LAW REFORM IN SOUTH AFRICA: 21 YEARS SINCE THE ESTABLISHMENT OF A SUPREME CONSTITUTIONAL DISPENSATION

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ABSTRACT

The Republic of South Africa has a mixed legal system. It is a hybrid of Roman Dutch common law (influenced by English law), indigenous customary law, legislation at various hierachical levels emanating from different geographical areas, and a supreme justiciable constitution.

Since the system of *apartheid* (formally between 1948 – 1993) was not based on Roman Dutch common law, it necessarily required massive legislative 'law reform'. The dawn of constitutional democracy in South Africa on 27 April 1994, including the incorporation of a justiciable Bill of Rights, once again necessitated large-scale law reform in the South African State in order to dismantle the *apartheid* structure and draconian legal legacy. This process entails both formal reform of the law (by constitutionally-mandated agencies) and institutional law reform (primarily by the South African Law Reform Commission).

Although the various legislative authorities have and going forward will bear the brunt of the reform of existing legislation, the judiciary also has a crucial law-reform function. Certain courts have the jurisdiction to directly review the constitutionality of legislation against the Constitution, including the Bill of Rights. All courts and tribunals have an indirect law-reform function in that they must interpret all law legislation, and develop the common law and customary law in order to promote the spirit purport and objects of the Bill of Rights.

However, law reform in South Africa is not limited to changes and intervention by legislatures, subordinate lawmaking bodies and the judiciary. The South African Law Commission was specifically established to facilitate law reform in the Republic of South

Africa. The Commission is in essence an advisory body whose aim is directed at the renewal and improvement of the law of South Africa on a continuous basis, but it has no lawmaking powers itself.

Apart from the competent lawmakers, the judiciary and the Law Reform Commission, other role players — such as the State Law Advisors, civil society and developments in international law — also play a role in the wide-ranging law reform and fundamental transformation required by the new constitutional dispensation. During the past 21 years these law-reform efforts proved to be effective and successful.

KEYWORDS:

Law reform in South Africa; mixed legal system; supreme Constitution; constitutionalism; Law Reform Commission; statutory law; common law; legislative process; judicial lawmaking; legislative drafting; Chapter Nine institutions.

1 INTRODUCTION

On 10 December 1996 former President, the late Mr Nelson Mandela, signed the South African Constitution of 1996 into law during a ceremony in Sharpeville, South Africa.[1] The date on which the Constitution was signed, interestingly marked International Human Rights Day. This momentous occasion not only heralded fundamental changes to the South African political landscape and legal system in general, but also in relation to law reform in particular.

The central argument in this review is twofold: first, after the end of apartheid in South Africa in 1994 the wide-ranging and discriminatory legislative reform introduced by the system of *apartheid* necessitated massive law reform initiatives in order to rid the legal system of racial discrimination, inequalities and oppression (this in itself requires a brief historical overview to contextualise law reform since 1994); and second, that the required law-reform program — based on both a formal reform of the law, as well as institutional law reform — was indeed succesful.

Before the principle of law reform (both formal and institutional) within the South African legal system is investigated, it is necessary to briefly revisit the meaning of the concept of 'law' and to mention some of its basic tenets. In the introduction to their book Kleyn and Viljoen begin as follows:

> Law is made for and by people. It *[the law]* is not cast in stone. Neither is it elevated above criticism. The law is constantly being recreated. It is thus not a completed monument … but rather an unfinished statute …[2]

The writers further submit that much has been written about what the law is, but that not a single correct answer has been found. Notwithstanding the law's inconclusive definition, some general characteristics of the law have been identified. Such characteristics include: that the law consists of a body of rules or regulations that are directed at facilitating and regulating human interaction (i.e. a set of norms distinguishing good from bad); it orders and structure society and it is created, applied and also reformed by certain institutions of the state (Kleyn and Viljoen p.2). Notwithstanding the intricacies of what law is and how it is created, it has become undoubtedly evident that people need certain rules to guide and regulate their interaction with each other, and also with other things. Rules are needed to order and

structure societies and to determine what actions and conduct are acceptable and what are not.[3]

Consensus further seems to confirm that the law should be more than just a list or series of decrees and rules. It should ideally reflect the shared and often changing values of a particular society (the majority of the population). In instances where the law/legal rules do not reflect such shared values, then often a legitimacy crisis can result with the further negative consequence such as that the law is not supported and complied with. Against such a background it seems obvious that the law ─ as stated by Kleyn and Viljoen ─ is not cast in stone and should be evaluated and adapted (reformed) on a regular basis as per the changing needs and developments of the society (Kleyn and Viljoen p. 3). Legal rules are further cast in language, which must be interpreted so that the law is as far as possible accessible and predictable. In creating or even reforming the law to keep abreast with continuous developments in modern societies, it must be adapted regularly to be and remain effective. Such adaptations, as are discussed below, are mainly facilitated through legislative enactments and also through judicial interpretive exercises. However, lawmaking and law reform are issues that must be approached from the perspective of each specific legal system of each unique society (state). Each legal system determines, to a large extent, what the requirements for law creation and law reform are. The South African legal system is no different in this regard, and it provides for both substantive and procedural requirements that must be adhered to for either a new rule to be 'created' or for an already existing legal norm to be adapted and reformed.

Any discussion or evaluation of law reform from a South African perspective must therefore be evaluated against South African legal history and especially its new supreme constitutional

dispensation. The first part of this review will deal with the formal reform of South African law — development of new legislation, the amendment of existing legislation and the the repeal of redundant and obsolete legislation by the constitutionally-competent and legally-authorised agencies such as the legislatures in the three spheres of government, and to a lesser degree, the judiciary. The second part of the article will focus on the work of the South African Law Reform Commission as principal agent of institutional law reform, mainly in the areas of developing and modernising the law in South Africa.

2 BRIEF OVERVIEW OF THE SOUTH AFRICAN LEGAL HISTORY AND DEVELOPMENT

The South African legal system is characterised as a mixed legal system,[4] initially largely based on Roman Dutch common law and later influenced by English law. As Lourens du Plessis (*An Introduction to Law* (1991) 3rd ed Juta p.71) explains:

> The (official) legal system in South Africa … corresponds in some respects to European-Continental legal systems in the Romano-Germanic or civil law family and other respects to systems in the Anglo-American or common law legal family, especially English law.

