be recognised.

71 Proclamation 2 of 1885.

72 Kennedy & Schlosberg (n 5) 403.

73 *Idem* 456f.

74 Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 62ff.

75 Act 68 of 1951.

76 Nicholson "A critical analysis of the role of traditional leadership in modern South African law" 2006 (vol 12-1) *Fundamina* 184-192.

77 Bennett's work referred to in n 74 is an invaluable guide into indigenous law.

people of colour in the Cape were given the same land rights as those of settlers.⁷⁸ During the same period, the English government introduced a certain degree of self-governance in the Cape Colony.⁷⁹ Of particular interest is the Cape franchise, which has its origin in the introduction of a multiracial vote in Cape municipalities in 1836 with the establishment of municipal councils. In 1853 the Cape of Good Hope Constitution Ordinance granted representative governance to the colony and ended its status of a crown colony.⁸⁰ This was followed by the transformation to responsible government in 1872.⁸¹

Natal followed the Cape model. In 1844 Natal became a District of the Cape Colony and in 1856 the Charter of Natal established a separate colony with representative government and franchise qualifications basically the same as in the Cape.⁸² The Zulu War and the demographics of the territory⁸³ postponed the introduction of responsible government to 1893.⁸⁴ However, Natal would introduce the prototype of Apartheid by Law 11 of 1865⁸⁵ and the development of indirect rule as set out above.

The Boer Republics vanished as a result of South Africa's mineral wealth. After the Boer War the British made serious efforts to bring the vanquished foes on board in a colony which was pivotal in the protection of the route to India, and had become a major producer of gold, diamonds and minerals.⁸⁶ At the conclusion of the Boer War Crown Colony rule was introduced in the Boer states.⁸⁷ Self-government was promulgated in 1906 for the Transvaal and in 1907 for the Orange River Colony, but the franchise was granted exclusively to whites in an attempt to co-opt the former citizens of the Voortrekker Republics at the expense of the black population.⁸⁸

78 Ordinance 50 of 1828.

79 The creation of the legislative council in 1834 and the Local Government Ordinance 9 of 1836. Le Cordeur (n 39) 90-92; Kennedy & Schlosberg (n 5) 12.

80 Ordinance 29 of 1852 as amended by order in council dated 11 March 1853 introduced a two-chamber parliament to be elected by males earning fifty pounds per year or owning property with a rental value of twenty five pounds per year. S 17 of *The Parliamentary Voters' Registration Act* 14 of 1887 (to make better provision for the registration of persons entitled to the electoral franchise under the Constitution Ordinance) did not recognise tribal communal tenure as qualification. *The Franchise and Ballot Act* 9 of 1892 increased the property qualification to seventy five pounds and introduced a literacy test. Le Cordeur (n 39) 91f; Benyon "The British Colonies" in Cameron & Spies (n 3) 161f.

81 Kennedy & Schlosberg (n 5) 16ff.

82 Edgecombe (n 43) 175.

83 30 000 Whites, 25 000 Indians and 400 000 Zulus.

84 Kennedy & Schlosberg (n 5) 25f.

85 Law 11 of 1865 *Disqualifying Certain Natives from Exercising Electoral Franchise*. This statute for all practical purposes excluded natives from the franchise; by 1905 only three black Natalians had had the vote. Edgecombe (n 43) 175.

86 Spies "Reconstruction and unification, 1902-1910" in Cameron & Spies (n 3) 219-227.

87 The Vereeniging Peace Treaty of 31 May 1902 proclaimed British sovereignty, but promised self-government. Clause 8 postponed the decision on the black franchise till after the granting of self-government.

88 Spies (n 86) 225f.

5 The Union of South Africa

In 1908 the failed Customs and Railway Conference passed resolutions proposing a national convention to prepare a draft Constitution for a South African Union. The colonial parliaments approved the final draft, the Bill passed through the parliament of the United Kingdom and the Union was established in 1910.⁸⁹ The leading characteristic of this Constitution was the supremacy of the legislature and the consequent lack of judicial review.⁹⁰ The government resided in Pretoria, parliament in Cape Town and the Appellate Division⁹¹ of the Supreme Court⁹² in Bloemfontein. The latter was established to achieve uniformity of laws.⁹³ English and Dutch were the official languages of the Union.⁹⁴ The multiracial Cape franchise was incorporated and entrenched in sections 35 and 152,⁹⁵ the administration of native affairs vested in the Governor-General-in-Council,⁹⁶ and this policy of white co-optation remained one of the foundations of the Union of South Africa.⁹⁷ Its success was exemplified by the support the dominion provided to the British Empire in both World Wars.

