

Programme of a Joint Colloquium Hosted by

The International Association of Legal Science and The World Society of Mixed Jurisdiction Jurists

Mixed Jurisdictions as Models? Perspectives from Southern Africa and Beyond

University of Stellenbosch, South Africa, 14-15 May 2009

Thursday, 14 May 2009 - Morning session

09:00 – 9:30 **Opening /welcoming addresses**

Dean of the Faculty of Law, University of Stellenbosch, Prof Gerhard Lubbe
Former President of IALS, Prof Xavier Blanc-Jouvan
President of WSMJJ, Prof Vernon Palmer

9:30-12:30 **Mixed legal systems in Africa and especially Southern Africa – general part**

9:30-10:00 *Speaker 1:* Prof Tom Bennett, University of Cape Town, South Africa

Topic: “Legal Pluralism and Mixed Legal Systems: Comparison of Laws and Disciplinary Divides”

Abstract: This paper concerns two similar legal phenomena in South Africa: on the one hand, the interaction between African customary and common law, and, on the other, between Roman-Dutch and English law. Because the latter phenomenon is already the subject of a considerable, although often partisan, literature due to a famous *bellum juridicum*, one might assume that we have something to learn about the prospects for customary and common law. In South Africa, however, the processes of borrowing and adaptation are considered from very different perspectives, such that the chosen fields of study are constructed quite differently.

Indeed, despite similarities, no one has systematically compared the interaction between customary and common law (which produced a so-called ‘official’ customary law) and Roman-Dutch and English law (which produced South African ‘common’ law). The reason can no doubt be ascribed to the different types of law involved, but even more important is the difference in methods and perspectives of the academic disciplines. The task of examining African customary law has generally fallen to legal anthropology, and the field of research is described as a plural legal system. The study of Roman-Dutch and English law, on the other hand, is the task of comparative law, and here the field of research is described as a mixed legal system.

Differences in method and perceived subject matter might suggest the futility of comparison, but the subjects of research nevertheless share much in common: they are sites of a constant interaction between distinct legal orders, whereby rules may be blended, so as to result in a synthesis, or may be transferred from one regime to another. Whichever process is involved, the relationships under study are not specific, *ad hoc* contacts, as is implied in the case of domestic courts deciding which system of law to apply via a system of internal conflict rules or private international law. Rather, the relationships are

general and long-term, and, in both the cases of plural and mixed systems, they concern indigenous laws and so-called legal transplants.

This paper argues that, if disciplinary differences can be put aside, collaboration by legal anthropologists and comparative lawyers holds the promise of a fruitful partnership.

10:00 –10:30

Speaker 2: Prof Charles Fombad, University of Botswana, Botswana

Topic: “Mixed Systems in Southern Africa: the Shifting Balance within the Mix”

Abstract: The interest in mixed systems, especially those which combine elements of two potentially contradictory and inconsistent systems such as the Common law and the Civil law, has increased in modern times. A number of Southern African countries are classified as “mixed jurisdictions” because they received either directly or indirectly, during the colonial period, elements of both the English Common law and the Civil law in the form of Roman-Dutch law. It is not without some significance that this mixed system is shared by countries in the same region and who are also members of the Southern African Economic Community (SADC). In an era of globalisation and regionalisation like this, the sharing of a mixed legal heritage should provide a strong basis for legal convergence through the development of common legal concepts and principles that could reinforce cooperation. This will however, certainly depend on how the mixed systems in these countries have evolved.

Since independence there have been fundamental changes in the legal systems of each of these countries in the inevitable process of legal modernisation. This has raised questions whether in the process there has been a movement towards a more mixed or less mixed system, or whether the pull has been in one or the other direction, and what effect this is likely to have on the legal system. A critical examination of the trend of legal developments in these countries shows that, apart from South Africa, the English law element of the mix is increasingly becoming more dominant. This paper will attempt to explain why the Roman-Dutch element of the mix is in decline in most of these countries in spite of the fact that Roman-Dutch law remains the substratum of the legal system. It is argued that since through cross-fertilization and horizontal transfers, all legal systems within SADC will eventually mix to some degree, there is need for more serious legal scholarship that transcends national boundaries to see how the Southern African mix can be enhanced and where possible, converge into a unique legal system common to all these countries, if not the region as a whole.

10:30-11:10

Discussion

11:10-11:30

Tea

11:30-12:00

Speaker 3: Prof Enyinna Nwauche, Director of the Centre for African Legal Studies, Associate Professor of Law, Rivers State University of Science and Technology, Nigeria

Topic: “Between Legal Integration and Pluralism in Post Colonial Africa: *The Interaction and Integration of Customary Law and Received English Common Law in Nigeria and Ghana*”

Abstract: Almost half a century after independence, many post-colonial English-speaking countries are not clear whether they are committed to pursue national integration of their laws or promote legal pluralism. While the recognition of indigenous customary law and the received English common law point to a policy of legal pluralism, there are clear signs that integration of the legal system is not only necessary but inevitable and actively promoted.

