HARMONISATION OF LAW: THE SOUTH AFRICAN EXPERIENCE[*]

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Abstract: *South Africa has a mixed jurisdiction in more than one sense. This paper describes the successful harmonization of Roman-Dutch and English law, the obstacles to integration of indigenous law into the South African legal system and the work in progress integrating human rights into the private law.*

Keywords: Comparative law, mixed jurisdiction, legal history, harmonisation of law, law of contract, constitution, expropriation, indigenous law

1. Introduction

Having been advised for many years by educationalists to use the Socratic method, I did suspect that they believed that Socrates was a famous Brazilian soccer player and that his method consisted of passing the ball. However, the method of the other Socrates only works if you know the answers yourself. Nevertheless, I will begin this address by playing the devil's advocate and ask, during the Salzburg Summer School of European private law, "What is European private law? Does it still exist? Or is it the law which is slowly developed by European directives?' The answers depend on the paradigms one adheres to, Coing and Zimmermann[1] or Riesenhuber,[2] but I believe that the tacit assumption of the Salzburg Academy is that we are moving step by step towards harmonisation and unification of law within the European Union.[3] Several members of our academy are members of the Expert Group on European contract law[4] and it is to be hoped that the Salzburg Academy shall directly and indirectly make further contributions towards unification of law in Europe. My presentation relates some of the experiences of the South African law in past and present in the quest for a unified South African private law.

South Africa has a so-called mixed jurisdiction in several ways. First, in the traditional textbook[5] sense where mixed legal systems denote a marriage between the civil and the common law, which can usually be attributed to colonial history. The second mixture is particular to Africa and results from the fact that at some

stage during history every country in Africa has been a colony.[6] In consequence every African country has a mixed jurisdiction since the colonisers introduced their own law, but for pragmatic administrative reasons gave partial recognition to local law.

Finally, more recently another *mélange* is under construction on account of the advent of constitutional democracy in South Africa. This process consists of the integration of constitutional values and more particular the Bill of Rights into private law.

I will sketch the experiences in each field and finish with some conclusions, but first of all an elementary historical overview is required.

2. Historical overview

Written history of Southern Africa commences with the advent of European explorers: In 1488 the Portuguese landed at Mosselbay,[7] followed by the Dutch in 1652,[8] whose commercial settlement gave way to English rule in 1795/1806/1814.[9]

The latter provided some of the reasons for the Great Trek during the 1830's,[10] when thousands of white settlers moved inland concomitant with the wars creating larger indigenous kingdoms.[11] The resulting states, both Boer republics[12] and African kingdoms, soon disappeared[13] as first, in 1867 diamonds[14] and later, in 1871 gold were found.[15]

In 1902 the whole country had become a British Crown Colony[16] and in 1910 the Union of South Africa was established.[17] In 1948 apartheid[18] and in 1994 democracy were introduced.[19]

3. Relevance of the history for legal development

The Dutch East India Company, the employer of Jan van Riebeeck, who landed in 1652 at the Cape was a commercial company[20] and its sole interest was the establishment of a fortified refreshment station for her merchant ships on the Amsterdam-Batavia route.

During the seventeenth century the Dutch were a world power and Dutch legal science flourished.[21] Dutch legal tradition was based on Roman law and part of the European *ius commune,* a coherent framework of legal concepts, principles and rules.

The remote and strategic position of the Cape was the reason that the shock waves of the French Revolution sweeping European legal culture hardly touched the Cape, since the territory found itself in a different legal culture under a new colonial regime, namely the British who ruled the waves and needed to protect the route to India.

3.1 British occupation

In terms of the articles of capitulation in 1795[22] and in accordance with the rule of international law stating that the laws of a conquered country remain in force until they are altered by the conqueror, which had become part of English law by the decision of Lord Mansfield in *Campbell v Hall*[23] the laws of the Cape remained in force.

Thus English-educated lawyers[24] were confronted with a Roman-law based system, and legal development in the Cape Colony was entrusted to lawyers trained in another jurisdiction, in another legal tradition,[25] and in another language.

