

REFLECTIONS ON THE INTERPLAY OF AFRICAN CUSTOMARY LAW AND STATE LAW IN SOUTH AFRICA¹

Gardiol van NIEKERK*

Abstract. *South Africa has a multicultural society in which legal pluralism prevails. Within the dual-systems state-law paradigm, the Western common law is the principal legal system that directs legal development and reform. The common law is hybrid in nature: predominantly founded on the civilian tradition (Roman-Dutch law) but substantially influenced by the common-law tradition (English law). African customary law is recognised as state law but assumes a secondary position. The dominance of the common law is revealed in the interplay of the two state-law systems, but it is evident in judicial decisions that a measure of convergence of the systems has taken place. Attempts at the harmonisation of the two systems of law are one-sided and directed only at the adaptation of the African customary law. This has resulted in the expansion of the existing multiplicity of legal sources by the creation of a new official legal system that has features of the Western common law and vaguely resembles African customary law. Further, the adaptation of the African customary law to bring it in line with the predominantly Western constitutional values has enhanced the divide between the official customary law and the unofficial living African customary law that has developed in accordance with fundamental African juristic postulates.*

Keywords: *African customary law; western common law; state law; civilian tradition; common-law tradition; African tradition; harmonisation; convergence; integration; traditional courts; customary marriage; polygyny; succession; African values; restorative justice; amende honorable; ubuntu*

1 Introduction

European intrusion in Africa, and in particular the so-called “scramble for Africa”, left the continent with multicultural societies and, concomitantly, legal pluralism. In Southern Africa, the legal pluralism is by and large based on a dual-systems theory,² comprising two systems of law as recognised state law.

One group of countries in this region, bound by their legal histories,³ shows remarkable coherence in their legal systems – not only in their substantive law, but also in the regulation of the various legal systems that are recognised and applied. So entwined are the histories of these countries, that an eminent South African judge, who

also served on the benches of many other Southern African countries, dubbed them the “South African Law Association”.⁴ These countries are South Africa, Lesotho, Botswana and Swaziland. Although not originally included in the paradigm, on account of the similarity of their legal histories and systems, logically, Namibia and Zimbabwe also form part of the group.

At present, the two systems of law that are officially recognised in this region are African customary law, the autochthonous law of the region, and the imposed Western or European⁵ common law. The application of both systems is further constitutionally safeguarded throughout the area.⁶ The official legal systems run parallel and interact in restricted, prescribed circumstances. Although both are recognised as state law within the paradigm of “state-law” pluralism, they operate within the confines of a relationship of unequal power: the European common law is dominant and European values generally direct legal development.

But, besides the state-law pluralism, there exists also deep legal pluralism in Southern Africa: there are laws that are unofficially observed by different communities and that are not recognised by the state. These are, for example, the laws of religious communities (in South Africa the Hindu, Muslim and Jewish communities), and living customary law,⁷ that has evolved in synchrony with the needs of indigenous African communities, is applied by non-state tribunals, and that often conflicts with the state-recognised customary law.

The focus of this article will be on the interplay in South Africa of the two systems recognised as state law (the imposed “western” common law and the official African customary law) as well as the interplay of state law (comprising both the common law and state-recognised African customary law) and the living African customary law.

2 African Customary Laws in South Africa

In South Africa, as in the rest of Africa, the problem of a plurality of sources is enhanced by the fact that the various legal systems that are applied are fundamentally different.

The fact that the state-law pluralism in South Africa is based on a dual-systems theory does not mean that in addition to the common law only a single system of African customary law is applied and recognised. South Africa has a complex structure of legal sources – earning it a place amongst the mixed jurisdictions of the world. The common law is hybrid in nature: predominantly civilian but with distinct common-law features. And as for the African customary law, there are numerous indigenous cultural communities observing diverse legal systems that correspond to a lesser or greater extent.

On the one hand, some traditional communities or tribes inhabiting different geographical areas and even different countries in Southern Africa,⁸ share close ethnic, linguistic and cultural bonds and their legal systems are accordingly closely connected.⁹ In fact, the tribal connection is so important in African culture that it frequently takes precedence over the connection with a specific state, especially since the borders of different African states often cut across tribal territories.¹⁰

On the other hand, though, the various customary laws, and the basic institutions of kinship, marriage and succession that lie at the heart of customary law and social ordering, generally show fundamental differences – to such an extent that one of the first scholars to study the African customary laws of the British Dependencies remarked that “there is to-day only a slight body of law common to all the Bantu-speaking tribes of the Union [of South Africa]”.¹¹