However, it stands to reason that the contact between the transplanted Western (colonialist) legal system and the indigenous African legal traditions will — especially after the advent of constitutionalism in 1994 — in future have a profound impact on law reform in South Africa. Roman Dutch law was introduced (and subsequently applied) in South Africa in 1652 when Jan van Riebeeck landed in the Cape to establish an outpost for the *Vereenigde Oost-Indische Compagnie* (VOC). When the British government annexed the Cape in 1806 and established

British rule, Roman Dutch law was allowed to continue in the colony. Apart from the incremental influences of English law in certain areas of the law, Chief Justice De Villiers in *De Villiers v Cape Divional Council* 1875 Buch 50 held (incorrectly, it should be added) that legislation adopted in the Cape after 1806 must be interpreted in accordance with English rules of statutory interpretation.

In 1836 a group of disgruntled settlers of Dutch descent (the Boers) left the Cape Colony to escape British rule. This exodus led to the establishment of two Boer republics in the interior, applying Roman Dutch law in their respective territories. After the Second Anglo-Boer War in 1902 both these republics were colonised by the British government. In 1910 the four British Colonies (Cape, Natal, Orange Free State and Transvaal) were unified as the Union of South Africa in 1910. After Britain adopted the Statute of Westminster in 1931 the Union of South Africa became an independent member of the Commonwealth. In 1948 the National Party came to power. This heralded the formal start of *apartheid* as official state policy (although racial discrimination existed in the colonies and the Union prior to 1948). As a result of the universal rejection of its racial policies the Union of South Africa left the Commonwealth in 1960, and in 1961 it became the Republic of South Africa under the Constitution of 1961.

Apart from the ideology of *apartheid*, the South African constitutional system was — in typical Westminster-fashion — based on sovereigny of parliament, with an official policy of separate development for the various non-white ethnic groups in South Africa. An important document in the context of future law reform in South Africa was the adoption of the Freedom Charter in 1955 in Kliptown, near Johannesburg. This document was adopted by a group of anti-apartheid activists, and had a significant impact on the negotiations which led

the adoption of the both the Interim Constitution and the Constitution of 1996. In 1983 the Constitution Act 110 of 1983 replaced the 1961 Constitution. This Constitution provided for a tri-cameral parliament with limited representation for so-called Coloured and Indian voters, but Blacks were still excluded from this new constitutional system, the so-called 'homelands' being an integral part of the policy of separate development.

On 2 February 1990 the African National Congress and other banned political organisations were unbanned by the South African government, and in 1991 Nelson Mandela was released after 27 years in prison. Lengthy negotiations between the South African government, opposition groups and other role players culminated in the adoption of the Interim Constititon by the then South African parliament in 1993 and the first fully democratic elections in 1994. The Interim Constitution took effect on 27 April 1994, and was replaced by the current Constitution of 1996.

To fully understand (and evaluate) current law reform in South Africa, it is necessary (if not crucial) to understand the historical context of apartheid, and the changes to law required after 1994. It is interesting to note that the system of *apartheid* was not based on the Roman Dutch common law, but required legislative intervention (social engineering). That in itself required law reform on a massive scale. The monumental change from a system of legally-entrenched racial discrimination, inequality, brutal repression of dissedents and the disenfranchisement of the majority of the population, to true democratic constitutionalism based on a justiciable supreme constitution and human rights, opened the door for transformation of society in general, but also for fundamental, widespread law reform in particular. This explains the emphasis on the Constitution as a transformative document, requireing far-reaching legislative 'reverse engineering' to redress the ills of the past.[5]

3 THE DAWN OF TRUE DEMOCRACY AND CONSTITUTIONALISM

As stated above, the old system of racially-based sovereignty of parliament gave way to a non-racial, non-sexist constitutional democracy, based on a justiciable Bill of Rights, universal franchise, socio-economic rights, and of course, the express application of fundamental constitutional values in the post-apartheid legal domain. Through the adoption of a supreme constitution, South Africa was elevated to the status of a true substantive (or material) constitutional state (or *rechtsstaat*, in the German sense of the word). A supreme constitution is not merely another legislative document, but the supreme law (*lex fundamentalis*) of the land. A constitutional state (which has a supreme constitution) is underpinned by two foundations: a formal one (which includes aspects such as the separation of powers, checks and balances on the government, and the principle of legality: in other words, the institutional power map of the country); and a material or substantive one (which refers to a state bound by human rights and a system of fundamental values such as social justice and equality). It is then against this back drop of a constitutional state that the sources of law and law reform in South Africa should be evaluated.

4 SOURCES OF SOUTH AFRICAN LAW (AND FORMAL REFORM OF THE LAW)

Formal reform of the law in South Africa falls within the domain of the various constitutionally-mandated legislatures and subordinate lawmakers, as well as the judiciary (albeit indirectly). Since these agencies are the primary drivers of formal reform of the law in South Africa, a bried description and analysis of this process is necessary.

4.1 Legislation

Although South Africa is a mixed legal system, legislation forms the most important part of South African law. Legislation (or statute) law in South Africa is primarily defined by two legislative instruments: the Interpretation Act 33 of 1957 (the Interpretation Act) defines legislation as any law, proclamation, ordinance, Act of Parliament or other enactment having the force of the law, and all by-laws, rules, regulations or orders. According to the Constitution legislation comprises national and provincial legislation; proclamations, regulations and other instruments of subordinate legislation; old order legislation[6]; and legislation in the new constitutional order since 1994.

The Constitution not only refer to legislation emanating from certain geographical spheres or areas (national, provincial and local authorities), but they also refer to a time-line (old order en post-1994 legislation), as well as a hierarchical distinction (for instance 'instruments of subordinate legislation'). This means that the term 'legislation' in South Africa must be understood, interpreted and applied in terms of a horizontal timeline (old order or post-1994 law), geographical areas of South Africa before and after 27 April 1994, and governmental spheres (national, provincial and local)); and vertical hierarchical authority (the supreme constitution, primary (original) legislation, and delegated (subordinate) legislation). The resulting interpretive problems and application challenges have a direct impact on continuing law reform in South Africa.

4.1.1 The Hierarchical Authority

4.1.1.1 The Constitution:

The Constitution (although not an Act of Parliament) is a special *sui generis* statute and is the supreme law of the Republic. Section 2 (the supremacy clause) of the Constitution reads:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

This means that the Constitution is both the substantive yardstick (through the Bill of Rights, in particular) and transformative driver for law reform in South Africa. The late Ettiene Mureinik ('A bridge to where? Introducing the interim bill of rights' (1994) *South African Journal on Human Rights* 31) referred to the supreme Constitution as a bridge in a divided society: a bridge from a culture of authority (based on sovereignty of parliament) to a culture of justification (based on a supreme constitution).

However, the supremacy clause merely creates the potential of unconstitutionality – it remains for competent courts to invalidate, or competent lawmakers to amend or repeal, the legislation in question, leading to law reform.