The English solved this dilemma by transforming the judiciary and changing the law of procedure. The Charters of Justice of 1827 and 1832[26] established an independent judiciary in the form of a Supreme Court with a professional bench and the Privy Council became the highest court of appeal; only British and colonial advocates could appear and be appointed as judges.[27] English became the official language of all superior courts.[28]

Because the engine of legal development in the common law had been the administration of justice, Dutch procedural law was replaced by the English law of criminal and civil procedure,[29] a jury system and the concomitant English law of evidence were introduced.[30]

As a general rule the Supreme Court would, whenever Dutch law was silent, look for answers in English law, where the robust development of commerce had spurred legal development, with the result that English mercantile law was freely imported.[31]

The possibility of appeal to the Privy Council led to the introduction of the English doctrine of *stare decisis.*[32]

The success of the nineteenth-century harmonisation of the Cape law can be attributed to the introduction of the English system of administration of justice, which shifted the accent from system, concepts, principles and rules to the laws of procedure and evidence and the rules of court.

Introduction of the precedent system and the consequent law reporting[33] and translation of the basic and systematic textbooks of Roman- Dutch law[34] created the right ingredients for the developing South African common law.

The Cape Colony and its legal system and judicial organisation gradually annexed the whole of South Africa.[35]

3.2 Boer republics, Union, Apartheid

The Great Trek resulted in the establishment of new states, namely the Oranje Vrijstaat[36] and the Zuid Afrikaansche Republiek.[37] The settlers founded a new Afrikaner culture in these republics: Dutch was the official language, Roman-Dutch law the legal system[38] and all efforts were directed at maintaining contact with the mother culture.[39]

After establishment of the Union in 1910,[40] English and Dutch became the official languages of the Union.[41] A South African legal system developed from the law of the four provinces, English law, the translated Roman-Dutch authorities and German pandectists.

In 1948 the National Party won the elections as the result of its Apartheid campaign[42] and after its victory commenced to implement this ideology by means of legislation.[43]

The recognition of Afrikaans as a language[44] had led to the transformation of certain universities into bastions of Afrikaans learning.[45] After 1948 Afrikaner legal scholars as well as Afrikaner members of the judiciary attempted to rid South African law of English influences,[46] a movement known as purism. The role of private law has been largely ignored in studies of Apartheid and views are divided whether the common law in particular was tainted by Apartheid.[47]

4. Indigenous law

The second "mix" was the direct result of colonial and separatist policies, namely indirect rule and recognition of indigenous law

The policy of indirect rule was applied in Natal in 1849 when the power of native chiefs to examine and decide cases between members of their tribes according to indigenous law was preserved.[48] The next step was that the Lieutenant-Governor assumed the title of supreme chief of the native tribes.[49] The *Native Administration Law*[50] of 1875 introduced the repugnancy clause when it was provided that African civil matters could be adjudicated according to native African laws, customs and usages "so far as these shall not be repugnant to the settled principles and policy of natural equity."[51]

The same policy was taken over in the Zuid Afrikaansche Republiek in 1885[52] and continued in the *Native Administration Act* 38 of 1927[53] and the *Bantu Authorities Act*[54] in 1951.

The *status quo* has been retained in the new constitutional dispensation.[55] Thus, the role of indigenous law in the new constitutional order remains subjected to the same repressive tolerance. Viewed by many as a relic of colonialism and

apartheid, indigenous law has not shed its subordinate status, nor are meaningful attempts of harmonisation noticeable. The most positive approach has been voiced in the constitutional court, where Justice Sachs expressed the opinion that "development of the legal system demands giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice."[56] However, he also opined that "there are many aspects and values of traditional African law, which will [also] have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order."[57] In a series of recent decisions essential parts of the main body of indigenous law, the law of persons and the law of succession, have been held to be unconstitutional on account of gender discrimination.[58] This clearly indicates the barrier against integration of indigenous law, namely that the essential characteristic of this law, patriarchy[59] is in conflict with the equality clause of the Bill of Rights.[60]

5. Constitutional development

The democratic constitution introduced a new legal order. The Constitution proclaims itself to be the supreme law of the land, rules supreme and directs the development of society.[61] The Bill of Rights forms an essential part and the various human rights are entrenched and protected.[62] The overriding human right in the Constitution is human dignity.[63] Constitutional supremacy is safeguarded by judicial review and the constitutional court is the highest court of the country. The constitutional values as expressed in the bill of rights permeate every aspect of SA law.

In a recent decision the position was summed up[64] when it was held that "It is now accepted that all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid and, if that law is grounded in the common law, then it must be developed so as to bring it into line with the Constitution. All courts have a constitutional obligation to develop the common law so as to bring it in line with the values that underlie the Constitution."