South African legislation gives limited effect to the differences in the legal systems of the various groups and, in general, the diverse African customary laws are treated and referred to as a unit in policy documents, legislation and judicial decisions pronouncing on the recognition and application of that law. The reason for this is obvious: from a macro-comparative perspective, African customary laws show sufficient coherence to be regarded as belonging to a separate family of laws, founded in a single African tradition, and intersecting both in the process of legal reasoning and in the basic axioms which underpin such legal reasoning. Furthermore, African customary law is the only “other” law officially recognised in its entirety next to the European or Western law.¹²

3 African Customary Law and “Western” Common Law

3.1 Harmonisation

The prevailing legal pluralism in South Africa has been variously viewed by academics, the courts and the state. Since the introduction of a constitutional democracy, South Africa has not displayed any overt objective to eliminate the existing legal pluralism. On the contrary, it has embraced the notion of a “rainbow nation” and with it the application of its diverse legal systems.¹³ Accordingly, in order to find a workable, practical solution for the management of the various legal systems, a course of action was embarked upon to harmonise the Western law and the African customary law and in so doing, to achieve equality, simplification of the legal system, nation building, modernization and economic development.¹⁴ This goal has been actively pursued by the state since the 1990’s and is apparent in the South African Law Reform Commission’s ongoing projects on “The Harmonisation of the Common Law and the

Indigenous Law” in various fields of the law. The aim with these projects is to remove explicit conflict within the various systems of law through legislative intervention, but simultaneously to retain individual characteristic features of the legal systems, thus ensuring their continued application as separate legal systems. The quandary of managing a multiplicity of legal sources is of course not limited to a national level and certainly not to Africa. In fact, the South African endeavours to accommodate its different sources of law at national level with a view to modernization and economic development remind of similar processes in Europe.

A decade ago the European Commission initiated the idea of a “common” European private law for the development of a single market. The premise was not a total integration of legal concepts, rules and cultures, but rather the coming together of various legal systems through a process of harmonisation or convergence, implying both change and the retention of separate legal systems with their own identities. The drafting of, among others, the much-debated Common Frame of Reference for European Private Law (DCFR) was an off-shoot of this endeavour. In an analysis of the plurality of sources in European private law, Smits¹⁵ shows how the DCFR failed in its primary objective of managing the diversity through harmonisation, ultimately creating universal norms for the region. Interestingly Smits points out that the harmonised European law is regarded as separate from the national law, to the extent that academics discuss the influence of the European law on their national law.¹⁶ As will be shown below, to an extent this is also the result of the harmonisation effort in South Africa.

The objective of harmonisation may be feasible and more easily attained in a region that shares, in essence, similar cultures and more specifically, a homogeneous legal culture. The European legal community has common perceptions of the concept of law, a theory of valid legal sources, a legal methodology, a theory of argumentation and of legitimation of the law, as well as a common basic legal ideology.¹⁷ But harmonisation poses an almost insurmountable problem in Africa where the relevant systems of law differ on a macro-comparative level both with relation to the process of legal reasoning, and in the fundamental postulates that underpin such legal reasoning, such axioms being based on societal values. The legal technique in dispute resolution, legal process and the general approach to law and legal reasoning of the imposed “Western” South African common law is characteristically civilian and hence fundamentally specialised. This gives rise to legalism, conceptualism and rationalism.¹⁸ In contrast, African customary law is characteristically non-specialised and reveals a lack of separation, differentiation and classification with regard to all aspect of social ordering.¹⁹ This diversity in the legal systems also makes convergence difficult but, as will be explained below, not quite impossible.

The question is whether the legislative enactments that have ensued from the harmonisation projects of the South African Law Reform Commission, have indeed accomplished harmonisation, or whether these acts have unintentionally caused the elimination of the plurality of laws, as happened with the DCFR. *Prima facie*, it appears as if the legislation has indeed to an extent realised its goal of harmonisation. However, on a closer scrutiny of the legislation and draft legislation regulating the interaction of the African customary law, and the common law, especially as regards marriage, succession²⁰ and the courts, it becomes clear that harmonisation has occurred only to a very limited extent. I shall explain this with reference to one of these pieces of legislation, the Recognition of Customary Marriages Act 120 of 1998.²¹

This Act was primarily aimed at the recognition of customary marriages and the harmonisation of the marriage laws in South Africa, not at creating universal norms. However, as confirmed by the South African Constitutional Court,²² the process of harmonisation was “inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes”, and took place within the mould of Western values as elicited in the Constitution of the Republic of South Africa, 1996.

In its first case adjudicating on the Bill of Fundamental Rights enshrined in the Constitution of the Republic of South Africa, 1996,²³ the Constitutional Court declared that the South African Constitution should not be regarded as giving effect to Western values only, but that it is fundamentally rooted in the values, traditions and beliefs of all sectors of the multicultural South African community;²⁴ and that African law, legal thinking, values and ideas should accordingly play an important role in developing a constitutional jurisprudence.²⁵ Unfortunately, subsequent judicial decisions bear slight evidence to this commitment to give effect to African values in the interpretation and application of general legislation and the Constitution. Core African institutions, such as the rule of male primogeniture in succession, have been abolished where an alternative route, allowed by the Constitution, provided that laws could be developed (consonant with their foundational postulates) to become aligned with the Constitution.