Another unique feature of the Constitution is the interpretation clause, which has a direct impact on interpretation of legislation in general, and law reform in particular. Section 39 provides as follows:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 39(1) deals with the interpretation of the Bill of Rights ─ chapter 2 of the Constitution ─ whilst section 39(2) contains the peremptory guidelines regarding the interpretation of all other legislation. Apart from the fact that section 39 creates the opportunity for indirect law reform by the judiciary, it also serves to ensure that the same interpretive methodology is used during 'ordinary' statutory interpretation and the interpretation of the Bill of Rights.

4.1.1.2 Original or Primary Legislation:

Original or primary legislation derives from the original and comprehensive legislative capacity of a plenary and democratically-elected legislative body. This legislative capacity is either derived directly from the Constitution, or is assigned by another Act of Parliament. Original legislation consists of Acts of Parliament since 1910; new provincial Acts of the nine new provincial legislatures since 1994; provincial ordinances of the four 'white' provinces (1910 – 1986); legislation of the former so-called homelands (until 1994); and new local government (municipal) legislation since 1994.

4.1.1.3 Subordinate (delegated) legislation:

An elected legislature may find it necessary to delegate some of its legislative powers to other persons or bodies. These are then vested with subordinate legislative powers under enabling legislation. Subordinate legislation are legislative administrative acts whose validity can be reviewed by the courts.

4.1.2 Timeline: Old order and Post-1994 Legislation

Old-order (pre-1994) legislation is defined by the Constitution as any legislation enacted before the Interim Constitution took effect, and will remain in force until amended or repealed, or declared unconstitutional. Old order legislation that continues in force does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.[7]

4.1.3 Space - Old and New Geographical Areas, and Co-operative Spheres of Government

The Interim Constitution created nine new provinces, replacing the four former provinces (Transvaal, Cape Province, Orange Free State and Natal), the four ‘independent’ homelands (Bophuthatswana, Venda, Transkei and Ciskei) and the six self-governing territories (Lebowa, Gazankulu, Kangwane, Kwandebele, Kwazulu and QwaQwa). Since 1994 the old racially-based local authorities were also consolidated and ‘recreated’ into new categories of municipalities. The new authorities at national, provincial and local level have to contend with both existing and new legislation, applicable to old and new areas of jurisdiction.

The new constitutional order has also introduced a system of co-operative government. The traditional distinction between national, provincial and local government areas of competence and authority still remains, but the rigid hierarchical boundaries between these territorial areas of competency have been blurred. For example, a national Act of Parliament will not necessarily trump a provincial Act in a case of conflict between them.[8]

4.1.4 Changes to Legislation

Common-law rules can be abrogated by disuse, but legislation cannot. It cannot simply disappear: it must be repealed by a competent lawmaking body (*R v Detody* 1926 AD 168) or declared invalid by a court. In terms of the doctrine of separation of powers it is important to distinguish between the terms repeal and invalidation of legislation, and who is authorised to do either. Repeal refers to the process whereby the legislation is deleted, in other words, removed from the statute book. On the other hand, invalidation is when the legislation is declared to be legally unacceptable. The legislation may not be applied any more, but remains on the statute book until removed by a competent lawmaker. Courts may not and do not repeal legislation — they invalidate legislation. Elected legislatures and persons or other bodies enabled by primary legislation are competent lawmakers, and may repeal or amend legislation. An example of this occurred when the Constitutional Court abolished capital punishment in 1995 in the case of *S v Makwanyane* 1995 (3) SA 391 (CC), following a moratorium on the imposition of the death penalty since February 1990. The Court ruled that capital punishment, as provided for in section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977 was in conflict with the Constitution. The invalidated section 277 remained on the statute books (albeit unconstitutional and not implementable) until it was repealed by Parliament with section 35 of the Criminal Law Amendment Act 105 of 1997.

For original legislation the legislative authority of the relevant legislatures includes the power to pass or amend any legislation before them, subject off course to the hierarchical and territorial competencies prescribed by the Constitution (ss 44 and 55 read with s 68 in the case of parliament; ss 104 and 114 in the case of provincial legislatures; and s 156 in the case of municipalities). In the case of subordinate legislation the enabling Act may in some instances expressly state that the power to enact subordinate legislation includes the power to

amend or repeal it. If not, section 10 of the Interpretation Act expressly provides that subordinate legislative authority includes the power to amend or repeal such legislation.

4.1.4.1 Amendment and Repeal of Legislation:

In practice there are two types of amending legislation: the non-textual (indirect) amendment and the textual (direct) amendment. A textual amendment is done by the relevant legislator (original or subordinate) with the necessary authority by means of a formal amendment Act or other amending legislative instrument. A non-textual amendment occurs where there are no direct changes to the actual wording of the principal (initial) legislation, but the 'amending' legislation merely describes the extent of the changes in the law with reference to the provisions that will be affected.[9]

A competent lawmaker may also repeal and replace, or repeal legislation (including date-bound repeal with a so-called sunset clause). A rare form of repeal is implied repeal: where two different enactments dealing with the same matter clash, it is presumed (by the judiciary) that the relevant legislature by implication intended that the later enactment repeals the earlier enactment. The two enactments must both be on the same hierarchical level an regarding repeald be on the same level of generality. The earlier law is not repealed by judiciary, but implicitly by the legislature – the court is merely the "messenger". It must also be stressed that ─ in line with the separation of powers doctrine ─ Parliament cannot confer a power on a delegated legislative body to amend or repeal an Act of Parliament (*Executive Council Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC)).

Delegated (subordinate) legislation owes both its existence and authority from its enabling original legislation. If the enabling Act is declared unconstitutional by a court, the delegated

legislation issued in terms of such an invalidated Act will also cease to exist, unless the court orders otherwise (*Moseneke v Master of the High Court* 2001 2 BCLR 103 (CC)). If the enabling Act is repealed, all the delegated legislation issued in terms of the repealed Act will also cease to exist (*Hatch v Koopoomal* 1936 AD 197).

4.1.4.2 Invalidation of Legislation:

Courts invalidate legislation on constitutional grounds (the legislation is declared unconstitutional because it violates some or other constitutional principle) or because the legislation does not comply with administrative law or other statutory requirements.

When deciding a constitutional matter within its power, the High Court or Supreme Court of Appeal or the Constitutional Court must declare legislation which is inconsistent with the Constitution to be unconstitutional (s 172(1) of the Constitution). Section 167(5) read with section 172(2) of the Constitution means that a declaration of unconstitutionality of legislation by the High Court or Supreme Court of Appeal has no force until Constitutional Court (as apex court) confirms it, but the High Court or Supreme Court of Appeal may make an order which is just and equitable (including appropriate interim relief). Subordinate (delegated) legislation may also be invalidated by a court if it is unconstitutional, or if it does not comply with administrative law (eg vagueness, *ultra vires*, etc).