The constitutional imperatives are contained in section 39.[65]

Section 39 (1) instructs the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and section 39 (2) provides that the courts must develop the common law or indigenous law in the spirit, purport and objects of the Bill of Rights.

Nevertheless, the response of the judiciary in the field of private law has been cautious[66] and the transformation of South African private law[67] has been driven by legislation.[68]

I will briefly discuss two instances which exemplify this development: one in the law of contract and the other in property law.

5.1 Contract

The essence of the South African law of contract has been freedom and sanctity of contract, which were viewed as the contractual expressions of self-autonomy and human dignity.[69] These foundations were put to the test in *Barkhuizen v Napier*,[70] where the Constitutional Court was faced with a standard contract. Mr Barkhuizen had insured his car, which was later destroyed in an accident. The insurer repudiated the claim and two years later Barkhuizen instituted action. The insurer responded by raising the special plea that the time-limitation clause in the contract required summons to be served within 90 days of repudiation. Barkhuizen alleged the claim to be contrary to public policy as well as inconsistent with section 34 of the Constitution, which guarantees access to court.[71] The Constitutional Court sidestepped direct testing of the constitutionality of a contractual term against a provision in the Bill of Rights and held that the proper approach of constitutional challenges to contractual terms of private parties is to determine whether the challenged term is contrary to public policy,[72] as evidenced by the constitutional values.[73] The Court developed a test to determine whether a particular contractual term or the enforcement thereof is contrary to public policy, which test for practical purposes reduced the matter to fairness.[74] In consequence, the decision resulted in various interpretations by the judiciary, academics and practitioners.[75] Thus, when Breedenkamp, a commodities trader, suspected of being involved in illicit tobacco trading, arms trafficking, oil distribution, diamond extraction and reputedly a confidant and financial supporter of Robert Mugabe, was blacklisted by the USA and the Standard Bank of SA closed his accounts,[76] Breedenkamp took the bank to court and pursued the matter up to the Supreme Court of Appeal. He averred *inter alia* that the benchmark for constitutional validity of a contractual term was fairness[77] and that even if a contract is found to be fair and valid, its enforcement must also be fair.[78] This argument was based on the *Barkhuizen* decision, as it was proposed that the latter decision had laid down that fairness was a core value of the Bill of Rights.[79] The Supreme Court of Appeal held that Bredenkamp's argument was without merit and closed the door on the idea that the Constitutional Court had elevated fairness to a constitutional value.[80]

5.2 Property

Section 25 of the Constitution, the property clause, protects rights to property, but simultaneously makes provision for land reform.[81]

5.3 Mineral and Mining rights

In 1998 the government published the *White Paper on Minerals and Mining* proposing that the international norm was the vesting of custodianship of mineral rights to the State. This view was based on the *United Nations Charter of Economic Rights and Duties of States*,[82] and the constitution.[83]

The Mineral and Petroleum Resources Development Act[84] came into effect on 1 May 2004 and gives effect to the notion of state custodianship of mineral rights.[85]

The Act[86] not only transforms the South African mining industry, but has drastically changed property law, since the act effectively transferred ownership of privately held mineral rights to the state.[87] Holders of "old order" mineral rights had to apply to convert them to "new order" rights and if those rights were not used, they were lost.[88]

However, in two recent decisions the Gauteng North High Court has ruled that the Act is effectively expropriating unused, old order mineral rights without compensation.[89] The most common interpretation of the decisions is that the state may be compelled to pay compensation or reinstate ownership of expropriated mineral rights. If the decisions are upheld on appeal the rulings would constitute a significant landmark in the protection of old order property rights.

6. Conclusion

The narrative of South African private law shows that the marriage between Roman Dutch and English law may not have been a happy one, but was indeed a successful union. However, the legacy of colonialism and the disastrous social engineering of Apartheid have introduced new challenges.

Although the South African constitution recognises diversity, the British approach of introducing new institutions, structure and process, thus placing the focus on legal procedure, was successful because both systems shared the same values. However, the integration of indigenous law into the SA legal system has been a failure on account of the conflict between the legal cultures. The cultural

divide between the patriarchal system of customary law and the Bill of Rights appears to be difficult to breach.