The process of harmonisation in the Recognition of Customary Marriages Act was furthermore a one-sided process in that it changed only the customary law to bring it in harmony with the common law and with Western values. There was never a question of finding a middle ground where the two systems could meet and the common law was never similarly scrutinised for possible adaptation. The only change that was made in the South African law of marriage in general was that polygynous marriages are now recognised, albeit only under specific circumstances and only with relation to African customary marriages.

In general, it may be said that as regards the African customary law, the drive to harmonise the Western common law and African customary law has led to such a divergence from the original customary law and its foundational values that it has amounted to the creation of a new hybrid marriage law with features of both the European common law and customary law. This means that the existing plurality of sources has been expanded rather than managed. A further result is that the divide between this new official African customary law of marriage and the living customary law has been widened and the potential for conflict has so been enhanced, as the traditional form of customary marriage is still being upheld in the rural areas and has not been affected by the legislation or judicial decisions.²⁶

Indeed, it is understandable why the eminent scholar on African law, James Read,²⁷ regards African legal systems as “particularly dysfunctional in the field of family law, where African forms of social organisation have resisted harmonisation ... with transplanted alien, and radically different, social forms”. Read’s words are especially apt when applied to South African courts’ interpretation of the Recognition of Customary Marriages Act, 1998. This Act came into effect in 2000, and after more than a decade there is still no certainty on its interpretation. This applies not only to the open-ended provisions such as section 3(1)(b) which sets as a requirement for a valid customary marriage that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”, but also other sections, such as those dealing with polygynous marriages and the proprietary consequences of such marriages.

South African courts are generally alive to the importance of giving legal effect to customary institutions but the result of this commitment is that inept legislative drafting often force them to resort to creative interpretations to attain the desired outcome, in the process causing legal uncertainty. Hence the fundamental rule of interpretation of statutes that words should be accorded their ordinary, grammatical meaning to determine the intention of the Legislature is sometimes ignored in favour of a purposive interpretation which gives effect to constitutional demands and context. At the risk of falling in too much detail, this will be illustrated with reference to a very recent, as yet unreported, case before the Supreme Court of Appeal.²⁸

In this case the legal question concerned non-compliance with section 7(6) of the Recognition of Customary Marriages Act, which determines that a husband who wishes to enter into a further customary marriage, *must* make an application to a court for the approval of a written contract regulating the matrimonial proprietary consequences of his marriages. The Court *a quo*, relying on existing case law, had found that the section should be interpreted as peremptory rather than as directory, affording the word “must” its ordinary grammatical meaning. It accordingly found that the non-compliance with the requirement had invalidated the subsequent marriage.²⁹

On appeal, though, also relying on existing case law, the Court found that a balance ought to be struck between the textual interpretation and the context of the Act of which the primary goal, as stated in its preamble, is the recognition of customary marriages and the attainment of equality of the spouses.³⁰ It found that the subsequent marriage was valid. This less restrictive, purposive interpretation within the historical context of race, gender, marital status and class discourse in South Africa, is commendable and gives effect to the intention of the South African Law Reform Commission. In its *Report on Customary Marriages*, the Commission emphasised that “[t]o declare the second marriage invalid would constitute such a grave departure from customary laws that few people would pay any attention to the penalty”.³¹ Yet, it remains to be seen whether the Supreme Court of Appeal has settled the interpretation of this section and in so doing has managed to confirm the continued existence of this important institution of African customary law, or whether it, too, will have to be made to conform to western values.

In this decision, the Court pointed out that by contrast with section 7(6), section 3(1)(b) was a mandatory provision and that non-compliance with it would render a customary marriage invalid. Ironically, though, the courts do not consistently interpret this section as mandatory.³²

In essence, the requirements and consequences of customary marriages in the Recognition of Customary Marriages Act are merely adaptations of those at common-law. The attempted “harmonisation” of African customary law and state law through legislation moulded in a common-law paradigm has resulted in uncertainty. This is evident in a collection of divergent decisions in which cases are increasingly resolved on an ad-hoc basis.³³ In turn, the management of the interaction of the two legal systems has become a peripheral issue.

3.2 Convergence

Beyond the active attempts to harmonise the Western common law and the African customary law in South Africa lies the spontaneous process of convergence. In its widest sense, convergence is a dynamic phenomenon, a process by which legal systems, institutions, ideologies and methods approach one another and become reasonably similar and by which distinctions gradually disappear. One may distinguish between a doctrinal and functional convergence.³⁴ A doctrinal convergence, the coming together of concepts and principles, is not actually within reach in South Africa where the relevant legal systems are so fundamentally different. However, there does appear to be some measure of functional convergence in the interdependent use of concepts,

the continuous process of gaining knowledge of “the other system,” and concomitant process of becoming able to work with the other system.