Competent courts involved in constitutional review (the testing of legislation against the Constitution) may try, if reasonably possible, to modify or adapt the legislation to keep it constitutional and alive. The courts may employ a number of corrective techniques or remedial correction of legislation (so-called reading down, reading up, reading in and severance) in an attempt to keep the legislation in question constitutional and valid.

4.1.5 Statutory Law Reform Through Judicial Interpretation

As mentionedd above, since 1806 South African statute law was influenced by English law. The adoption of legislation was (and largely still is) done in terms Westminster principles, and South African legislative drafters follow the English-based Commonwealth principles of legislative drafting. Flowing from this, as well as other theoretial reasons, the interpretation of legislation also followed typical English-law principles: the use of the plain, grammatical meaning of the legislative text, application of various degrees of literal interpretation and a slavish adherence to the so-called golden rule, in the process leading to a general disregard of legislative context by the courts.

The arrival of a human rights-based legal system under a supreme constitution drastically changed the interpretive methodology of the South African judiciary since 1994. The Constitution is now supreme, and everything and everybody are subject to it. This means that the Constitution as legislation cannot be interpreted in the light of the Interpretation Act or the Roman Dutch common law or the traditional customary law. Everything and everybody, all law and conduct, all canons of interpretation, all traditions and perceptions and procedures are qualified by the Constitution (and subject to possible changes and reform). In *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) 863J Cameron J (currently a justice of the Constitutional Court) summarised this principle very well:

> The Constitution has changed the 'context' of all legal thought and decision-making in South Africa.

Section 39(2) of the Constitution now obliges all courts, tribunals and forums involved in the interpretation of legislation to promote the spirit, purport and objects of the Bill of Rights. During statutory interpretation, the Constitution (and its values) must now be considered

from the outset, irrespective of traditional rules of interpretation (clear texts, plain meanings and so on). Former Chief Justice Ngcobo said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) at paras 72, 80 and 90:

> The starting point in interpreting any legislation is the Constitution … first, the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be capable of such interpretation ... [legislation] must be interpreted purposively to promote the spirit, purport and objects of the Bill of rights ... the emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous.

The interpretation clause in the Constitution introduced a more flexible and purposive approach to statutory interpretation, forcing the judiciary to have proper regard to text, context, constitutional values and legislative history.[10]

This is important, since the bulk of statute law in South africa is old-order legislation (pre-1994). Most of these laws were enacted during apartheid, but must now be interpreted in terms of a new constitutional framework. In *Harksen v President of The RSA* 2000 (5) SA 478 (CC) par 18 the Constitutional Court expressly stated that since the Constitution is the supreme law of the land and all legislation must be read subject to it, it is unnecessary for legislation expressly to incorporate terms of the Constitution. As a result constitutional provisions or values or principles are part of the implied contents of all statutes. This means that the South African courts are now ─ within the constraints of the rule of law and separation of powers ─ also involved in law reform, albeit indirectly.

4.2 Common law and Customary (Indigenous) Law

4.2.1 Roman Dutch Common Law

As noted above South African common law refers to Roman Dutch law, as introduced in the Cape in 1652, and influenced by English law since 1806. Common law can fall away through disuse (eg *Green v Fitzgerald* 1914 AD 88) in which the court held that the common-law crime of adultery was abrogated through disuse), and legislation will always trump the common law.

In addition South African courts always had an inherent power to adapt and develop the common law, but since 1994 the courts are obligated to develop the common law in such a way that it promotes the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution). However, in *S v Masiya* 2007 (2) SACR 435 (CC) the Constitutional Court stressed the fact that in a constitutional democracy the major responsibility for law reform lies with the legislature.

4.2.2 Customary law

Customary law refers to the legal systems of the different indigenous black tribes in South Africa. It is largely unwritten customary law (called 'living law'), some of which have been codified in legislation (known as 'official law'). The rules differ from tribe to tribe, and area to area. It is a communal system, in the past largely ignored by the colonial powers. After Union in 1910 a uniform policy was adopted regarding the recognition and application of customary law. The Black Administration Act 38 of 1927[11] created a special judicial system and application of customary law for black people, but these courts were abolished during the 1980's. Individual customary law is now applied by the ordinary courts in South Africa, as well as traditional courts of chiefs and headmen. However, it is difficult to determine what

customary law is at a given time in a particular area. In terms of section 211(3) of the Constitution the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Furthermore, customary law must be developed by all courts, forums and tribunal in such a way that it promotes the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution).

In *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Others* 2005 (1) SA 580 (CC) the Constitutional Court dealt with a constitutional challenge to the rule of male primogeniture (which allows complete inheritance by the eldest male descendant) as it applies in the African customary law of succession, as well as constitutional challenges to section 23 of the Black Administration Act 38 of 1927, regulations promulgated in terms of that section and section 1(4)(b) of the Intestate Succession Act 81 of 1987. The Constitutional Court upheld the challenges, struck down the impugned statutory provisions and regulations, and put in place a new interim regime to govern intestate succession for black estates.

4.3 Extra-constitutional Drivers of Law Reform

The Constitution recognises and supports traditional and formal law-reform drivers and agencies as discussed above. However, there are a number of important non-formal institutions and other drivers of law reform in South Africa. Although most of these are not provided for in the Constitution, and do not in themselves have any law-making powers, they nevertheless have played an important law-reform role in the past, and undoubtedly will again in the future.

5 INSTITUTIONAL LAW REFORM — THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC) 1973 - 2017

5.1 Introduction

The South African Law Reform Commission (SALRC) was established as an institution to facilitate law reform in South Africa. The Commission dates back to the 1970's and was created before the new constitutional scheme was enacted. The SALRC was specifically established in terms of the South African Law Reform Commission Act 19 of 1973 (the Law Reform Commission Act). According to the long title of the Act, the main objective of the Act is to establish a South African Law Reform Commission and to provide for matters incidental thereto.

The South African Law Reform Commission is a specialised designated institution, mandated with the research of South African law reform with a view to make recommendations for the development and modernisation of the South African legal system.