The Union would introduce the prototype of the center-periphery model:⁹⁸ part of the country was engaged in highly sophisticated mining for gold, diamonds, coal and other minerals, around which mining industry secondary industries developed. All industries had enormous need for labour and food. Commercial farming around the industrial areas blossomed and increased the demand for labour. Meanwhile, in the remote parts of the country, the majority of the population continued traditional subsistence farming.⁹⁹

89 *Idem* 225ff.

90 Kennedy & Schlosberg (n 5) 83ff. *Rex v McChlery* 1912 AD 199.

91 S 96 of the *South Africa Act* 1909 (9 Ed 7 c 9).

92 Cf the *South Africa Act* of 1909 (n 91). Part VI (ss 95-116) of this Act is titled *The Supreme Court of South Africa*. S 98 transformed the several Supreme Courts of the four colonies into provincial divisions of the Supreme Court of South Africa.

93 Cf Letter of Sir Henry de Villiers to AG McGregor of 27 December 1889 in Walker *Lord de Villiers and his Times* (1925) 111.

94 In the Cape Colony the *Constitution Ordinance Amendment Act* 1 of 1882 allowed members of Parliament to conduct debates in English or Dutch. The *Dutch Language Judicial Use Act* 21 of 1884 and the *Dutch Language Judicial Use Amendment Act* 25 of 1908 compelled both superior and inferior courts to allow the use of both languages.

95 The other entrenched clause was s 137 which established English and Dutch as the two official languages of the Union. These sections could only be amended by a two-thirds majority in both Houses of Parliament.

96 S 147 of the *South Africa Act* 1909 (n 91). The meaning of "governor-general-in-council" was defined in s 13 of the same Act as the governor-general acting with the advice of the executive council.

97 In 1931 the Statute of Westminster (22 Geo 5 c 4) gave the Union sovereign independence, which was affirmed by the *Status of the Union Act* 69 of 1934.

98 Hawthorne "Distribution of wealth, the dependency theory and the law of contract" 2006 *THRHR* 59ff.

99 The *Natives Land Act* 27 of 1913 which purported to maintain the *status quo* regarding the ownership of land by describing native areas in the schedule to the Act and prohibiting acquisition outside these areas.

Political events reflected the economic, national and racial divides and set the scene for a tripartite dispensation which would characterise the South African jurisdiction: as Brit and Boer vied for power, the black population provided the labour in agriculture, mines and developing industry.¹⁰⁰ From 1909 until 1948 the British held political, economic and cultural power. In consequence, the legal development followed the pattern of the Cape Colony during the nineteenth century. A South African legal system therefore developed from the following sources and in the following order: the law of the four provinces, English law, the translated Roman-Dutch authorities and German pandectists.

6 1948-1994

A new watershed was reached in 1948 when the electorate abandoned one of the intellectual forces behind the establishment of the United Nations in favour of the National Party. Impending decolonisation and majority rule led a founder nation of the United Nations into a doomed experiment, which lasted until 1994 when one of the consequences of the end of the cold war was the advent of democracy on the Southern tip of the African continent.

The National Party which came to power in 1948¹⁰¹ relied heavily on the Apartheid slogan in the election campaign and after their victory the government commenced to implement this ideology by means of legislation.¹⁰² The racial issue dated back to the origin of white settlement when slaves were imported during the rule of the Dutch East India Company.¹⁰³ Although the British abolished

100 Spies "Unity and disunity, 1910-1924" in Cameron & Spies (n 3) 231-247; Murray & Stadler "From the pact to the advent of Apartheid, 1924-1948" in Cameron & Spies (n 3) 248-270.

101 Coetzer "The era of Apartheid, 1948-1961" in Cameron & Spies (n 3) 271ff. Another milestone was the departure from the Commonwealth on the establishment of the Republic of South Africa in 1961. Davenport "From referendum to referendum, 1961-1984" in Cameron & Spies (n 3) 303ff.