An example here is the reconsideration of the remedy of *amende honorable*³⁵ by South Africa’s highest courts and academics and its interrelation with the African principle of ubuntu. *Amende honorable* is a defunct delictual remedy for defamation that originated in medieval canon law and became part of South African law through Roman-Dutch law. This remedy is aimed at restoring the dignity of the plaintiff by an apology from the defendant. It has fallen into disuse in South Africa, but the courts have recently reassessed it as a solution in balancing the constitutionally guaranteed rights to human dignity and freedom of expression.³⁶ But what does that have to do with African customary law?

In *Dikoko v Mokhatla*,³⁷ the Constitutional Court declared that the African concept of ubuntu is closely aligned with the constitutional value of human dignity and with the remedy of *amende honorable*.³⁸ Ubuntu is in effect an expression of restorative justice in African jurisprudence and encompasses the idea that “a person is a person through others”.³⁹ The principles of harmony and solidarity of the community are fundamental postulates of African justice.⁴⁰ Although, broadly speaking, collective good takes a preferential position over individual claims, the welfare of the community is inextricably linked to the welfare of the individual. Accordingly, there are mechanisms in place in African customary law to protect the dignity of the individual.⁴¹

The communitarian principles of African justice were confirmed by the Constitutional Court and the idea of functional convergence expressed in the following dictum: “It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties ... The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process.”⁴²

And, recently the same Court⁴³ confirmed its view that the roots of honourable amends are present also in customary law and tradition, importantly, calling for “mature reflection and consideration” of the integration in this respect of African customary and Roman-Dutch law “into a single system of law under the Constitution”.⁴⁴ Significantly, this is not the usual call for integration within a Western paradigm, but for a true amalgamation of the two systems.

3.3 Integration

It is necessary very briefly to also touch upon the regulation of dispute resolution in South Africa through the integration of the African customary courts within the general court system. This process incorporates a measure of harmonisation, but is in essence aimed at the recognition of traditional African courts as parallel courts. The aim is to create a legislative framework for African customary courts and procedure which differ fundamentally from the typical Western legal process, characterised as it is by confrontational, accusatorial, specialised, formal, even ritualistic features, and where the outcome may be described in terms of winning and losing.

African customary legal procedure has survived, in some instances remarkably unscathed, and is today still widely followed in both unofficial and official courts. The state is in the process of integrating the traditional African courts into the existing state court system through legislation aimed at the regulation of traditional African courts. The history of African customary dispute resolution in South Africa is complex, ranging from colonial legislative recognition and distortion of traditional courts to a time when unofficial dispute resolution institutions held sway and eventually turned into vigilantism during the last three decades of the twentieth century. Space does not allow even a cursory exposition of this history.

Important here is the Traditional Courts Bill which was introduced in 2008 and may become law soon. This Bill purports to be schooled on the African customary system of justice and has elicited severe criticism as an entrenchment of patriarchy, the authoritarian rule of traditional leaders, and a reversion to Apartheid.⁴⁵ The Bill has incorporated certain democratic aspects of dispute resolution, such as the equal participation of women in the legal process. However, only an in-depth analysis will reveal whether it is a mere entrenchment of the adulterated black-letter colonial version of African customary justice or a true version of African participatory justice which is consensual, informal and non-specialised, the outcome being aimed at reconciliation and integration of the parties; where litigants are groups, not individuals; where orality is pre-eminent and there is no legal representation; where proceedings are inquisitorial in nature; and where legal reasoning is inductive and the approach to law casuistic.⁴⁶

4 Official African Customary Law and Living Customary Law

The concept of “living law” has taken on an important position in the South African customary-law discourse – this is evident not only in academic materials, but, importantly, also in judicial pronouncements,⁴⁷ and the work of the South African Law

Reform Commission. In fact, the recognition of Customary Marriages Act recognises the living customary marriage laws through the open-ended provision that requires that customary marriages be negotiated and entered into or celebrated in accordance with customary law.