5.2 Constitution and Objects

The Act makes it clear that the members of the Commission are appointed by the President. In section 3(1)(a)(i)-(ii) the Act determines that the Commission shall consist of the following members: (i) a judge of the Constitutional Court, the Supreme Court of Appeal or a High Court, as Chairperson; (ii) no more than eight persons, who according to the President to be fit for appointment on account of the tenure of a judicial officer or on account of experience as an advocate, as an attorney or as a professor of law at any university, or on account of any other qualification relating to the objects of the Commission. It also provides that no more than three members of the Commission may perform their functions in a full-

time capacity. The President may also appoint one or more additional members if necessary for the investigation of any particular matter by the Commission. Section 3(1)(c) and 3(2)-(3) of the Act provide that a member of the Commission is appointed for a period not longer than five years and such appointment may be revoked at any time by the President if good reasons exists for such revocation. With reference to the objects of the Commission the following are important: In essence the objects of the Commission shall be to do research with reference to all branches of the law of South Africa, and to study and investigate all branches of law in order to make recommendations for the development, improvement, modernisation or reform of the law. According to section 4 of the Act this mandate also includes recommendations regarding the repeal of obsolete or unnecessary provisions; the removal of anomalies; bringing about uniformity in the law in force in the various parts of South Africa; the consolidation or codification of any branch of the law; and steps aimed at making the common law more readily available.

It should be clear from these objectives that the Commission is in essence an advisory body whose aim is directed at the renewal and improvement of the law of South Africa on a continuous basis.[12]

5.3 Powers, Duties and Reports

The Act also provides for specific powers and duties of the Commission. Sections 1 and 5(1) of the Act provide that in order to achieve its objects, the Commission must from time to time draw up programs listing the various matters which, in its opinion, require consideration are included in an order of preference and must submit such programs to the relevant Minister for approval. The Commission may include in any programme any suggestions relating to its objects received from any person or body. As far as possible, the Commission must

investigate the matters that are appearing on its programme as approved or amended by the Minister and may also consult any person or body in a variety of ways. Whilst performing its powers and duties, the provisions of sections 2-6 of the Commissions Act 8 of 1947 will also apply to the Commission. These sections of the Commissions Act deal with issues such as the commission's sittings; powers as to witnesses; sittings to be public; issues of hindering or obstructing a commission and also offences by witnesses. Furthermore, sections 5(1) - (5) of the SALRC Act provide that if after an investigation on a matter the Commission is of the opinion that legislation ought to be enacted, the Commission must prepare relevant draft legislation.[13]

5.4 Committees and Working Methodology

Section 7A of the Act provides for the establishment of certain committees of the Commission. There are two categories: committees appointed by the Commission and consisting of members of the Commission only, such as the working committee; and committees consisting of members of the Commission and persons who are not members of the Commission. The latter members are appointed by the Minister. The object of this second category of committees is to utilise the expertise of persons from outside the Commission and to ensure direct community involvement in the activities of the Commission.[14] Furthermore, the committees of the Commission perform the functions assigned to them by the Commission and are subject to the Commission's directives. Activities performed by committees are deemed to be performed by the Commission and for the purposes of remuneration, members of committees are deemed to be members of the Commission. Section 7A(1)(a) of the Act provides further that, as part of the first category of committees, the Commission has established a working committee which consists of members of the Commission co-opted for meetings according to their availability. This working committee

can be considered as the executive committee of the Commission. In accordance with the Commission's directives, the working committee attends on a continuous basis to routine matters as well as other matters that require urgent attention. The working committee may exercise all the functions of the Commission, excluding the approval of reports. It also considers the inclusion of new investigations in the Commission's program and plans and manages the activities of the Commission's Secretariat.

Section 7A(1)(b) of the Act deals with advisory committees (the second category of committees). In this regard the Commission follows the practice of instituting advisory committees consisting of experts to assist with investigations and to advise the Commission if a specific investigation in the Commission's program so requires. Although the Act does not specifically refer to the appointment of project leaders, it is a common practice for the Commission to appoint a Project Leader for a particular investigation on each research program. Such a project leader could be either a commissioner, a member of an advisory committee or any other person who is neither a commissioner nor a member of an advisory committee.[15] Reportedly the main task of a project leader is to guide the designated research by providing advice and direction regarding a particular research project. If the project leader is also the designated chairperson of a committee, then he or she will also guide the proceedings of the advisory committee.[16] Apart from project leaders mentioned above, the Commission is also assisted by a full-time secretariat. This secretariat consists of an administrative component as well as a professional component. Furthermore, the deputy chief State Law Advisor serves as the secretary of the Commission. In addition, the research component of the secretariat consists of 14 state law advisors from diverse backgrounds. The main task of these State Law Advisors is to conduct the necessary research under the guidance of project leaders, to consult with interested parties, to compile issue papers,

discussion papers and draft reports, and also to carry out other assignments of the Commission.[17]

It should be pointed out that law reform cannot be delivered without high-quality research. The in-house researchers at the Commission are therefore professionally qualified lawyers and the majority of them have vast experience in the areas of law reform and development. As indicated above, the Act provides that the Commission must from time to time draw up programs, listing in order of preference the matters which in the opinion of the Commission require consideration and investigation. Interestingly, any person or body is free to submit proposals for law reform to the Commission. In each case the Commission will consider the merits of a proposal and in some instances a preliminary enquiry is instituted to determine whether the inclusion of a particular matter on the Commission's program is justified. The Commission is also authorised to include matters in the programme on its own accord. Efforts are made to dispose of urgent matters without delay, but since the Commission is required to follow certain procedures, some matters take up considerable time. Other factors such as the availability of funds, skilled research capacity, as well as the nature and extent of a particular enquiry also impact on the disposal timeline of particular issues. Although the practice of 'consultation' is often time-consuming the Commission regards such a practice as an indispensable part of the overall law reform process.[18]

The working methodology of the Committee can perhaps best be summarised as follows: Research is done to authoritatively determine the existing legal position in relation to a particular issue and then to identify shortcomings or deficiencies that need to be rectified. A process of wide consultation then takes place between the researcher, the project leader, the advisory committee if one exists, the general public, relevant stakeholders and also persons

with particular knowledge concerning the matter under investigation. Comparative studies are also carried out in order to enable the Commission to benefit from experiences elsewhere in the world. This particular practice relates to the importance of comparative legal studies. The consultation process is facilitated by the Commission's policy of compiling issue papers as a first step. Issue papers outline the problem or problems encountered within a particular area of law and then invite submissions on possible solutions. These issue papers are distributed as widely as possible for general information and comment and are in appropriate cases also supplemented by specialised workshops (note some of the examples mentioned below). The next step would then be to prepare a discussion paper. Responses received to an issue paper and the outcome of further intensive research form the basis for the preparation of such a discussion paper.[19] Discussion papers contain essential information on the investigation as well as the Commission's initial proposals for reform. In particular, a discussion paper will include a statement of the existing legal position and its deficiencies, a comparative survey as well as a range of possible solutions. In many instances the discussion paper will also include a draft Bill. Members of the public are then informed of the availability of a discussion paper by means of a variety of press releases and other information-sharing mechanisms. Feedback and responses to provisional proposals are then carefully studied before final decisions are made. It should be noted that in appropriate cases the Commission can also hear oral evidence.