The transformation of the South African legal system by integration of Human Rights into the private law is also encountering serious obstacles. This may well be the result of internal contradictions within the constitution and the human rights culture represented therein. Section 7 (2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, thus tasking the state both to respect as well as to realise human rights. This inconsistency is the result of the plurality of concepts of man represented in the constitution, in terms of which human dignity finds expression in autonomy and responsibility, but must also be realised by the state. This paradox confronts the courts when they are asked to interpret the values and ideals of the constitution. For example, human dignity in a humanistic world view includes the freedom to make your own mistakes and accept the consequences, while human dignity in the social model has a wellfare state interpretation. In consequence, the constitutionalising of South African private law is dependent on the political and philosophical beliefs held by a court, which will be deciding factors on the harmonisation of constitution and private law.

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[1] Helmut Coing (1912-2000) developed the paradigm of the European *ius commune* in his oeuvre, *cf Die ursprüngliche Einheit der europäischen Rechtswissenschaft* (1967); *Europäisches Privatrecht Älteres gemeines Recht* (1985); *Europäisches Privatrecht 19 Jahrhundert* (1989); *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (1973-1988). Klaus Luig "In Memoriam Helmut Coing" in 2002 (119) *ZSS RA* 662-678. Reinhard Zimmermann is the most productive exponent of this paradigm in legal history. *Cf* Dirk Heirbaut "Comparative law and Zimmermann's new ius commune: a life or a death sentence for legal history? Some reflections on the use of legal history for comparative law and vice versa"in Rena Van den Bergh (ed) *Ex iusta causa traditum Essays in honour of Eric H Pool (*2005) 136-153.

[2] Karl Riesenhuber *System und Prinzipien Europäischen Privatrechts* (2003); *Europäisches Vertragsrecht* (2006); *Systembildung im Europäischen Urheberrecht* (2007); *Europäisches Arbeitsrecht* (2009); *Europäische Methodenlehre* (2010).

[3] For a more subtle exposition of the objectives of the Salzburg Akademie and Summer School *cf* Michael Rainer *Introduction to Comparative Law* (2010) 52-57.

[4] Professor Irene Kull (Estonia), Professor of Law at the Faculty of Law in Tartu and Professor Jerzy Pisulinski (Poland), Professor of Law at the Jagiellonnian University in Kraków.

[5] David and Brierly *Major Legal Systems in the World Today* (1978); Zweigert and Kötz (Weir trans) *Introduction to Comparative Law* (1998); Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001).

[6] Africa has from antiquity until today been the target of foreign traders, invaders, colonisers and "investors", be it Israelites, Phoenicians, Greeks, Indians, Arabs, Romans, Vandals, Byzantines, Portuguese, Dutch, English, French, Germans, Spanish, Italians, Americans or Chinese.

[7] The Portuguese Prince Henry the Navigator (1394-1460) was the driving force behind the maritime exploration along the West coast route of Africa, which resulted in the rounding of the Cape of Good Hope by Dias in 1488 thus discovering the sea route into the Indian Ocean. The Treaty of Tordesilhas of 1494 granted the Cape sea route to the Portuguese. See Welsh *A History of South Africa* (2000) 2ff.

[8] In 1652 Jan van Riebeeck established a fortified refreshment station for the merchant ships of the Dutch East India Company, the Vereenigde Geoctroyeerde Oost-Indische Compagnie (VOC) on the Amsterdam-Batavia route. The Company had received the monopoly of trade with the lands to the East of the Cape of Good Hope and the West of the Straits of Magellan when it received its charter in 1602 from the States-General of the United States of the Netherlands. The VOC was a commercial corporation and a prototype of the modern public company; its capital was in the form of shares. In consequence, its aims were purely commercial and limited to run a secure station to provide its ships with water, meat, fruit, vegetables at a minimum cost. This affected its policy towards the indigenous population, namely one of non-aggression and pro-trade. Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *An illustrated History of South Africa* (1986) 61ff; Hahlo & Kahn *The South African Legal System and its Background* (1973) 534ff; Kennedy & Schlosberg *The Law and Custom of the South African Constitution* (1935) 5; Kilpin *Romance of a Colonial Parliament* (1930) 5; Welsh 12f.