Living customary law does not refer to the stagnated traditional African customary law that has survived unchanged to the present day. It refers to the law that has adapted to the changing needs of society in line with its underlying fundamental postulates, unadulterated by imposed Western values.⁴⁸ Living law, which has evolved within the framework of the fundamental postulates of African customary law, is often consonant with constitutional precepts. But, the courts do not always take account of the fact that there is a discrepancy between the living law and the traditional law that has survived in judicial decisions and legislation. Accordingly, they have abolished core principles of customary law, on the premise that the official versions of customary, which have in fact fallen out of step with the living law, constitute the true African customary law.⁴⁹

One such example is male primogeniture, a core principle in succession, which existed to secure the preservation of the family. In its traditional form, it entailed that senior males had a preferential position in succession. But succession involved stepping into the shoes of the deceased and assuming responsibility for the family, managing the family estate on their behalf – not obtaining individual ownership of family property. In official customary law this rule has evolved to become the senior male's right to succession and individual ownership of property, excluding females and younger siblings. In the living law, though, the rule has undergone fundamental changes and has survived to indicate priority in succession, but is no longer limited to the eldest male. Nevertheless, despite the option it had of developing the rule, the Constitutional Court preferred to abolish it. The result is that the division between the living and official versions of customary law is intensified. Few succession cases reach the official courts, and its abolition will not impact on the continued existence of the living law, especially in the deep rural areas. As indicated above, the Recognition of Customary Marriages Act has led to a similar evolution of a state-recognised customary marriage law which bears little resemblance to the living law that continues to exist irrespective of state interference.

Interestingly, Williams⁵⁰ argues that the internal dialogue in indigenous communities may present a solution to the conflict between culture and equality and that this conflict should not be resolved by a simple choice between the two; equality usually trumps culture. She points out that women inevitably “feel committed to both their culture and their equality” and could be role players in changing their culture from within.⁵¹

It is suggested that the living law is indeed a confirmation of this hypothesis and that if the courts pay more than lip-service to the living customary law, there would be no need to eliminate the plurality of sources instead of managing it.

Conclusion

To date state initiatives to harmonise the common law and the African customary law in South Africa have not been successful. These efforts are resulting in the evolution of an additional source of state law – a system of law with features of African customary law and the common law, but which is increasingly dominated by Western values. This enhances the problem of the multiplicity of sources and provides no solution to their management. The reason for the present state of affairs is that Western common law is still regarded as the primary legal system in spite of the fact that the Constitution gives recognition to African customary law and guarantees its application. In addition, the difficulty of ascertaining the living African customary law induces the courts to use stagnated official customary law as their frame of reference.

Nevertheless, harmonious co-existence of the common law and African customary law in South Africa is possible if reform is founded on the recognition of the prevailing legal pluralism and the exclusive goal is the management of the several sources. The premise cannot be the imposition of Western ideas and values on the African customary law so as to turn it into a hybrid system that is compatible with the common law. Managing the interaction of the two systems of state law has to be approached with sensitivity to the fundamental principles of both systems. And, importantly, African customary law should be freed from its historical and inevitable political shackles and viewed as a dynamic, living law.

¹ This article was published in Ukrainian as “Vzeadimova afrykanskoho zvychaevoho prava z pravom PAR” in (2012) No. 3-4 *Porivnialne Pravo* (Comparative Jurisprudence) and is published here with the kind permission of its Editor-in-Chief.

* *Professor, Department of Jurisprudence, School of Law, University Of South Africa.*
Vniekqj@unisa.ac.za.

² See generally C. Himonga “State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law” (2010) 25 *Tulane European & Civil Law Forum* 23ff.; A. Griffiths “Legal Pluralism in Botswana: Womens Access to Law” (1998) *Journal of Legal Pluralism & Unofficial Law* 123 at 133; G.R. Woodman “Unification or Continuing Pluralism in Family Law in Anglophone Africa: Past Experience, Present Realities and Future Possibilities” (1988) 4 *Lesotho Law Journal* 33 at 36ff.; S.E. Merry “Legal Pluralism” (1970) 20 *International and Comparative Law Quarterly* 868 at 868-869.