After all relevant information has been considered the Commission would then compile its recommendations in a comprehensive report, which will then be submitted to the Minister. In making its recommendations, the Commission concentrate on the following considerations: the general provisions of the Constitution and in particular the need to provide access to justice for all; the protection of rights in general; the need to make the legal process

accessible and affordable; the need to make the law less complicated and finally to give effect to the values and principles underlying the Constitution. Over the years the Commission's discussion papers and reports were of a very high standard, and in many instances universities and other institutions have referred to and prescribed such research publications for discussion and consideration. General feedback suggests that the working methodology of the Commission is not only successful, but well understood and supported.

5.5 Miscellaneous

In terms of section 6(1)-(2) of the Act meetings of the Commission are held at times and places determined by the chairman of the Commission. The majority of members of the Commission constitute a quorum for a meeting. Section 6(4) of the Act provides that the Commission is authorised to regulate the proceedings at its meetings as it deems fit and is also obligated to keep minutes of the proceedings at such meetings. According to the Act, the secretary of the Commission and other officers and employees required for the Commission's functions, are appointed in terms of the Public Service Act 103 of 1994. The Commission may also in certain circumstances employ persons with special knowledge of a particular matter relating to the work of the Commission on a temporary basis. In terms of section 8(1)-(2) of the Act the Commission may also obtain the co-operation of anybody to advise or assist the Commission in the performance of its functions under the Act. Finally, section 9 of the Act also provides for aspects pertaining to the remuneration, allowances, benefits and privileges of members of the Commission.

5.6 Conclusion

Against this background it is clear that the SALRC plays a pivotal role in the improvement and the renewal of the entire legal system of South Africa. The Commission is widely

regarded as a centre of excellence producing ground-breaking legal research. Furthermore, the law reform process of South Africa and the mechanisms applied by the Commission are undoubtedly directed to comply and support the principles and values of the South African Constitution. It is specifically directed to meet the changing needs of a developing society under the safeguard of the rule of law. In the execution of its duties the SALRC strives to uphold a number of important values, including values such as equality, integrity, efficiency and the respect for the dignity of all members with in the legal system. Especially since the dawn of true democracy, initially under the Interim Constitution Act 200 of 1993, as well as the Constitution of 1996, the SALRC has been involved in significant law reform initiatives and developments. Some selected examples are briefly referred to below.

6 EXAMPLES OF RECENT SOUTH AFRICAN LAW REFORM COMMISSION PROJECTS AND DEVELOPMENTS

Since its establishment in 1973, and based on its mandate and internal functioning, the SALRC has in recent years and especially under the guidance of a new constitutional mandate produced a vast number of initiatives and reports. A number of these projects have led to significant examples of law reform developments in the South African legal system. Some of these are briefly discussed below as practical examples to prove that institutional law reform had been successful in South Africa.

6.1 Capital Punishment (1991)

In 1991 in its Interim Report on Group and Human Rights the South African Law Reform Commission described the imposition of the death penalty as ‘highly controversial’.[20] A working paper of the Commission (which preceded the Interim Report) had proposed that the right to life be recognised in a bill of rights, subject to the proviso that the discretionary

imposition of the sentence of death be allowed for the most serious crimes. As a result of the comments it received, the Commission decided to change the draft and to adopt a 'Solomonic solution' under which a futue Constitutional Court would be required to decide whether a right to life expressed in unqualified terms could be circumscribed by a limitation clause contained in a bill of rights. In 1995 the Constitutional Court declared the provision in the Criminal Procedure Act (which provided for the death penalty for certain crimes) unconstitutional (see 3.1.4 above).

6.2 Project 104: Money Laundering and Related Matters (1996)

In an effort to control and manage aspects of money laundering in South Africa, the Commission has in 1996 recommended the implementation of an administrative framework to facilitate the prevention, detention, investigation and prosecution of the practice of money-laundering. The Commission recommended that the administrative framework had to provide for a wide scope of application beyond the banking sector of South Africa and had to include all other role players such as attorneys, accountants, and financial insurers and institutions. These institutions had to ascertain the identity of the persons or institutions with which transactions were to be concluded in the course of a business relationship. Furthermore, institutions had to keep records of certain information regarding the identity of the parties as well as information relating to the specific transactions performed. Transactions exceeding a prescribed threshold also had to be reported. It was also recommended that a statutory body, called the Financial Intelligence Centre, had to be created with a broad mandate to oversee financial affairs in the Republic. Based on this project, the Financial Intelligence Centre Act 38 of 2001 (and its regulations) was later enacted to provide for an extensive system regulating certain financial activities in South Africa.

6.3 Project 94: An International Arbitration Act for South Africa (1998)

With the end of South Africa's economic isolation in 1994 and with the expected increase in regional and international trade and economic links with other countries, the SALRC initiated project 94. The Commission submitted that since many parties to international business transactions favour arbitration as a speedy method for dispute resolution, the South African international arbitration legal regime had to be transformed to bring it in line with international norms.[21] This was particularly necessary since the South African Arbitration Act 42 of 1965 did not contain provisions which expressly dealt with international arbitration. Furthermore, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was also very limited in its application to enforce foreign arbitral awards. The SALRC proposed that a new and effective legislative framework for the resolution of international trade disputes be enacted, based on a holistic approach to international arbitration law. Based on a variety of recommendations made by the Commission, and notwithstanding some 'feet-dragging' by the South African government, Project 94 eventually led to a new arbitration Bill[22] which was recently passed by both houses of South Africa's national parliament, and is set to become law in the Republic in 2018.[23]

6.4 Project 59: Islamic Marriages and Related Matters (2003)

Another important legislative reform project of the SALRC, which has created significant interest, not only in South Africa but also in other foreign jurisdictions, was Project 59.[24] Project 59 was directed to investigate Islamic marriages and related matters and to submit proposals for a new legislative regime to regulate such marriages within the South African legal order. The proposed legislative reform had to include matters such as the age of consent of the parties, the designation of marriage officers entitled to perform Muslim marriages, the recognition of marriages and a variety of other formalities.

It is interesting to note that the particular project was bolstered by an important judicial decision in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) in which the Court gave legal recognition to a Muslim marriage for purposes of the duty to support. The project resulted in the compilation of a variety of discussion papers (eg Discussion Paper 101), and finally the creation of a draft Bill which seeks to give effect to a comprehensive regulatory framework relating to Muslim marriages in South Africa. Although some ten years in the making, this reform process has unfortunately bogged down and no real progress is being made.[25] This is perhaps a good example of where law reform is needed and was initiated in terms of the system, but where the execution and legal reform were abdicated due to a lack of political will and decisiveness.