[9] After the French invasion of the United States of the Netherlands in 1795 the British conquered the Cape. In 1803 the Cape was handed over to the Batavian Republic in terms of the Treaty of Amiens, but at the resumption of hostilities between Britain and France, British forces once again occupied the Cape. In 1814 the British retained the Cape in terms of the *Convention between Great Britain and the Netherlands relative to the Dutch Colonies; Trade with the East and West Indies; etc signed at London on August 13, 1814*. The Netherlands received five million pounds sterling in consideration, and in satisfaction thereof, the Prince Sovereign of the Netherlands ceded in full sovereignty to His Britannic Majesty, the Cape of Good Hope and the settlements of Demerara, Essequibo, and Berbice. *Cf Larousse Encyclopedia of Modern History* (1968) 283 The Cape became a British Crown Colony. For a description of the British occupation see Welsh 88-116.

[10] Du Bruyn "The Great Trek" in Cameron & Spies 134f. Land hunger and to a degree revolt against a government incapable of providing safety and security were the primary causes of the move to the north. Du Bruyn 127ff; Welsh 146ff.

[11] Edgecombe "The Mfecane or Difaqane" in Cameron and Spies 115ff.

[12] The Oranje Vrijstaat and the Zuid Afrikaansche Republiek. *Cf* Thomas "Harmonising the law in a multilingual environment with different legal systems; lessons to be drawn from the legal history of South Africa" 2008 *Fundamina* 139ff.

[13] Edgecombe 126.

[14] Heydenrych "The Boer Republics, 1852-1881" in Cameron & Spies, 149.

[15] Grundlingh "Prelude to the Anglo-Boer War, 1881-1898" in Cameron & Spies 184.

[16] The Vereeniging Peace Treaty of 31 May 1902 proclaimed British sovereignty, but promised self-government. Clause 8 postponed the decision on the black franchise till after the granting of self-government. Self-government was promulgated in 1906 for the Transvaal and in 1907 for the Orange River Colony, but the franchise was granted exclusively to whites in an attempt to co-opt the former citizens of the Voortrekker Republics at the expense of the black population. Spies "Reconstruction and unification, 1902-1910" in Cameron & Spies 219-227.

[17] *Cf* Thomas 2008 *Fundamina* 144f.

[18] Coetzer "The era of Apartheid, 1948-1961" in Cameron & Spies 271ff. Another milestone was the departure from the Commonwealth on the establishment of the Republic of South Africa in 1961. Davenport "From referendum to referendum, 1961-1984" in Cameron & Spies 303ff. Although there was a myriad of Apartheid statutes the foundation was found in the following Acts: The *Prohibition of Mixed Marriages Act* 55 of 1949 and the *Immorality Amendment Act* 21 of 1950 prohibited marriages and sex between whites and people of other colours. The *Population Registration Act* 30 of 1950 introduced classification of every person according to race. The *Group Areas Act* 41 of 1950 introduced residential separation between the races and the implementation thereof meant that non-whites were removed from their homes to separate areas. The *Bantu Authorities Act* 68 of 1951 abolished the Natives Representative Council and made provision for the establishment of homelands and tribal authorities (ss 2-4). The ultimate aim was to concentrate the various black peoples in their respective territories where each group could develop into a self-sufficient unit. The *Bantu Education Act* 47 of 1953 introduced native education under the auspices of the Department of Native Affairs. The *Reservation of Separate Amenities Act* 49 of 1953 regulated the use of public amenities on a racial basis with the objective to prevent racial mixing. The *Natives (Abolition of Passes and Co-ordination of Documents) Act* 67 of 1952 compelled black people to carry identity documents at all times to control their movements. The *Natives (Prohibition of Interdicts) Act* 64 of 1956 took away black peoples' right to have access to the courts to question the validity of forced removal orders. The *Native (Urban Areas) Consolidation Act* 25 of 1945 prohibited black people to remain in a town for longer than seventy-two hours without special consent, while the *Native Building Workers Act* 27 of 1951 made it a criminal offence for a black person to perform skilled work unless specially allowed.

[19] In 1994 the interim Constitution was introduced, which was followed by the Constitution of 1996, which proclaims itself to be the supreme law of the land. In the new democratic South Africa the Constitution rules supreme and directs the development of society. The new Constitution of the Republic of South Africa contains a Bill of Rights in which the various human rights are entrenched and protected. Thus constitutional supremacy and concomitant judicial review have been introduced, although not yet fully entrenched.

[20] The Dutch East India Company, the Vereenigde Geoctroyeerde Oost-Indische Compagnie (VOC) was a commercial corporation and a prototype of the modern public company. Its capital was in the form of shares. For further information see Hahlo & Kahn 534ff; Welsh 12f.