- ³ For a cursory overview of the historical background see T.W. Bennett “Legal Pluralism and the Family in South Africa” (2011) 25 *Emory International Law Review* 1029 at 1029-1032.
- ⁴ Interestingly, some academics have changed the original name to “Southern African Law Association”. But in view of the prominent place of South Africa in the legal development of these countries as well as in their constitutional history, I am of the opinion that Mr. Justice Schreiner purposely referred to them as the “South African Law Association” See, generally, G.J. van Niekerk “Constitutional Protection of Common Law: The Endurance of the Civilian Tradition in Southern African” (2012) 17 (1) *Fundamina. A Journal of Legal History* 115ff.
- ⁵ The common law in South Africa is characterised as “European” or sometimes “Western” law as it shares a basic intellectual and jurisprudential tradition with other legal systems belonging to the Romano-Germanic and the Common-law legal families.
- ⁶ See, e.g., the Constitution of the Kingdom of Swaziland, 2005; the Constitution of Zimbabwe, 1980; the Constitution of the Republic of Namibia, 1990; the Constitution of the Kingdom of Lesotho, 1993; the Constitution of the Republic of South Africa, 1996. Interestingly, legal pluralism as such is recognised in art. 4 of the Mozambique Constitution: “The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution”: D. Pimentel “Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique” (2011) 14 *Yale Human Rights & Development Law Journal* 59 at 62. See, also, M. Ndulo “African Customary Law, Customs, and Women's Rights” (2011) 18 *Indiana Journal of Global Legal Studies* 87 at 96-97.
- ⁷ In the early twentieth century, Lt. Col. C.F. Rey, Resident Commissioner of the Bechuanaland Protectorate, in the Introduction to I. Schapera’s *A Handbook of Tswana Law and Custom* (London, 1938) warned that a codification of Tswana law would stultify further development and that such a codified law would quickly fall out of step with the living law.
- ⁸ Traditional communities are still widely referred to in academic writing as “tribes”. However, this has been perceived to have a derogatory meaning: T.W. Bennett *Application of Customary Law in Southern Africa* (Cape Town, 1985) at 118-119. S. 2(1) of the *Traditional Leadership Governance Framework Act* 41 of 2003 determines that a traditional community is formally recognised as such if it is subject to a traditional leadership system in terms of its customs and if it observes a system of customary law; cf., also, C.W. Okeke “African Law in Comparative Law: Does Comparativism Have Worth?” (2011) 16 *Roger University Law Review* 1 at 8.
- ⁹ E.g., there is a connection between the indigenous Tswana communities inhabiting the Bechuanaland Protectorate (Botswana) and other countries such as Angola, Southern Rhodesia (Zimbabwe), South-West Africa (Namibia) and South Africa. The Tswana of Botswana are represented by three groups, the Southern, Northern and Eastern groups, the latter of which (consisting of the Maletle, Tlôkwa and Kgatla), had migrated from South Africa (Schapera (n. 7) at xi-xiv and 1-2). Further, the customary laws of the Swazi of Swaziland, Sotho of Lesotho and Tswana of Botswana still closely correspond with their allied indigenous systems in South Africa and works on those traditional laws (e.g., Schapera *Native Land Tenure in the Bechuanaland Protectorate* (London, 1943); Ashton *The Basuto* (London, 1952); Marwick *The Swazi* (Cambridge, 1940)) are indispensable in any study of traditional Tswana, Sotho or Swazi law in South Africa.

¹⁰ See Okeke (n. 8) at 2 and 7.

¹¹ See Julius Lewin *Studies in African Native Law* (Philadelphia, 1947) 68, and generally 68-76. Lewin received his legal education at the University of Cape Town, practised at the Bar in Cape Town and the Middle Temple in London during the 1930s and later entered academia, lecturing at the London School of Economics. His academic career took him to the University of the Witwatersrand in South Africa where he was Professor in the Department of Social Anthropology and African Government. He later became research fellow at the University of Manchester and visiting professor of public law at Columbia University, New York: see "Julius Lewin Papers" available at <http://www.historicalpapers.wits.ac.za/inventory/A2357.php> (accessed 18 May 2012); see, also, J.S. Read "Law in Africa: Back to the Future?" in I. Edge (ed.) *Comparative Law in Global Perspective* (Ardsey, 2000) 173 at 174.

¹² As opposed to Muslim law, for example, which the state is still in the process of recognising.

¹³ This is in line with the Pimentel's premise (n. 6) at 66ff, that recognition of legal pluralism goes hand-in-hand with respect for indigenous cultures.

¹⁴ G.J. van Niekerk "The Convergence of Legal Systems in Southern Africa" (2002) 35 *Comparative and International Law Journal of Southern Africa* 309 at 312-314; Woodman (n. 2) at 60ff; M.W. Prinsloo "Pluralism or Unification in Family Law in South Africa" (1990) 23 *Comparative and International Law Journal of Southern Africa* 324ff.

¹⁵ J.M. Smits "Plurality of Sources in European Private Law, or: How to Live with Legal Diversity" in R. Brownsword, H.-W. Micklitz, L. Niglia & S. Weatherill (eds.) *The Foundations of European Private Law* (Chippingham, 2011) 330ff.

¹⁶ *Idem* at 326.

¹⁷ M. van Hoecke "The Harmonisation of Private Law in Europe: Some Misunderstandings" in M. van Hoecke & F. Ost (eds.) *The Harmonisation of European Private Law* (Oxford, 2000) at 3 argues that harmonisation is possible only in what he refers to as a "sufficiently homogeneous legal culture".

¹⁸ Van Niekerk (n. 13) at 317; M. van Hoecke "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 *International and Comparative Law Quarterly* 495 at 503.

¹⁹ A.C. Myburgh *Papers on Indigenous Law* (Pretoria, 1985) *passim*; Van Niekerk (n. 13) 317.

²⁰ For an overview of the state regulation of succession, see Bennett (n. 3) at 1048-1050.