Using Nigeria and Ghana as examples, this paper asserts that post-colonial English-speaking African legal systems cannot realize their potential of contributing to resolving deep socio-political economic problems bedeviling their societies unless there is a conscious effort towards the creation of a national common law out of the received English Common law and customary law. It is in the process of creating a national common law that these countries will confront fundamental challenges that can transform or stultify their legal system. These challenges include the multi-ethnic character of their people; the interaction of religion and customary law in the public sphere; the appropriate recognition respect and nurturing of customary law; the development of the received English common law; the role of legislation; the effect of a unified court system and the effect of the values embodied in the bill of rights of the Nigerian and Ghanaian constitution. These challenges are then contextualized in an overview of the development of land tenure, succession, customary arbitration, and the protection of the public sphere.

12:00-12:30 Discussion

12:30 - 14:00 Lunch

Thursday, 14 May 2009 - Afternoon session

14:00 - 15:45 ***Mixed legal systems in Africa and especially Southern Africa – specific topics***

14:00-14:25 *Speaker 1:* Prof Chuma Himonga, University of Cape Town, South Africa

Topic: “Mixing Laws in the field of Family Law in Southern Africa: Unveiling the mix from State and Individual Actors’ Perspectives

Abstract: The aim of the paper is to show the variations of the idea of a mixed legal system (the mix) in the African context as it is seen from the perspectives of the state and the individual actors within the legal system in the field of family law. After discussing the manifestation of the mix in the area of the “law” (both official state law and non-state law) regulating the family, the paper turns to the examination of the state and individual actors’ perspectives of the mix. Using illustrations from normative intersections and interactions in the field of family law, the paper attempts to show that there is a more complicated view of the mix at the level of individual actors than at the level of the state. Unlike the state perspective that separates the various normative systems within the mix, the actors usually combine these systems in single juristic acts. They do this to give the transactions in question the perceived legitimacy in the eyes of both their families or community and the state legal system.

14:25-14:50

Speaker 2: Prof Francois du Bois, University of Nottingham, UK

Topic: "Public accountability and corrective justice: State liability in South Africa's evolving mixed legal system"

Abstract: The South African law of delict until recently clearly exhibited a Diceyan approach to state liability. As in England, it could be said that 'every official ... is under the same responsibility for every act done without legal justification as any other citizen' (A. V. Dicey *The Law of the Constitution*). This is one of several areas of delictual liability in which the mixed character of South Africa's legal heritage is exemplified by the way in which a Civilian legal framework was filled with (largely) English legal content. Arguably, the post-Apartheid constitutional dispensation has brought change to this as to many other features of South African law. In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the Supreme Court of Appeal inaugurated an approach which anchors state liability in the constitutional directive to ensure that the state be held accountable – a foundation for responsibility that seemingly diverges from the grounding of the delictual liability of citizens in corrective justice. Strikingly, the English judiciary have refused to follow a similar path: recent decisions on the liability of public bodies in the context of the Human Rights Act have insisted that tort liability, even of public institutions, pursues compensation of damage, and not the vindication of rights. Moreover, while South Africa has seen a steady expansion of state liability in delict, the English courts have in these cases sought to keep a tight rein on it.

This paper explores these South African developments in light of this contrast by treating them as a new stage in the evolution of that country's mixed legal system. Engaging with notions of 'accountability', 'correction', 'compensation' and 'the vindication of rights', it investigates the question whether South African law has indeed taken a new direction. Through comparative analysis of contemporary English law and Civilian legal systems, the paper considers whether this development can be seen as a 're-Civilianisation' of this area of delictual liability. It also probes the extent to which this evolving mixture generates tensions that might illuminate what is generally at stake in the field of state liability in delict/tort.

14:50-15:30

Discussion

15:30-15:45

Tea

Mixed Legal Systems and Legal Education

15:45-16:15

Prof Lionel Smith, McGill University, Canada

Topic: "Teaching Mixity"

Abstract: The formation of a jurist will affect his or her approach to the legal order: profoundly, and often permanently. In this presentation the author will describe the experiences of the McGill Faculty of Law in teaching law in a bilingual and bijuridical environment over the last forty years. The author will suggest that approaches to legal pedagogy reflect the philosophical commitments of an institution to dimensions of mixity. The presence and relative prominence in the teaching program of multiple languages, legal systems, and approaches to

law send clear signals to jurists-in-training as to what the institution considers to be valuable and important.

16:15-16:45

Discussion

19:30

Colloquium dinner

Friday, 15 May 2009 - Morning sessions

9:00-10:45

Mixed systems as models for European integration

9:00-9:30 *Speaker 1:* Prof Hector MacQueen, University of Edinburgh, Scotland, UK

Topic: "The Common Frame of Reference in Europe".