[21] In the textbook-tradition the humanist research of the "Dutch school" is given extraordinary attention, with the result that the misnomer of "antiquarian school" is attached to all Dutch jurists from the United States of the Netherlands. The subsequent life of Roman-Dutch law proves this generalisation to have been erroneous. Albeit that erudite jurists such as Grotius and Bynkershoek devoted research to classical Roman law and legal and biblical history, the primary contribution of the Dutch jurists resides in scholarship in the field of public international law, private law, legal education and in the practice and adjudication of law. Furthermore, the Dutch jurists made an important contribution to the

development of legal practice by publication of legal opinions, for example the *Hollandsche Consultatien*, the *Nieuwe Hollandsche Consultatien*, the *Vervolg op de Hollandsche Consultatien*, the *Advyzen* collected by Van den Berg, De Haas, Barels and others. The whole spectrum of this branch of law was eventually digested into the register of Nassau la Leck, who published a collection consisting of four parts, between 1778 and 1789, with the obvious aim to facilitate access to this aspect of old Dutch law. The full title of this work makes mention of *advysen*, *consultatien*, *decisien*, *observatien* and *sententien*, which means that the content consisted of opinions by advocates or other practitioners and decisions by the courts. Roberts *A South African Legal Bibliography* (1942) mentions at 45 that a total of forty collections were entered into this compilation, which contains a total of 10 991 opinions and decisions.

[22] *Cf* Theal *Records of the Cape Colony* (1905) I 127; De Vos *Regsgeskiedenis* (1992) 243.

[23] *Campbell v Hall* (1774) Cowp 204, 98 E R 1045 at 209, 1047; Hahlo & Kahn 575.

[24] Trained in the Inns of Court in Westminster and not at university.

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

[26] Already in 1807 the governor had constituted himself a court of appeal for civil cases and in 1808 the governor and two assessors became the same in criminal cases. In 1811 circuit courts were introduced; in 1813 court proceedings were conducted in public; from 1814 Dutch and English were the languages of judicial proceedings; in 1826 justices of the peace were created; in 1827 the jury system was adopted, which in turn led to the introduction of the English law of evidence in 1830. Charter of Justice of 1832, *His Majesty's Royal Charter for the Better and More Effectual Administration of Justice within the Colony of the Cape of Good Hope*.

[27] De Vos 246ff.

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

[29] Hahlo & Kahn 576.

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

[31] Hahlo & Kahn 577.

[32] De Vos 249.

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

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

[35] Thomas 2008 *Fundamina* 138.

[36] The Bloemfontein Convention of 1854 recognised the Oranje Vrijstaat as an independent state. *Artikelen van Verdrag tusschen Sir George Russel Clerk en de Representanten van de OranjeVrijstaat, 21 February 1854*; Kennedy & Schlosberg 27f.

[37] The independence of the Zuid Afrikaansche Republiek was formally accepted when the British signed the Sand River Convention in 1852.

[38] In the ZAR the first addendum to the Constitution of 1858 declared the law of the state to be the law found in the code of Van der Linden. In the case of *lacunae*, the works of Leeuwen and Grotius were declared to be supplementary binding sources. In the OFS s 56 of the Constitution and Ordinance 1 of 1856 provided Roman-Dutch law, as found in the works of Voet, Leeuwen, Grotius, Papegaaij, Merula, Lijbrecht, Van der Linden and Van der Keessel, to be the applicable law.

[39] Heydenrych 183-199; Welsh 221ff.

[40] Welsh 225ff.

[41] In the Cape Colony the *Constitution Ordinance Amendment Act* 1 of 1882 allowed members of Parliament to conduct debates in English or Dutch. The *Dutch Language Judicial Use Act* 21 of 1884 and the *Dutch Language Judicial Use Amendment Act* 25 of 1908 compelled both superior and inferior courts to allow the use of both languages. S 137 of the *South Africa Act* 1909 (9 Ed 7 c 9) established English and Dutch as the two official languages of the Union.

[42] The racial problem dated back to the arrival of the first cargo of slaves in 1658. Hahlo & Kahn 527. The British abolished slavery in the Cape and made provision for a qualified franchise, but the constitutions of both Boer republics did not grant citizenship to the black population within their territories.

[43] *Cf supra* n 18.