²¹ For academic discussions of the Act, see among others, Bennett (n. 3) at 1044-1048; J.A. Robinson "The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994" (2005) 26 *Obiter* 488 at 494ff; N. van Schalkwyk "Law Reform and the Recognition of Human Rights within the South African Family Law with Specific Reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic Marriages" (2003) 36(2) *De Jure* 289 at 291ff; C.J. Bonthuys "Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity" (2002) 18 *South African Journal on Human Rights* at 41ff; M. Pieterse "Its a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-Racialism" (2001) 17 *South African Journal on Human Rights* 364 at 382ff; V. Bronstein "Confronting Custom in the New South

African State: An Analysis of The Recognition of Customary Marriages Act 120 of 1998” (2000) 16 *South African Journal on Human Rights* 558ff; I.P. Maithufi “The Recognition of Customary Marriages Act of 1998” (2000) 117 *Journal for Contemporary Roman-Dutch Law* 516ff; J. Church “The Convergence of the Western Legal System and the Indigenous African Legal System in South Africa with Reference to Legal Development in the Last Five Years” (1999) 5 *Fundamina. A Journal of Legal History* 8ff.

²² In *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) par. [21].

²³ *S v Makwanyane* 1995 (6) BCLR 665 (CC) in par. [358].

²⁴ In par. [361].

²⁵ In par. [365].

²⁶ Cf. J.C. Bekker & G.J. van Niekerk “*Gumede v President of the Republic of South Africa*: Harmonisation, or the Creation of New Marriage Laws in South Africa” (2009) 24 *South African Public Law* 206 at 206-222.

²⁷ Read (n. 11) at 176; see, also, Okeke (n. 8) at 15.

²⁸ *Ngwenyama v Mayelane and Another* (474/11) [2012]; ZASCA 94 (1 Jun 2012).

²⁹ See *Mayelane v Ngwenyama* 2010 (4) SA 286 (GNP) in pars. [25]-[26]; see, also, JC Bekker & GJ Van Niekerk “Broadening the Divide Between Official and Living Customary Law: *Mayelane v Ngwenyama & Another* 2010 (4) SA 286 (GNP); [2010] JOL 25422 (GNP)” (2010) 73 *Journal for Contemporary Roman-Dutch Law* (n. 25) at 679ff.

³⁰ In par. [22].

³¹ At 90.

³² In *Mabuza v Mbatha* 2003 (4) SA 218 (C), e.g., the Court remarked that it is inconceivable that ceremonial marriage customs may be elevated to something so indispensable that without them there could be no valid marriage; see also G. Nkosi “The Extent of the Recognition of Customs in Indigenous Law of Marriage: A Comment on *Mabuza v Mbatha* (2003) 1 All SA 706 (C)” (2004) 17 *Speculum Juris* 325ff and the decision in *Gladstone (Ramoitheki) v Liberty Group Ltd* 2005 JDR 0762 (WLD).

³³ Cf., among others, the divergent opinions expressed in *Fanti v Boto and Others* 2008 5 SA 405 (C); *Mabuza v Mbatha* (n. 32) and in *Nontobeko Virginia Gaza v Road Accident Fund* (SCA) unreported case number 314/04.

³⁴ D.W.M. Waters “Convergence and Divergence: Civil Law and Common Law” (Inaugural Lecture, Katholieke Universiteit Nijmegen, Centrum voor Postdoctoraal Onderwijs, 1998) at 21 and 31ff shows that an ongoing functional convergence has led to an observable doctrinal convergence in European law. B.S. Marquesinis “Studying Judicial Decisions in the Common Law and Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that Exist Between these Legal Families” in Van Hoecke & Ost (n. 17) at 125ff, shares the view that civil-law and common-law systems are converging.

³⁵ On this remedy, see generally: A. Mukheibir “Reincarnation or Hallucination? The Revival (or not) of the Amende Honorable” (2004) 25 *Obiter* 455ff and “Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law” (2007) 28 *Obiter* 583ff; J.R. Midgley “Retraction, Apology and Right to Reply” (1995) 58 *Journal for Contemporary Roman-Dutch Law* 288ff.]

³⁶ Mukheibir “Reincarnation” (n. 35) at 585.

³⁷ 2006 (6) SA 235 (CC).

³⁸ See, also, *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) pars. [199]-[200].

³⁹ This was confirmed in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) in pars. [113]-[115]; see also generally, T.W. Bennett “Ubuntu: An African Equity” (2011) 14 *Potchefstroom Electronic Law Journal* at 4ff.

⁴⁰ M. Gluckman Natural Justice in Africa in C. Varga (ed.) *Comparative Legal Cultures* (Dartmouth, 1992) at 176 opines that the fact that courts maintained the principles of law while restoring the disturbed relationships within the community shows an adherence to a doctrine of natural justice in Africa. In Africa relationships do not come to an end at death. Therefore equilibrium has to be maintained both horizontally (between the living members of the community) and vertically (between the community and the deceased ancestors): E.A.R. Omi & K.C. Anyanwu *African Philosophy. An Introduction to the Main Philosophical Trends in Contemporary Africa* (Rome, 1981) at 143; see, also, J.S. Mbiti *African Religions and Philosophy* (New York, 1975) at 107.