102 Although there was a myriad of Apartheid statutes the foundation was found in the following Acts: The *Prohibition of Mixed Marriages Act* 55 of 1949 and the *Immorality Amendment Act* 21 of 1950 prohibited marriages and sex between whites and people of other colours. The *Population Registration Act* 30 of 1950 introduced classification of every person according to race. The *Group Areas Act* 41 of 1950 introduced residential separation between the races and the implementation thereof meant that non-whites were removed from their homes to separate areas. The *Bantu Authorities Act* 68 of 1951 abolished the Natives Representative Council and made provision for the establishment of homelands and tribal authorities (ss 2-4). The ultimate aim was to concentrate the various black peoples in their respective territories where each group could develop into a self-sufficient unit. The *Bantu Education Act* 47 of 1953 introduced native education under the auspices of the Department of Native Affairs. The *Reservation of Separate Amenities Act* 49 of 1953 regulated the use of public amenities on a racial basis with the objective to prevent racial mixing. The *Natives (Abolition of Passes and Co-ordination of Documents) Act* 67 of 1952 compelled black people to carry identity documents at all times to control their movements. The *Natives (Prohibition of Interdicts) Act* 64 of 1956 took away black peoples' right to have access to the courts to question the validity of forced removal orders. The *Native (Urban Areas) Consolidation Act* 25 of 1945 prohibited black people to remain in a town for longer than seventy two hours without special consent, while the *Native Building Workers Act* 27 of 1951 made it a criminal offence for a black person to perform skilled work unless specially allowed.

103 The first cargoes of slaves arrived in 1658. Hahlo & Kahn (n 2) 527.

slavery¹⁰⁴ and made provision for a qualified franchise, both Boer Republics in a short time enacted Constitutions in terms of which the black population within their territory did not have citizenship. The multiracial Cape franchise was soon deleted from the political scene and the manner in which it was orchestrated illustrates the essence of the “rule of law” during the Apartheid years to perfection.¹⁰⁵ Another pivotal question, namely the ownership of land,¹⁰⁶ also predated 1948 as this matter was supposedly settled in 1913 by the *Native Land Act*.¹⁰⁷

For a period of nearly fifty years the policy of Apartheid was implemented and justified by the National Party government and its adherents by a variety of arguments, which ranged from the improbable to the impossible.¹⁰⁸ However, the wisdom of hindsight teaches today that not only was Apartheid a morally indefensible, unjust, racist and evil doctrine, but that its practical implementation caused enormous economic and human hardship.¹⁰⁹ It also limited the prosperity and harmony of South Africa and its neighbouring countries in a manner, the enormity of which is only slowly becoming visible now. However, economic pressures¹¹⁰ forced the Nationalist government to enter into negotiations with the African National Congress¹¹¹ and paved the way for the transition to democracy in 1994.

104 Cf *supra* n 31.

105 *Harris v (Dönges) Minister of the Interior* 1952 (2) SA 428 (A). For the resulting manipulation of the Appellate Division of the Supreme Court and the enlargement of the senate, see Coetzer (n 101) at 276f.

106 Van der Walt “Towards the development of post-apartheid land law: an exploratory survey” 1990 *De Jure* 1-45.

107 Act 27 of 1913 supplemented by the *Development Trust and Land Act* 18 of 1936. Olivier & Du Plessis “Swart grondbeheer buite die stedelike gebiede en die nasionale state: Agtergrond en oorsig” 1990 *De Jure* 285-314.

108 Eg that its origins were found in the Bible; that separate but equal amenities were provided; that the blacks themselves preferred it this way; that the whites were the original inhabitants of the area etc.

109 The crimes against humanity, which were perpetrated during the Apartheid years, have become public as the result of the work of the Truth and Reconciliation Commission.

110 Welsh (n 4) 491, 495, 502, 505.

111 In 1949 the ANC (established in 1912) displayed open resistance and accepted a militant programme of action. Especially the Youth League under the leadership of Walter Sisulu embraced Black Nationalism and advocated both lawful and unlawful mass action. In 1950 when half the black labour force on the Witwatersrand stayed away from work, strikers were killed in clashes with the police. In the early fifties the ANC, the Indian Congress and the Franchise Action Council (a body established by the Coloureds to oppose their removal from the voters' lists) organised resistance campaigns against discriminatory legislation. The government answered with stricter legislation to clamp down on dissent, but the membership of the ANC increased and the international community started to take notice of events in South Africa. At the Congress of the People in Kliptown in 1955 more than 3000 delegates adopted the Freedom Charter which demanded equal rights for all in a democratic state. The response of the Nationalist government was police raids and arrest for high treason. Some black nationalists viewed the Charter as a betrayal of Black Nationalism and in 1959 the Pan African Congress was established to claim “Africa for the Africans”. The Sharpsville and Langa tragedies in 1960 heralded a new phase. A demonstration against the pass laws led to police violence leaving seventy one people dead and hundreds injured. The Verwoerd government declared a state of emergency, detained nearly 12 000 people and banned the ANC and the PAC, while whites and blacks fled the country. The struggle moved underground, South Africa left the British Commonwealth and gradually became a pariah amongst civilised nations.