[44] In 1925. Murray & Stadler "From the pact to the advent of apartheid" in Cameron & Spies 249; Welsh 401.

[45] For example the University of Stellenbosch and the University of Pretoria.

[46] Eg JC de Wet and P van Warmelo. Compare Gauntlett (ed) *JC Noster; 'n Feesbundel* (1979); Joubert (ed) *Petere Fontes: LC Steyn-Gedenkbundel* (1980); Van der Westhuizen (ed) *Paul van Warmelo Huldigingsbundel* (1984). Prominent examples are Steyn CJ (*Trust Bank van Afrika Bpk v Eksteen* 1963 (3) SA 402 (AD); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD)); Van der Heever JA (*Baines Motors v Piek* 1955 (1) SA 534 (AD); *Preller v Jordaan* 1956 (1) SA 483 (AD)), and Joubert JA (*Bank of Lisbon & South Africa v De Ornelas* 1988 (3) SA 580 (A)). Cameron "Legal chauvenism, executive-mindedness and Justice LC Steyn's impact on South African law" 1982 *SALJ* 38. Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985). Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 137.

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

[48] Natal Ordinance 3 of 1849. Natal would also introduce the prototype of Apartheid by Law 11 of 1865 *Disqualifying Certain Natives from Exercising Electoral Franchise,* which statute for all practical purposes excluded natives from the franchise. By 1905 only three black Natalians had had the vote.

[49] Bennett 62.

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

51 S 5 of Ordinance 26 of 1875.

[52] Bennett 62.

[53] S 1. Indigenous law was codified in Natal by Law 19 of 1891 and officially recognised elsewhere. This situation was consolidated in the *Native Administration Act* 38 of 1927, which also established a separate system of courts, chief's courts, native commissioner's courts and the native appeal court. These courts applied indigenous law provided that it was not in conflict with the principles of public policy or natural justice.

[54] Act 68 of 1951. This statute established traditional authorities at local government level. These local traditional authorities were granted limited jurisdiction over civil disputes.

[55] Chapter 12 of the Constitution and Schedule 6; Iain Currie "Indigenous Law" in Chaskalson *et al Constitutional Law of South Africa* (1999) ch 36 1-30.

[56] In *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 365.

[57] *Id* at para 383.

[58] *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC); 2009 (3) SA 152 (CC); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC); *Mthembu v Letsela*r [1997] JOL 1359 (T); *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC*); Maneli v Maneli* 2010 (7) BCLR 703 (GSJ); MM v MN 2010 4 SA 286 (GNP). See also *CILSA* Thomas & Tladi "Legal pluralism or a new repugnancy clause" 1999 *CILSA* 354-363; Bekker & Van Niekerk "Gumede v President of the Republic of South Africa: harmonisation, or the creation of new marriage laws in South Africa?" *2009 SA Public Law* 206-222; Kerr "The nature and future of customary law" 2009 (4) *SALJ* 667-689; Obeng Mireku "Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision' (2010) 10 (2) *African Human Rights Law Journal* 515-523; Bekker & Van Niekerk "Broadening the divide between official and living customary law: *Mayelane v Ngwenyama* 2010 4 SA 286 (GNP); [2010] JOL 25422 (GNP)" 2010 *THRHR* 679-689.

[59] In general in terms of customary law women are incapable of having property rights (with certain exceptions); Sec 11 (3) (b) of the *Native Administration Act* 38 of 1927 prohibits women outside Kwazulu to contract or litigate without assistance from father or husband; women need consent of their guardian for marriage, and have no access to or maintenace for minor children after divorce.

[60] Constitution S 9. Equality- (l) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

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

[62] Chapter 2 ss 7-40.

[63] Ss 1, 7 & 10.

[64] By Jajbhay J in *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 GSJ at 315.

[65] Sec 39 (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 objectives of the Bill of Rights

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

[67] Botha "Democracy and rights: Constitutional interpretation in a postrealist world" 2000 *THRHR* 561-582; Carpenter "Equality and non-discrimination in the new South African constitutional order (1): The early cases" 2001 *THRHR* 409-423; Carpenter "Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions" 2001 *THRHR* 619-642; Carpenter "Equality and non-discrimination in the new South African constitutional order (3): The saga continues" 2002 *THRHR* 37-59; Carpenter "Equality and non-discrimination in the new South African constitutional order (4): Update" 2002 *THRHR* 177-186. Chaskalson "From wickedness to equality: the moral transformation of South African law" 2003 *Int J of Constitutional Law* 590-609.