⁴¹ See, generally, G.J. van Niekerk “Pre-contact African Judicial Procedure and the *Legis Actio* Procedure of Early Roman Antiquity: A Comparative Analysis” (2009) 4 *Studia Iurisprudentia (Universitatis Babeş-Bolyai)* available at <http://studia.law.ubbcluj.ro/articole.php?an=2009> (accessed 16 Jun 2012).

⁴² Mokgoro J in *Dikoko v Mokhatla* (n 39) in pars. [68] and [69].

⁴³ *Le Roux and Others v Dey* (n. 38) in par. [200].

⁴⁴ In par. [199]: here the Court did not consider the reinstatement of the *amende honorable*, but argued for the development of South African law in accordance with the equitable principles of Roman-Dutch law.

⁴⁵ See, e.g., the criticism levelled against this Bill by S.M. Weeks “The Traditional Courts Bill: Controversy around Process, Substance and Implications” (2011) 35 *South Africa Crime Quarterly* 3ff and S.M. Weeks & A. Claassens “Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them” (2011) 3 *Stellenbosch Law Review* 823ff.

⁴⁶ See, e.g., I. Eberечи “Who Will Save These Endangered Species? Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms” (2012) 20 *African J of International and Comparative Law* 22 at 29-34; A. Allott “African Law” in J.D.M. Derrett (ed) *An Introduction to Legal Systems* (London, 1968) 145. Van Niekerk (n. 41) (accessed 10 Jun 2012) and G.J. van Niekerk “Orality in African Customary- and Roman Law of Contract: A Comparative Perspective” (2011) 44 (2) *De Jure* 364ff. On the ancient African law of procedure, see in general: A.T. Bryant *The Zulu People* (Pietermaritzburg, 1948); T.O. Elias *The Nature of*

African Customary Law (Manchester, 1956); P. Bohannan *Justice and Judgment among the Tiv* (London, 1957); H.A. Junod *The Life of a South African Tribe* (New York, 1966); E. Cotran & N.N. Rubin (eds.) *Readings in African Law* vol. 1 (London, 1970); I. Schapera (n. 7) and "The Tswana" in D. Forde (ed.) *Ethnographic Survey of Africa. Southern Africa* part 3 (London, 1971); H.O. Mönnig *The Pedi* (Pretoria, 1978); Myburgh (n. 19); A.C. Myburgh & M.W. Prinsloo *Indigenous Public Law in KwaNdebele* (Pretoria, 1985); G.J. van Niekerk *A Comparative Study of the Application of Indigenous Law in the Administration of Criminal Justice in Southern Africa* (unpublished LLM Dissertation, University of South Africa, 1986) and "Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law" in A.J.G.M. Sanders (ed.) *Southern Africa in Need of Law Reform* (Durban, 1981); S.E. van der Merwe "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders *op. cit.*

⁴⁷ See, e.g., the following decisions of the Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (and H. Mostert H. & P. Fitzpatrick "'Living in the Margins of History on the Edge of the Country' – Legal Foundation and the Richtersveld Community's Title to Land" (2004) issue 3 *Journal of South African Law* 498ff); *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC); *Bhe v Magistrate, Khayelitsha and Others*; *Shibi v Sithole and Others*; *SA Human Rights Commission and Others v President of the Republic of South Africa and Others* 2005 (1) BCLR 1 (CC); *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC); also Ndulo (n. 6) at 102.

⁴⁸ For an in-depth theoretical discussion of the concept of "living law", see C. Himonga & C. Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *South African Law Journal* 306 at 319ff; G.J. van Niekerk "Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court" (2005) 26 *Obiter* 474ff; D. Taylor "Where There is a Way There is a Will: How Traditional African Homesteads Reflect the Legal Consequences of Succession" in T. Falola & S.J. Salm *Urbanization and African Cultures* (Durham, 2005) at 417ff; Pimentel (n. 6) at 61 esp. note 7; Okeke (n. 8) at 10; Weeks & Claassens (n. 45) *passim*; see, also, W. Menski *Comparative law in a Global Context. The Legal Systems of Asia and Africa* (Cambridge, 2006) at 477ff for a discussion of unofficial law and dispute resolution institutions in Africa.

⁴⁹ Ndulo (n. 6) at 102ff; Bennett (n. 3) at 1037 and 1041ff.

⁵⁰ S.H. Williams "Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption" (2011) 18 *Indiana Journal of Global Legal Studies* 65 at 68-70.

⁵¹ *Idem* at 70.