7 Legal development from Union into the twenty-first century

During Union a second division appeared within South African law, a schism which would be aggravated after 1948. The recognition of Afrikaans as a language in 1925¹¹² was followed by transformation of certain universities into bastions of Afrikaans learning and in due course a dichotomy in legal education¹¹³ and legal tradition¹¹⁴ became entrenched as Afrikaner nationalism found a part of its identity in “anti-Englishness”. Thus, as Afrikaner political power gained momentum, after 1948 Afrikaner legal scholars¹¹⁵ as well as Afrikaner members of the judiciary¹¹⁶ attempted to rid South African law of English influences, a movement known as purism.¹¹⁷ A similar divide would position the legal fraternity into liberal and conservative paradigms.¹¹⁸ The role of private law has been largely ignored in studies of Apartheid and transitional justice and views are divided whether the common law in particular was tainted by Apartheid.¹¹⁹

A watershed has been the introduction of the Constitution which proclaims itself to be the supreme law of the land. In the new democratic South Africa the Constitution rules supreme and directs the development of society.¹²⁰ The new Constitution of the Republic of South Africa contains a Bill of Rights in which the various human rights are entrenched and protected.¹²¹ The overriding human right in the Constitution is human dignity.¹²² Thus constitutional supremacy and

112 Murray & Stadler (n 100) 249; Welsh (n 4) 401.

113 Steyn “Regsbank en regs fakulteit” 1967 *THRHR* 101. Cf, for example, the essays in Kahn (ed) *Select South African Legal Problems. Essays in Memory of RG McKerron* (1974) and Van Warmelo et al (eds) *Huldigingsbundel Aangebied aan Professor Daniel Pont op sy Vyf-en-Sestigste Verjaarsdag* (1970).

114 Hahlo & Kahn (n 2) 586ff.

115 Eg JC de Wet and P van Warmelo. See, eg, Gauntlett (ed) *JC Noster; ‘n Feesbundel* (1979); Joubert (ed) *Petere Fontes: LC Steyn-Gedenk bundel* (1980); Van der Westhuizen (ed) *Paul van Warmelo Huldigingsbundel* (1984).

116 Prominent examples are Steyn CJ (*Trust Bank van Afrika Bpk v Eksteen* 1963 (3) SA 402 (AD); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD)); Van der Heever JA (*Baines Motors v Piek* 1955 (1) SA 534 (AD); *Preller v Jordaan* 1956 (1) SA 483 (AD)); and Joubert JA (*Bank of Lisbon & South Africa v De Ornelas* 1988 (3) SA 580 (A)). Cameron “Legal chauvenism, executive-mindedness and Justice. LC Steyn’s impact on South African law” 1982 *SALJ* 38. Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985).

117 Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 137.

118 Roux “Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court” 2004 *SAJHR* 532f for further details. Also Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001).

119 Roederer “The transformation of South African private law after ten years of democracy: the role of torts (delict) in the consolidation of democracy” 2007 *Bepress Legal Series* 740 1-76; <http://law.bepress.com/expresso/eps/740> (27 November 2007); Klug “Law under and after Apartheid. Abel’s sociological analysis” 2000 *Law & Social Inquiry* 657-667.

120 The Constitution is expressly value-based. See ss 1, 7, 39(1) & (2).

121 Chapter 2 ss 7-40.

122 Ss 1, 7 & 10.

concomitant judicial review have been introduced, although not yet fully entrenched.¹²³

The South African Constitution¹²⁴ distinguishes between legislation, the common law and indigenous law. This means that the South African legal system is not codified; it is a mixed legal system. It is mixed in more than one way: between Western law and indigenous law and between the Romano-Germanic tradition and the Anglo-American or common-law tradition.