6.5 Project 124: Privacy and Data Protection (2009)

In recent years, the concern about information protection has increased significantly worldwide as a result of the expansion of electronic commerce and technological developments. The concept of centralised government and the rise of massive credit and insurance industries that manage vast computerised databases have turned into what some have defined as 'the modest records of an insular society into a bazaar of information available to nearly anyone at any price'.[26] Globally the surveillance potential of powerful computer systems prompted demands for specific rules governing the collection and handling of personal information. The question is no longer whether information can be obtained, but rather whether such information should be obtained and, if legally obtained, how it should be used. Another fundamental issue underlying these questions is that if the collection of personal information is allowed by law, the fairness, integrity and effectiveness of such collection and use should also be protected. Against this background it has been reported that

more than 50 countries have enacted information protection statutes at national or federal level and the number of such countries is steadily increasing. The investigation into privacy legislation for South Africa is therefore in line with international trends. It is a legal fact that privacy is a valuable aspect of a person's personality. As a result data and information protection thus forms an element of safeguarding a person's right to privacy. In South Africa the right to privacy is protected in terms of both the common law, and also in terms of section 14 of the Constitution.

However, the constitutional right to privacy is not absolute, but may be limited in terms of law of general application and has to be balanced with other entrenched rights included in the Constitution. Against this background (and following two crucial international instruments The Council of Europe's 1981 Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data and the 1981 Organisation for Economic Co-Operation and Development's Guidelines Governing the Protection of Privacy and Trans-border Data Flows of Personal Data), the SALRC recently embarked on a programme to reform and adapt the South African legal system pertaining to this particular issue. The research, recommendations and draft legislation produced were the result of a thorough consultation process, and the adoption of draft legislation in future by Parliament, the protection of private information should bring South Africa in line with international requirements and developments.[27]

6.6 Project 141: Medico-Legal Claims (2017)

After the appointment of a new board of members of the SALRC in 2013, the Minister of Justice and Constitutional Development invited all state departments to submit views on law reform or any aspect of statutory or common law applicable to the mandate of that particular

ministry for possible inclusion on the Commission's law reform programme. The Department of Health requested the SALRC to investigate medical legal claims. This request was proposed as a result of the challenges faced by the health sector due to the escalation in claims for damages based on medical negligence and the increasing financial implications for the public sector as a whole. After considering the request and conducting a preliminary investigation a proposal paper was compiled, which recommended the inclusion of requests for an investigation into medical legal claims on the SALRC's program. A medico-legal summit was held in March 2015, as well as a medical malpractice workshop in March 2017. The preliminary investigations indicated that no legislation currently exists in South Africa to specifically address legal claims in the medical field, which means that claims based on medical negligence are dealt with under common law. The escalation in medical negligence litigation, and in particular the increasing the quantum of damages sought and awarded, has become a major cause for concern in the public and private health sectors. The SALRC concluded that there is an urgent need to undertake reform of the law in order to regulate a system that will become paralysed if no action is taken. Regardless of the nature of the changes, it was concluded that legislation will be required to effect such changes, which legislation will aid in furthering the implementation of broader government policy, such as the National Development Plan. Although the National Health Act 61 of 2003 provides for a framework for a single health care system, the legislation is still inadequate to deal with the regulation and control of medical legal claims. Currently the SALRC is working through a variety of comments received after a process of public participation was concluded on the topic, and a draft report is to be produced during the next term of the Committee.

6.7 Project 25: New Interpretation Act

As a concluding example it is perhaps interesting to note that some years ago the Commission was with the task of revising the South African statute book for constitutionality, redundancy and obsolescence. One of the Acts to be revised, as part of this important law reform exercise, is the Interpretation Act 33 of 1957. The Interpretation Act was drafted during an era of parliamentary sovereignty, and is neither in line with the current constitutional dispensation, nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994. In 2006 the Commission published discussion paper 112 (Statutory Revision: Review of the Interpretation Act 33 of 1957), but no further legislative developments to repeal and replace the 1957 Act have since occurred, and the project seems to have been shelved for the time being.

7 OTHER DRIVERS OF LAW REFORM

7.1 State Law Advisors

The Office of the Chief State Law Adviser is a branch within the Department of Justice and Constitutional Development. It provides legal advice, representation and legislative drafting services to the executive, all state departments at both national and provincial levels, municipalities, parastatals and independent or autonomous bodies that may refer work to it. It supports the government to achieve its objectives of transforming South African society and redressing past imbalances by providing efficient and cost-effective legal advice, legislative drafting and translation services. Its duties include the drafting and certification of legislation; translation of legislation; writing of legal opinions; scrutiny and certification of all international agreements including extradition agreements; scrutiny and certification of draft subordinate

legislation; review and certification of municipal by-laws; consultation services to organs of state; and performing any other function referred to it by the executive.

The State Law Advisers scrutinise, develop, draft and certify all primary legislation before it is introduced in the Parliament of the Republic of South Africa. It is the responsibility of the State Law Advisers to ensure that draft legislation is compatible with the Constitution and other legal instruments and that it will withstand constitutional muster. In this way, the State Law Advisers make a significant contribution towards the development of South Africa's constitutional jurisprudence ─ and indirectly ─ to law reform.

7.2 Chapter Nine Institutions

One of the unique features of the new South African constitutional dispensation, is the creation and entrechment of certain state institutions designed to provide and support the envisaged system of constitutional democracy and open government. These institutions, often referred to as the 'Chapter Nine' institutions, include institutions such as the Public Protector; the South African Human Rights Commission as well as the office of the Auditor-General, and are independent and subject only to the Constitution and the law (s 181(1)-(2) of the Constitution). The Chapter Nine institutions do not form part of any of the three spehres of government, but are rather tasked to act as checks and balances in relation to the manner in which the government exercise its powers and performs its functions.[28] Apart from their constitutional entrenchment, the Chapter Nine institutions are also afforded certain additional powers through specifically enacted national laws. In this respect they play an important oversight role in investigating certain conduct in state affairs; the promotion, protection and monitoring of human rights in the Republic as well as the auditing and report on accounts and financial management of state departments and administrations.[29] Given their constitutional

status and enhanced statutory powers, the role and importance of the Chapter Nine institutions in relation to issues pertaining to South African law reform, should not be overlooked.

7.3 Application of International law

Section 39(1) of the Consitution provides that internationallaw must be considered during the interpretation of the Bill of Rights. However, international law has another indirect influence on law reform in South Africa.

In terms of section 231 of the Constitution an international treaty becomes law in the Republic when it is enacted into law by national legislation. A good example is the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 which was enacted to ensure that the Rome Statute of the International Criminal Court is effectively implemented in the Republic, and that anything done in terms of the Act conforms with the obligations of the Republic in terms of the Statute, and to provide for the crimes of genocide, crimes against humanity and war crimes. This is a good practical example on how international law impacts on law and law reform in South Africa.

