

## NORTH- SOUTH, EAST- WEST, ARE CONSTITUTIONS UNIVERSAL?

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SUMMARY: 1. Introduction: South Africa; 2. Constitution; 3. Transplants, appeal and resistance; 4. Conclusion.

## 1. Introduction: South Africa

This note departs from a more comprehensive understanding of a mixed jurisdiction. Based on the legal historical development of past centuries, but complemented by more recent events and concomitant new paradigms, South Africa's mixity is manifold and includes several paradoxes. Thus, the 'why, how and when' connect to colonisation, decolonisation, globalisation, crypto neo-colonisation, Euro-centrism and black consciousness, which all have added and continue to do so, new facets to the present South African jurisdiction. This raises the question whether, and if so how, co-existence or harmonisation of different legal traditions takes place in a mixed jurisdiction. In South Africa co-existence, harmonization and resistance can be identified and the South African position exemplifies both the pitfalls and the benefits of mixity.

Several different stages can be identified: first, the marriage between the civil law and the English common law was the result of two colonial powers succeeding each other; the second colonisation coincided with the extension of territory, which led to an uneasy co-existence between European law and local customary law; the introduction of the Bill of Rights in 1994 introduced constitutionalisation of the South African common private law and friction within indigenous law. Lately, the cultural appropriation of indigenous law together with the wish for Africanisation of the law of South Africa combined to establish an academic paradigm dismissive of the status quo and claiming a new direction.

## 2. Constitution

The new constitution of 1996 introduced democracy as well as constitutional supremacy. This means that the constitution is the supreme law of the land as well as the source of all South African law. The newly created Constitutional Court became the highest court.

The constitution is transformative and section 39 instructs the courts to develop the common law and indigenous law to promote the rights, values, spirit and purport of the bill of rights.<sup>1</sup> In all fields of private law, contract, delict, property, family, succession, commercial, court decisions attempt to realise such transformation by harmonising constitutional values with legal tradition.<sup>2</sup> Strong impetus has been provided by legislation introducing amongst others

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<sup>1</sup> L. Hawthorne, *Self-actualisation: the promise of the South African Constitution*, in M.M. Botha et al. (eds.), *Developments in commercial law, Law of specific contracts and banking law* 2019, vol. 1, p. 51-73.

<sup>2</sup> For example, *In re Benjamin Godlieb Heydenrych testamentary trust, the George King testamentary trust and the Cyril Houghton bursary trust*, 2012 (4) SA 103 (WCC) freedom of testation was confronted with the Constitution. P. Matsemela, *Modern freedom of testation in South Africa: its application by the courts*, *Journal of Law, Society and Development Multi-, Inter- and Transdisciplinary*, 2015 2 (1), pp. 93-119; P. J. Thomas, *The intention of the testator: from the 'causa Curiana' to modern South African law*, in Hallebeek et. al. (eds.) *Inter cives necnon peregrinos* 2014, pp. 727-741. Also *King N.O. and Others v De Jager and Others* [2021] ZACC 4.

employment equity,<sup>3</sup> land redistribution,<sup>4</sup> land tenure reform,<sup>5</sup> consumer protection,<sup>6</sup> marriage,<sup>7</sup> equality,<sup>8</sup> and a new regime of mineral rights.

The recent development of mineral rights law is summarily set out as this exemplifies the new amalgam of constitutional and private law.

Previously, the land owner held a *sui generis* limited real right to prospect, extract and mine the minerals in his ground.<sup>9</sup> This right was transferable and had economic value. To mine the state had to grant a mining permission.<sup>10</sup>

In 2002 the Mineral and Petroleum Resources Development Act (MPRD)<sup>11</sup> was passed in order to amongst others protect the environment, to ensure ecologically sustainable development of resources, to promote economic and social development and social upliftment of communities affected by mining, to bring about equitable access to resources, to eradicate all forms of discriminatory practices and to take measures to redress the results of past racial discrimination.<sup>12</sup> To achieve these objectives<sup>13</sup> the Act acknowledges that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof.<sup>14</sup> This construction was introduced to avoid payment of compensation.<sup>[15]</sup> In *Agri South Africa v Minister of Minerals and Energy*<sup>16</sup>, the Constitutional Court upheld

<sup>3</sup> Employment Equity Act, no. 55 of 1998.

<sup>4</sup> Restitution of Land Rights Act, no. 22 of 1994; Interim Protection of Informal Land Rights Act, no. 31 of 1996. The 18<sup>th</sup> amendment to the constitution launched in 2018 to allow expropriation of land without compensation, was withdrawn in 2021. A new draft Expropriation Bill is being drafted.

<sup>5</sup> Land Reform (Labour Tenants) Act, no. 3 of 1996; Extension of Security of Tenure Act, no. 62 of 1997.

<sup>6</sup> Consumer Protection Act, no. 68 of 2008. L. Hawthorne, *Public Governance: Unpacking the Consumer Protection Act 68 of 2008*. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) (THRHR)*, 2012 75(3), pp.345-370; National Credit Act, no. 34 of 2005, L. Hawthorne, *Making public knowledge, making knowledge public: information obligations effect truth-in-lending and responsible lending*, *SAPR/PL (SA Publiekreg/Public Law) 2007 22*, pp.477-490.

<sup>7</sup> Presently marriage is defined by the Marriage Act, no. 25 of 1961, Recognition of Customary Marriage Act, no. 120 of 1998 and the Civil Union Act, no. 17 of 2006, which provides for same-sex marriages. In a Green Paper the government proposes a new marriage policy based on three of the pillars of the constitution — equality, non-discrimination and human dignity. Thus, recognition to Muslim marriages, Hindu marriages, marriages conducted according to Jewish rites, as well as traditional marriages in terms of traditions and rituals, should be provided. Furthermore, South Africa should fulfil the commitment made in the SADC Protocol on Gender and Development regarding preventing child marriages.