Several new directions should be mentioned: (1) Section 39 (1) instructs the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and (2) Section 39 (2) provides that the courts must develop the common law or indigenous law in the spirit, purport and objects of the Bill of Rights. Nevertheless, the response of the judiciary in the field of private law has been cautious and on the conservative side.¹²⁵ The moral transformation of South African law¹²⁶ has essentially taken place within constitutional and Human Rights law.¹²⁷

The common law¹²⁸ appears to have reached the stage of development where consultation of the original sources has become superfluous.¹²⁹ As the above shows, political events appear to bear a limited effect on this branch of the law. A number of statutes have directed private law in new directions: employment equity, land reform,¹³⁰ security of tenure¹³¹ and consumer protection.¹³²

123 Gordon & Bruce *Transformation and the Independence of the Judiciary in South Africa* (2007).

124 See s 39(2).

125 Tladi "Breathing constitutional values into the law of contract: freedom of contract and the Constitution" in Belovsky & Skrejek (eds) *The Roman Law Tradition in Societies in Transition* (2003) 97-111; Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157-176; Hawthorne "The principle of equality impacts on the classical law of contract" 1999 *THRHR* 597-603; Hawthorne "A new millennium, a new approach?" 2001 *THRHR* 511-517; Hawthorne "Closing of the open norms in the law of contract" 2004 *THRHR* 294-302; Jordaan "The constitutional impact on the law of contract in perspective" 2004 *De Jure* 58-66.

126 Chaskalson "From wickedness to equality: the moral transformation of South African law" 2003 *Int J of Constitutional Law* 590-609.

127 Botha "Democracy and rights: Constitutional interpretation in a postrealist world" 2000 *THRHR* 561-582; Carpenter "Equality and non-discrimination in the new South African constitutional order (1): The early cases" 2001 *THRHR* 409-423; Carpenter "Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions" 2001 *THRHR* 619-642; Carpenter "Equality and non-discrimination in the new South African constitutional order (3): The saga continues" 2002 *THRHR* 37-59; Carpenter "Equality and non-discrimination in the new South African constitutional order (4): Update" 2002 *THRHR* 177-186.

128 For a detailed discussion see Thomas "The South African common law into the 21st century" 2005 *TSAR* 292-299.

129 As wished for by Lee *Introduction to Roman-Dutch Law* (1931) at 25. Today the majority of practitioners, judicial officers and academics do not and cannot consult or even find these "old folios and quartos".

130 The *Restitution of Land Rights Act* 22 of 1994, the *Development Facilitation Act* 67 of 1995, and the *Communal Property Associations Act* 28 of 1996. See Van der Walt "Roman law, fundamental rights, and land reform in Southern Africa" 1998 *THRHR* 400-423.

131 The *Restitution of Land Rights Act* 22 of 1994; The *Land Reform (Labour Tenants) Act* 3 of 1996; the *Extension of Security of Tenure Act* 62 of 1997; the *Residential Landlord and Tenant Act* 3 of 1997; (Gauteng; repealed in 2001); the *Land Affairs General Amendments Act* 61 of 1998; the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

Indigenous law also remains in flux.¹³³

As the Constitution provides for eleven official languages, the dominance of Afrikaans and English has been terminated, which is also bound to have implications for legal culture.

Legal education has been modernised. During the early nineties of the last century Latin was removed as requirement for legal qualification; in the new LLB curriculum¹³⁴ there is no place for foreign languages. The project to translate the Latin and Dutch sources was discontinued by the South Law Commission during the late 1980s.

From the above it is clear that the South African common law finds itself at a crossroads and it is an open question whether its new direction will be dictated by globalisation resulting in an increasing number of international trade law transplants or by development of African Union law or by Africanisation of South African law.¹³⁵

7 1 Courts

Section 165 of the Constitution vests the judicial authority in the courts. Section 166 describes the various courts and their hierarchy: the Constitutional Court,¹³⁶ the Supreme Court of Appeal,¹³⁷ the High Courts, and the Magistrates' Courts. The thirteen High Courts replace the Supreme Courts

Wethmar "The traditional private law property concept versus the South African constitutional property concept" in Belovsky & Skrejpek (eds) (n 125) 125-128; Hawthorne "Statutory illegality of residential leases" 1999 *THRHR* 128-131; Hawthorne "Restrictive eviction procedures" 2003 *THRHR* 655-660; Roux (n 118) 511-543.