[68] A number of statutes have directed private law in new directions: employment equity, broad based black economic empowerment, affirmative action, proportional representation in all spheres of life and land reform. Examples are the *Restitution of Land Rights Act* 22 of 1994; the *Land Reform (Labour Tenants) Act* 3 of 1996; the *Extension of Security of Tenure Act* 62 of 1997; the *Land Affairs General Amendments Act* 61 of 1998; the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998; the *National Credit Act* 34 of 2005; *Consumer Protection Act* 68 of 2008.

[69] Atiyah *The Rise and Fall of Freedom of Contract* (1979) 226ff; Brownsword "Freedom of Contract, Human Rights and Human Dignity" in Friedmann and Barak-Erez (eds) *Human Rights in Private Law* (2001) 181, 185ff; Christie *The Law of Contract* (2001); Kerr *The Principles of the Law of Contract* (2002); Collins *The Law of Contract* (2003) 3-10; Adams and Brownsword *Understanding Contract Law* (2004) 185-204.

[70] 2007 (5) SA 323 (CC).

[71] At par [2]-[5].

[72] At par [23] the Constitutional Court held that the question of horizontality had still to be decided. At par [30] the CC applied the indirect horizontal approach using public policy to test whether the contractual term in question was contrary to public policy as expressed by the constitutional values. In regard to the scholarly debate relating to the question of horizontality *cf* Rautenbach "Constitution and contract – exploring "the possibility that certain rights may apply directly to contractual terms or the common law that underlies them" 2009 *TSAR* 613; Sutherland "Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) Part 1 2008 *Stell LR* 390 at 394ff; Bhana & Pieterse "Towards a reconciliation of contract law and Constitutional values: Brisley and Afrox revisited 2005 *SALJ* 865; CHECK Woolman "The amazing vanishing bill of rights" 2007 *SALJ* 762.

[73] *Barkhuizen v Napier* pars [23-26] & [30].

[74] See Luanda Hawthorne "*Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 GSJ; and *Breedenkamp v Standard Bank of SA Ltd* 2009 (6) SA 277 GSJ; *Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA Contract law: Contextualisation and unequal bargaining position Redux" 2010 (2) *De Jure* 397ff.

[75] See the literature referred to in n 72.

[76] Hawthorne 400f.

[77] *Id* 401f, 405.

[78] *Ibid.*

[79] *Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA at par [27].

[80] Hawthorne 405.

[81] Section 25. Property. - (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application–(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e)the purpose of the expropriation. (4) For the purposes of this section –(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

[82]Article (2)(1) which was held to grant to states full permanent sovereignty, including possession and disposal over all its natural resources.

[83] Constitutional support was also argued in terms of the proposition that the state is bound to take legislative and other measures to enable citizens to gain equitable access to rights in land.

[84] No 28 of 2002 (MPRDA).

[85] The preamble to the Act recognises the mineral wealth as a national asset, a common heritage that belongs to all in South Africa and pronounces the state as the custodian thereof. This is further enunciated in Section 2(a) of the Act as it acknowledges the right of state to exercise sovereignty over the entire mineral and petroleum resources within the republic.

[86] MPRDA, its associated Broad–Based Socio–Economic Empowerment Charter for the Mining Industry and its attendant Scorecard.

[87] To enable any third party to apply to the Department of Minerals and Energy (DME) for new order prospecting rights or mining rights over these previously privately held minerals.

[88] In order to promote security of tenure and to secure existing prospecting and mining rights, affected entities were given five years to submit applications for the conversion of old order mining licences to new order mining rights (by 30 April 2009). Up to two years were granted for the conversion of old order prospecting permits to new order prospecting rights (by 30 April 2006). Furthermore, in respect of unused old order rights, the MPRDA granted to the holder of such a right a one–year exclusive right to apply for a new order prospecting or mining right. This was meant to give the holders the opportunity to mitigate their losses. The state argued that if they did not use the opportunity, the minister had a defence against a claim for compensation on the basis that the holder acted unreasonably in not applying for similar rights under the new act.

[89] *Agri SA v Minister of Minerals and Energy: Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (NGP); *Agri South Africa v Minister of Minerals and Energy and Another* 2011 (3) All SA 296 (GNP.