<sup>8</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, no. 4 of 2000.

<sup>9</sup> P. J. Badenhorst and H. Mostert, *Minerals and Petroleum*, in *The Law of South Africa: vol. 18 Mining and Minerals*, W. A. Joubert (ed.), 2007, para 41.

<sup>10</sup> *Id.* Para 54.

<sup>11</sup> No. 28 of 2002.

<sup>12</sup> MPRDA Preamble and s. 2.

<sup>13</sup> Const. s. 7 (2): The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>14</sup> MPRDA Preamble and s. 3(1). The exact meaning of custodianship is uncertain. It is proposed that minerals are now *res communes*, *res publicae* or in public trust. Badenhorst and Mostert, para 101.

<sup>15</sup> J.D. van der Vyver, *Nationalisation of mineral rights in South Africa*, *De Iure* 2012 45, pp. 125-142.

<sup>16</sup> [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).; see also *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219 (A).

this stratagem and confirmed the state as ‘custodian’ of the country’s mineral resources. In consequence section 3(2) of the MPRDA grants to the state absolute powers, but also places specific duties on the state, namely to ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.<sup>17</sup>

In respect of indigenous law it should be mentioned that the recognition of customary law and the policy of separate but unequal is to an extent adhered to today, which causes friction with the new constitutional dispensation. For example, indigenous law has patriarchy and primogeniture as essential characteristics, which conflict with the Bill of Rights.<sup>18</sup> In *Bhe and Others v Khayelitsha Magistrate and Others*<sup>19</sup> the Constitutional Court addressed this matter in depth. However, whether the *status ante quo* persists in the periphery, i e no harmonisation, but uneasy co-existence, remains an open question.

### 3. Transplants, appeal and resistance

It is trite that the South African Constitution ‘borrowed’ from the German, American and Canadian counterparts.<sup>20</sup> In consequence, the early jurisprudence of the Constitutional Court relied on comparative precedents in these jurisdictions. After a hesitant start constitutional triumphalism became widespread.<sup>21</sup> However, as time went by within academia (and society) a considerable segment adheres to the opinion that the constitution is a legal transplant and should be rejected as being Eurocentric, a tool of white monopoly and a direct consequence of colonialism. In 2018 an edition of the *South African Journal for Human Rights*<sup>22</sup> was devoted to this question. The introduction by the special editor Joel Modiri eloquently set out the socio-economic, ontological and epistemological context leading to the present divisions around the constitution. The leading protagonists of the constitutional abolitionist paradigm, Joel M Modiri,<sup>23</sup> Mogobe Bernard Ramose<sup>24</sup> and Tshepo Madlingozi<sup>25</sup> set out both context and essence of the movement. Their deconstruction of the South African *status quo*<sup>26</sup> represents the present opposition to legal transplants and a negation of mixed

<sup>17</sup> MPRDA s. 3 (3).

<sup>18</sup> P. J. Thomas, & D. D. Tladi, *Legal pluralism or a new repugnancy clause*, *CILSA* 1999 32, pp 354-363.

<sup>19</sup> [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

<sup>20</sup> Tshepo Madlingozi, *South Africa’s first black lawyers, amaRespectables and the birth of evolutionary constitution- a review of Tembeka Ngcukaitobi’s The Land is Ours: South Africa’s first black lawyers and the birth of constitutionalism*, *SAJHR* 2018, pp. 517-529 at 528.

<sup>21</sup> D. M. Davis, *Is the South African Constitution an obstacle to a democratic post-colonial state?*, *SAJHR* 2018 3 pp. 359-374 at 362f.

<sup>22</sup> *South African Journal on Human Rights*, 34:3.

<sup>23</sup> *Conquest and constitutionalism: first thoughts on an alternative jurisprudence*, *SAJHR* 2018 3, pp. 300-325.

<sup>24</sup> *Towards a post-conquest South Africa: beyond the constitution of 1996*, *SAJHR* 2018 3, pp. 326-341.

<sup>25</sup> *South Africa’s first black lawyers, amaRespectables and the birth of evolutionary constitution- a review of Tembeka Ngcukaitobi’s The Land is Ours: South Africa’s first black lawyers and the birth of constitutionalism*, *SAJHR* 2018 “, pp. 517-529.

<sup>26</sup> D. M. Davis, *Is the South African Constitution an obstacle to a democratic post-colonial state?*, *SAJHR* 2018 3 pp. 359-374; F. Cachalia, *Democratic constitutionalism in the time of the postcolony: beyond triumph and betrayal*, *SAJHR* 2018 3, pp. 375-397; these authors are critical of both

jurisdictions. Other contributors from different disciplines present propositions for a structure supporting alternative theories with as common denominator the rejection of Western legal theories validating conquest and colonisation and the suppression of indigenous values and knowledge.

#### **4. Conclusion**

It is premature to predict a paradigm shift, but the emergence of a new paradigm represents the questioning of the *status quo*.

However, the essence of the debate addresses whether the post-communist triumphalism, proclaiming the end of history and war as a result of the universality of capitalism, democracy and human rights as legislated in supra-national instruments. It appears that these beliefs did not take cognisance of cultural relativism and pluriformity. Do MacDonald's and Starbucks indeed rule the world or should differences be respected?

#### **Abstract**

Attention is drawn to a new paradigm in the mixed jurisdiction of South Africa, which raises questions regarding universality of values.

L'articolo intende proporre una nuova visione del sistema di giurisdizione mista del Sud Africa, sollevando alcune domande riguardo alla possibilità di fare riferimento a valori giuridici universali.

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constitutional triumphalism as well as the abolitionists, but maintain that the constitution has achieved the rule of law, human rights and democracy.