132 Hawthorne "Making public knowledge, making knowledge public: Information obligations effect truth-in-lending and responsible lending" 2007 *SAPR/PL* 477-490.

133 Van Niekerk "Customary law, public policy and narrative in the courts" 2000 *THRHR* 403-417; Nicholson "The realisation of human rights within the context of African customary marriages" 2003 *THRHR* 373-389; Rautenbach "The administration of black estates: Life before and after 5 December 2002" 2004 *THRHR* 216-229; Rautenbach & Du Plessis "South African Law Commission's proposals for customary law of succession; retrogression or progression?" 2003 *De Jure* 20-31; Mofokeng "The lobolo agreement as the 'silent' prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277-289; Bekker "Inheemse reg – 'n pleidooi vir die ontwikkeling van 'n nuwe jurisprudence" 2006 *THRHR* 529-546; Kotzé & Rautenbach "Bereddering van intestate boedels van swart persone: Van toeka tot nou" 2007 *THRHR* 43-65; Bakker "The new unofficial customary marriage: Application of s 7(6) of the Recognition of Customary Marriages Act 120 of 1998" 2007 *THRHR* 481-489.

134 Introduced by the *Qualification of Legal Practitioners Amendment Act* 78 of 1997 which provides that LLB is the only legal qualification for admission and enrolment as advocate or attorney.

135 As repeatedly called for during the month of October by the Judge President of the Cape of Good Hope Provincial Division of the High Court; cf www.legalbrief.co.za (24 October 2005 and 22 October 2007).

136 S 167 (3), (4) and (5) of the Constitution set out the jurisdiction of this court.

137 S 168 (3) of the Constitution grants this court appeal jurisdiction in any matter.

created by the *South Africa Act*¹³⁸ as well as the Supreme Courts of the four independent homelands.¹³⁹ The High Court is a court of first instance, but also serves as a court of appeal from the Magistrates' Court.¹⁴⁰ The latter are divided in districts and regional courts and have both civil and criminal jurisdiction.¹⁴¹

Although the Constitution does not mention the courts of chiefs and headmen, section 16(1) of Schedule 6 of the Constitution ("Transitional Arrangements") provides that courts of traditional leaders continue to function and to exercise jurisdiction in terms of the legislation applicable. In consequence, chiefs and headmen continue to exercise both civil and criminal jurisdiction over tribal members in their areas.¹⁴²

Specialised courts¹⁴³ are the small claims court,¹⁴⁴ labour courts,¹⁴⁵ land claim courts,¹⁴⁶ the income tax court,¹⁴⁷ the competition courts,¹⁴⁸ the electoral court,¹⁴⁹ the national consumer tribunal,¹⁵⁰ the divorce court,¹⁵¹ the children's court,¹⁵² the maintenance court¹⁵³ and the equality court.¹⁵⁴

7.2 Legal profession

The legal profession developed on British lines, which means a division in two branches, namely advocates and solicitors.¹⁵⁵ Solicitors or attorneys are

-
- 138 Ss 95-116 of this Act were replaced by the *Supreme Court Act* 59 of 1959. This Act preserved the court structure but increased the number of provincial divisions to six, three of which had local divisions.
- 139 Transkei, Ciskei, Bophuthatswana and Venda, the so-called TBVC states.
- 140 For further details Theophilopoulos, Rowan, Van Heerden & Boraine *Fundamental Principles of Civil Procedure* (2006) 10-12.
- 141 S 170 of the Constitution prohibits a Magistrates' Court to enquire into and rule on the constitutionality of any legislature or any conduct of the president.
- 142 In terms of ss 12 and 20 of the *Black Administration Act* 38 of 1927 which was repealed in 2005. Pillay & Prinsloo "The changing face of 'traditional courts'" 1995 *De Jure* 383-395.
- 143 Theophilopoulos *et al* (n 140) 13ff.
- 144 Constituted by the *Small Claims Courts Act* 61 of 1984.
- 145 The Labour Court and the Labour Appeal Court established by the *Labour Relations Act* 66 of 1995. The Labour Court has exclusive jurisdiction in all matters concerning the *Labour Relations Act* and any other relevant statute.
- 146 S 22 of the *Restitution of Land Rights Act* 22 of 1994.
- 147 S 83 of the *Income Tax Act* 58 of 1962.
- 148 The Competition Tribunal and the Competition Appeal Court established in terms of the *Competition Act* 98 of 1998.
- 149 S 18 of the *Electoral Act* 73 of 1998.
- 150 Established by s 26 of the *National Credit Act* 34 of 2005.
- 151 Established by s 10 of the *Black Administration Act* 38 of 1927, amended by the *Divorce Court Amendment Act* 65 of 1997.
- 152 Established by the *Children's Act* 33 of 1960 and preserved in the *Child Care Act* 73 of 1983 when the latter statute replaced the *Children's Act* in 1983.
- 153 Established by the *Maintenance Act* 23 of 1963 and preserved in the *Maintenance Act* 99 of 1998.
- 154 S 16 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 provides that every Magistrates' Court and every High Court is also an equality court.
- 155 The academic qualification for both is the LLB.