Abstract: This paper will consider the genesis, content and prospects of the Common Frame of Reference project in the European Union, and reflect on the value and significance it may have outside Europe, with particular reference to Africa. The CFR will also be assessed from the perspective of Scots law."

9:30-10:00

Speaker 2: Prof Sjef van Erp, University of Maastricht, The Netherlands

Topic: "The concept of ownership in the Common Frame of Reference: only civil law, no common law?"

Abstract: The concept of ownership used in the CFR seems strongly based on the civil law tradition. In the most recent version of the CFR also trust law is included. Which concept of ownership is used in the trust part of the CFR? How far does this civil law approach to ownership create problems in common law and/or mixed jurisdictions?

10:00-10:45

Discussion

10:45-11:15

Tea

11:15-13:00

Harmonisation of African law

11:15-11:35

Speaker 1: Prof Martha Simo Tumnde, Dean, Faculty of Social and Management Sciences, University of Buea, Cameroon

Topic: The Harmonisation of Business Law in Cameroon: the Issues, Challenges and Prospects

Abstract: Until the recent introduction of OHADA in Africa, Cameroon remained an example, *par excellence* of a confused legal system characterized by outdated or obsolete laws which were not only scanty in nature but also proved largely inadequate both in content and spirit to address the legal issues of modern commercial transactions. This inability of the Cameroon legal system to

adequately address the tenets and problems of the burgeoning and expanding transactions of the business world has been the result of the bi-jural culture of Cameroon. Following the colonisation of Cameroon, English and French laws were applied in the West and Eastern Regions of Cameroon respectively. This legal balkanisation of Cameroon created a legal environment of uncertainty which resulted in a blatant conflict of laws in the same country with one flag, one people and one destiny. It was thus against this background that the Organisation for the Harmonisation of Business Law in Africa was created by the Treaty of Port Louis in Mauritius on the 17th of October 1993 in order to provide viable solutions to the legal dilemma that was the brain-child of the bi-jural culture of Cameroon. This paper therefore examines the historical background to Cameroon's legal framework, the nature and trends of the current uniform law reforms as well as the challenges with regard to the development and the implementation of uniform national laws. Finally, in keeping with the spirit and philosophy of law and legal systems meant to serve as a touch light to justice and equity, this paper proposes the way forward with the OHADA Treaty that has come to stay.

11:35-11:55 *Speaker 2* : Dr Christa Roodt, Aberdeen University, Scotland, UK

Topic: "Harmonisation of arbitration in Africa: what stands in the way?"

Abstract: This paper explores the interaction between the judiciary and arbitration fora in the resolution of commercial disputes in the context of Sub-Saharan Africa. Civil law, common law or mixed legal systems co-exist in this region and the fear of domination of the common law heritage by the civil law heritage represents one of the less obvious hindrances on the path to harmonisation. The analysis is rendered complex by the differences in the *lex loci arbitri*; the variety of frameworks that enable arbitration and determine the supplementary discretion of the arbitral tribunal; and in the level of support enjoyed by them. Legislative development may also be circumvented by political considerations. The position of three African states (South Africa, Sudan and Nigeria) is canvassed with reference to their respective relationships with OHADA, UNCITRAL and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In particular, consideration is given to the extent to which the relevant instruments and the *lex loci arbitri* allow courts to lend assistance to arbitrations and limit intervention by the judiciary. Comparison of a limited number of selected jurisdictions that are broadly representative of different arbitration strands or models – or whose legislative frameworks and arbitration environments have little in common – makes a clearer understanding of the interplay among different legal traditions and strands possible. The question is not so much which of the three arbitration models best manages the hindrances to harmonisation, but rather whether these states have realised their full potential for harmonised arbitration within the current arbitration context and culture.

11:55-12:15 *Speaker 3*: Prof Clare Dickerson, Tulane University, Louisiana, USA

Topic: OHADA on the Ground: Harmonizing Business Laws in Three Dimensions

Abstract: Even for business laws such as OHADA, implementation of harmonization must consider political as well as economic realities. Political will is essential to any top-down implementation and maintenance of harmonization, and the effort must also consider the economic realities, including the importance of the

informal sector. To these macro-realities are added legal and extra-legal commercial traditions, European and local. Both substance and procedure, including enforcement, are critical in each case. For most OHADA States, the OHADA regime is in the formal sector, embedded within the French-inspired formal legal institutions, and interacting with a substantially informal economy. In Anglophone Cameroon, the focus of this discussion, the additional player is the Anglo-Saxon legal tradition, shoe-horned within the French-based formal legal institutions and also inevitably interacting with the local realities, political, economic and cultural. The OHADA regime exerts its pro-harmonization pressure in an effort to create predictability in a complex and challenging environment.

12:15-13:00 Discussion
13:00-14:30 Lunch

Friday, 15 May 2009 - Afternoon session

14:30 – 15:30 ***Concluding session***