7.4 Calls for Decolonisation of the Law Degree Curriculum

After a number of recent violent demonstrations and calls by radical and disenchanted students for the so-called 'decolonisation' of South African universities, come demands for the decolonisation of the law of South Africa, as well as the curricula of law degrees. The demand is for curricula to have more local content, which implies that the content must be 'African-focused content'. It is argued that the current law and legal structures perpetuate inequality, and decolonisation is about equity, quality, fairness and social justice within South

Africa, where students have been pushing for decolonising law ─ it is about making the South African legal system serve the majority of the population. Since the curricula at South African law school inevitably reflect the positive law of the day, these calls for decolonisation of the law should be seen as part of radical political dynamics which may ─ or not ─ lead to policy changes and possible law reform.

8. CONCLUSION

In his article "Madiba would have agreed: The law is for the protection of the people" (2013) *De Jure* p. 879) former Justice of the Constitutional Court, Johann van der Westhuizen commented as follows: 'The oldest question in legal philosophy is the one most lawyers never think of: What is law and why is it there?'

Perhaps this question, at least in part, can be answered by revisiting the discussion on the consept of law as mentioned in paragraph 1 above. There seems to be some broad concensus that the law is there to protect the people and to manage and hormonise particular societies. However, and notwithstandings one's personal view regarding the origin and purpose of the law, the law not only exists but is also ever evolving. It is perhaps uncontroversial to submit that no modern legal system can withstand the challenges of modern life and to manage the daily competing interests in multi-plural societies, without the ability to adapt and change. Both domestic and even international communities require stable and legitimate legal systems to be in place together with effective mechanisms to provide for legal oversight and legal reform. Such mechanisms, we submit, should rather be pro-active than reactive in managing and controlling the multi-diversities of different legal relationships.

From a South African perspective, it has been highlighted above that the contempory South African legal order, provides for a wide variety of both formal and informal mechanisms to guide and facilitate law reform in the Republic. Such mechanisms, whether they refer to reform of the common law, customary law or statutory legal dispensation, now fall within the framework of a supreme constitutional text and is subject to entrechned constitutional scrutiny and verification.

In *Pharmaceutical Manufacturers Association of SA; In re: Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) (at para 44) Chaskalson P very clearly put this South African legal tradition in a constitutional framework (emphasis added):

> I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. **There is only one system of law.** It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Against the above-mentioned background it should be clear that the past 21 years of law reform in South Africa has been thriving and effective. Both formal reform of the law and institutional law reform proved successful, but much more remains to be done. Provided that political leadership remains committed and supportive of the mechanisms of law reform within the new constitutional order, law reform and legal transformation are set to continue

actively, and perhaps the South African experience can serve as a comparative example for other legal jurisdictions.

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[1] The Constitution of the Republic of South Africa, 1996 (the Constitution). The Constitution repealed the interim Constitution Act 200 of 1993 (the interim Constitution) and commenced on 4 February 1997. The interim Constitution was negotiated by political parties and other stakeholders, and adopted by the Parliament of the previous regime. The Constitution of 1996 was adopted by the Constitutional Assembly and certified by the Constitutional Court. It was initially incorrectly cited as Act 108 of 1996. From the date of commencement of the Citation of Constitutional Laws Act 5 of 2005, no Act number is associated with the Constitution. Any reference to the "Constitution of the Republic of South Africa Act 108 of 1996" in any law in force immediately prior to the commencement of this Act, is be construed as a reference to the "Constitution of the Republic of South Africa, 1996". It refers to itself as "the new"Beginner's Guide for Law Students: 4th ed, Juta and Co (2014) p. 1,Constitution" (item 1 schedule 6 of the Constitution).

[2] *Beginner's Guide for Law Students* (2014) 4th ed Juta p. 1.

[3] For more on this aspect, see Humby *et al* (eds) *Introduction to Law and Legal Skills in South Africa* 6th impression (2016) Oxford University Press p 1)

[4] For a *locus classicus* on the South African legal system and its history see Hahlo HR and E Kahn *The South African Legal System and its Background* 1973 Juta.

[5] This 'corrective law reform' is expressly grounded in the current Constitution, since the preamble to the Constitution states that "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights …".

[6] Defined in terms of item 1 Schedule 6 of the Constitution as any legislation enacted before the Interim Constitution took effect (on 27 April 1994).

[7] Item 3 Schedule 6 of the Constitution deals with the interpretation of terminology in old-order legislation.

[8] See also Bekink B (2016) *Principles of South African Constitutional Law* (2nd ed) LexisNexis.

[9] For example, item 3(2)(b) of Schedule 6 of the Constitution provides that a reference in old order legislation to — amongst others — an Administrator must now be interpreted as a reference to the Premier of a province, and so on.

[10] For more about the changing South African interpretive methodology since 1994, see Du Plessis LM (2002) *Re-interpretation of statutes* LexisNexis; Botha CJ (2012) *Statutory Interpretation: An Introduction for Students* (5th ed) Juta.

[11] Eventually removed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

[12] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 1-2 accessed on 20/11/2017.

[13] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 2 accessed on 20/11/2017.

[14] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 2-3 accessed on 20/11/2017, as well as s 8(2) of the Act.

[15] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 2-3 accessed on 20/1 See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 2-3 accessed on 20/11/2017.1/2017.

[16] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 2-3 accessed on 20/11/2017.

[17] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 4 accessed on 20/11/2017.

[18] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 4 accessed on 20/11/2017.

[19] See http://www.justice.gov.za/salrc/objects.htm#sthash.hP5hobjf.dpbs page 5 accessed on 20/11/2017.

[20] South African Law Commission, Interim Report on Group and Human Rights, Project 58, August 1991, para. 7.31.

[21] See https://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf accessed on 13/12/2017.

[22] The new legislation will provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law (UNCITRAL), into South African law, and the recognition and enforcement of foreign arbitral awards.

[23] See https://pmg.org.za/bill/700/ accessed on 13/12/2017.

[24] See https://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf accessed on 13/12/2017.

[25] See https://pmg.org.za/bill/235/ as accessed on 13/12/2017.

[26] https://www.justice.gov.za/salrc/r_prj124_privacy%20and%20data%20protection2009.pdf accessed on 13/12/2017.

[27] For more on this topic, see the Protection of Personal Information Act 4 of 2013.

[28] See Bekink B *Principles of South African Constitutional Law* note 7 above pp 579 ff.

[29] See sections 182, 184 and 188 of the Constitution respectively; see also the Public Protector Act 23 of 1994; the Human Rights Commission Act 54 of 1994 and the Auditor-General Act 12 of 1995.