general practitioners,¹⁵⁶ while advocates are specialists in court proceedings¹⁵⁷ and legal opinions and must be briefed by an attorney. Advocates or barristers qualify at university and are admitted by the High Court for practice before that court. The *Admission of Advocates Act*¹⁵⁸ does not require that an advocate has to be a member of a bar, but those advocates who are members of a bar have to undergo a period of training (one year) in pupillage with a member of the bar and sit an examination; they are subsequently regulated by their bar association.

Attorneys take the same university examination and require two year service in the office of a qualified practicing attorney. Attendance of a practical legal training course or community service can shorten the period, after which candidate attorneys write an examination set by their provincial law society.

7 3 Universities

The South African College established in 1829 commenced tuition in law in 1859. Shortly after the turn of the twentieth century universities were established along provincial and language lines. Apartheid led to a second wave of new universities as every population group was provided with a tertiary institution.¹⁵⁹ During 2004 a programme of mergers and consolidation has resulted in twenty-three tertiary institutions¹⁶⁰ for a population of forty-eight million inhabitants.

156 Attorneys must be members of a law society, which regulates and disciplines their behaviour: The *Attorneys Act* 53 of 1979.

157 Since 1995 attorneys have the right to appear in the High Court: The *Right of Appearance in Courts Act* 62 of 1995.

158 Act 74 of 1964.

159 Border Technikon, Cape Technikon, Durban Institute of Technology, Eastern Cape Technikon, Mangosuthu Technikon, Medical University of Southern Africa, Peninsula Technikon, Port Elizabeth Technikon, Potchefstroom University for CHE, Rand Afrikaans University, Rhodes University, Stellenbosch University, Technikon Free State, Technikon Northern Gauteng, Technikon North-West, Technikon Pretoria, Technikon Southern Africa, Technikon Witwatersrand, University of Cape Town, University of Durban-Westville, University of the Free State, University of Fort Hare, University of Natal, University of the North, University of the North-West, University of Port Elizabeth, University of Pretoria, University of South Africa, University of Transkei, University of Venda, University of the Western Cape, University of the Witwatersrand, University of Zululand, Vista University, Vaal Triangle Technikon.

160 Cape Peninsula University of Technology, Central University of Technology, Free State, Durban Institute of Technology, Mangosuthu Technikon, Nelson Mandela Metropolitan University, North-West University, Rhodes University, Stellenbosch University, Tshwane University of Technology, University of Cape Town, University of Fort Hare, University of the Free State, University of Johannesburg, University of KwaZulu-Natal, University of Limpopo, University of Pretoria, University of South Africa, University of Venda, University of the Western Cape, University of the Witwatersrand, University of Zululand, Vaal University of Technology, Walter Sisulu University.

8 Conclusion

The varied history of South Africa makes it possible to investigate to what extent language, culture, economic and political ideology are the determinants of a legal system of a country.

It is generally accepted that the so-called mother tongue, the language a person is brought up in, determines a person's thinking patterns and culture. Legal tradition is an integral part of culture and the backbone of a legal system. South African history shows that during the colonial days the Dutch language was superseded by English, which in due course shared with Afrikaans, until the present recognition of eleven official languages.

It is a widely held conviction that both economic and political ideology finds important reflection in the legal system of a country. Although the political and economic policies of the VOC and the British Empire in respect of South Africa differed vastly from the same of the sovereign country, the territory always fell within the ambit of the capitalist mode of production. The transition from Apartheid towards the post-Apartheid state has primarily had political consequences with moderate socio-economic changes.

8.1 Three pillars of South African private law

The trinity of a market-orientated legal system is found in freedom of contract, sanctity of private ownership and tort liability. These were the pillars of Roman-Dutch law, albeit applied by a monopolist trading company in its private domain.¹⁶¹ The fact that the Cape was owned and ruled by the VOC, a monopolistic company which regulated and controlled life and business at the Cape in terms of its commercial objectives, did not affect administration of a legal system in which freedom of contract¹⁶² and private ownership ruled supreme.

The history of South African private law shows that the dominance of and inroads made by English law, the resulting purism, the marginalisation of indigenous law, and the disastrous social engineering of Apartheid, have hardly touched the legal mechanisms of the South African market place. Whether this "business as usual" approach is an expression of the immorality of capitalism,

161 Cf n 8 and text to it above. In 1792 free trade was granted.

162 Grotius achieved international fame with his treatise on the freedom of the seas and implicit free trade: *Mare Liberum seu de Jure quod Batavis Competit ad Indica Commercia* (1633).

legal formalism,¹⁶³ legal realism, legal conservatism or old-fashioned legal positivism is a matter of academic debate.¹⁶⁴ Conservatism has proven impervious to political and economical pressures in that the above principles have remained beacons throughout the history of South African private law.

8 2 Harmonisation

This article addresses the legal history of the country from the context of the African Union. The purpose is to examine the possibility of harmonisation of certain segments of the legal system which are essential for a common economic market within this Union. South Africa has a so-called mixed jurisdiction, which is explained by the colonial history and the change from Dutch to British rule. However, at some stage of its history every country in Africa has been what is euphemistically called a colony, since Africa has from antiquity until today been the target of foreign traders, invaders, colonisers and “investors”, be it Israelites,¹⁶⁵ Phoenicians,¹⁶⁶ Greeks, Indians, Arabs,¹⁶⁷ Romans, Vandals, Byzantines, Portuguese,¹⁶⁸ Dutch, English, French, Germans, Spanish, Italians, Americans or Chinese.

In consequence every African country will by necessity have a mixed jurisdiction as the colonisers introduced their own law and for pragmatic administrative reasons to a certain degree gave recognition to local law. One result of this recognition has been that the interference with and adaptation of traditional laws by colonial administrators transformed the existing indigenous law into the new form of the so-called colonial indigenous law which co-existed with traditional indigenous law providing another layer in the onion of the law of the South. However, harmonisation in order to create a common market should be limited to the primary fields of the law dealing with economic transactions.

163 Roux (n 118) 534ff.

164 Cf Chanock (n 118); Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (1984); Forsyth (n 116); Dugard “The judicial process, positivism and civil liberty” 1971 *SALJ* 181; Dugard *Human Rights and the South African Legal Order* (1978); Ellman *In a Time of Trouble: Law and Liberty in South Africa’s State of Emergency* (1992); Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998); Abel *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (1995); Klare “Legal culture and transformative constitutionalism” 1998 *SAJHR* 146; Hoexter “Contracts in administrative law: Life after formalism?” 2004 *SALJ* 595; Hawthorne “Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism” 2006 (vol 12-2) *Fundamina* 71-87.

165 In the tenth century BC king Solomon found the riches of the land of Ophir along the East coast of Africa.

166 The Phoenicians of Tyre and Sidon founded Carthage on the North African coast.

167 Merchants from Greece, India and Yemen traded along the East coast of Africa as far down as Dar es Salaam before and into the Christian era. Cf Welsh (n 4) 4.

168 The Portuguese Prince Henry the Navigator (1394-1460) was the driving force behind the maritime exploration along the West coast route of Africa which resulted in the rounding of the Cape of Good Hope by Dias in 1488 thus discovering the sea route into the Indian Ocean. The

Harmonisation is not unification, but should recognise diversity within a framework set out by communal principles. The history of South African private law shows that such objective is achievable. The British method introduced in the Cape colony and subsequently in the Union consisted in the introduction of institutions, structure and process; by placing the focus on legal procedure instead of values, law has become the language of debate between conflicting legal cultures and succeeded in keeping the balance in society. Thus, cross-economical transactions may pave the way for cross-cultural harmonisation as abstract choices between value systems and the consequent conflict are avoided. The role of law in this shift from values to practices should be minimalist, restricted to the case at hand and striving for agreement on the commonalities which will construct the normative skeleton of the African Union.