TEACHING THE "OTHER LAW" IN A SOUTH AFRICAN UNIVERSITY: SOME PROBLEMS ENCOUNTERED AND POSSIBLE SOLUTIONS

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SUMMARY

African customary law is a legal system that is recognised in South Africa and forms part of the law of the indigenous people of South Africa. Due to colonialism and apartheid, this legal system was rejected and underdeveloped in favour of common law. The supremacy of the Constitution and its recognition of African customary law as an independent legal system, separate from the common law, aimed to correct past injustices that flowed from the underdevelopment of this important legal system. Whether the Constitution and higher learning institutions have attained the goal of developing African customary law in South Africa is a question that will be explored and debated in this contribution. Its aim is to assess the role of higher learning institutions in developing African customary law through their teaching of this system of law, as well as to outline some of the challenges faced by these institutions in offering an African customary law course to students. Possible solutions are discussed; the aim is to ensure that the teaching component of African customary law is developed, and to contribute to the current debate about curriculum transformation among universities and various stakeholders in higher learning. Curriculum transformation is key to the future development and inclusiveness of the South African community that is so diverse.

1 INTRODUCTION

Most South African universities prescribe a course in customary law as a prerequisite for a degree in law. Customary law, which was not previously regarded as part of South African law, is currently recognised as a legal system in South Africa in terms of section 211(3) of the Constitution of the

Republic of South Africa, 1996 (the Constitution). There are certain other legal systems of a religious nature – such as Muslim and Hindu systems – that are observed but are not as yet recognised in South Africa..[1] When a matter unavoidably deals with these systems of law, they may be applied subject to the Bill of Rights as enshrined in the Constitution. The application of these systems of law and customary law is mostly in the field of private law, especially family law. This is to be expected, as South Africa is a multicultural society.[2]

South African universities employ different names to describe this "other law" in their curricula. Some call it "African Customary Law", while others name the course "Legal Diversity". Some use the term "customary" while others prefer "legal pluralism". Legal Pluralism is used to indicate the plurality of legal systems observed in South Africa. Irrespective of the title of the subject, most universities indicate in their study materials or course outlines that the course deals with the study of customary law. Customary law has been defined as "the customs and usages observed among the indigenous African people of South Africa and which form part of the culture of those people".[3] Another term used to describe this legal system is "indigenous law".

In this discussion, teaching the "other law" refers to customary law as indicated above and does not include the laws of a religious nature that are observed in South Africa. The discussion focuses on the problems faced by teachers of law in their guidance of law students in trying to understand legal concepts in customary law. All textbooks on the subject presented by South African universities are written in English or Afrikaans – for example, Rautenbach and Bekker *Introduction to Legal Pluralism* is written in English and translated into Afrikaans.[4] Although this is positive, these texts refer to certain concepts of law using terms from indigenous languages used by people who adhere to a customary law system. Some students and lecturers who may be speakers of these languages may understand the vernacular concepts used in a different manner from the writers of the texts. In trying to understand these concepts, it may become important that users of these textbooks (both lecturers, authors of textbooks and students) have a working knowledge of the indigenous language used. Besides the language problem, there are other problems that are mentioned and dealt with below in the contribution.

2 NATURE OF SOUTH AFRICAN LAW

The South African legal system has been described as a mixed system of law based on the "common law", consisting mostly of Roman-Dutch law as

1 Rautenbach *Introduction to Legal Pluralism in South Africa* (2018) 62.

2 Maithufi "Customary Law of Marriage and the Bill of Rights in South Africa: Quo Vadis?" 1996 (2) *THRHR* 298.

3 S 1 of the Recognition of Customary Marriages Act 120 of 1998.

4 See also Bennett *Human Rights and African Customary Law* (1995); Bekker *Customary Law in Southern Africa* (1989) and Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014).

influenced by English law.[5] Customary law is also an important component of the South African legal system as confirmed by the Constitution.[6] Customary law is observed by various indigenous African population groups in South Africa.[7] Besides this system of law, certain religious systems of law, such as Christian, Muslim, Hindu, Jewish and other religious laws, are also observed in South Africa.[8] Although the various indigenous African populations observe a system of customary law, minor differences of principle exist among them in the fields of family law, law of property and others.[9]

The Constitution dictates that South African law (the mixed system of law indicated above) has to be applied subject to the Constitution. Where necessary, it also has to be developed in accordance with the spirit, purport and objects of the Bill of Rights.[10] This is because the Constitution is the supreme law of South Africa and any inconsistent law or conduct is null and void.[11] Customary law also has to be applied subject to any legislation that deals with it. In this manner, South African courts are able to shape this legal system to reflect what the Constitution requires.[12]

Despite the plurality of legal systems in South Africa, only customary law has been recognised as a legal system on the same footing as the common law.[13] In this regard, section 211(3) of the Constitution provides as follows:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

Section 39(2) of the Constitution provides further:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

These constitutional provisions affirm that courts have a role to play in the application and development of customary law. As already mentioned, some religious legal systems in South Africa have not been formally recognised, despite being observed by believers.[14] As a result, *inter alia,* religious marriages have not been recognised and their consequences not enforced.[15]

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5 Rautenbach *Introduction to Legal Pluralism in South Africa* 5.

6 S 211(3) of the Constitution.

7 S 1 of 120 of 1998.

8 Rautenbach *Introduction to Legal Pluralism in South Africa* 62.

9 Himonga and Nhlapo *African Customary Law in South Africa* 23.

10 S 39(2) of the Constitution.

11 S 2 of the Constitution.

12 See *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); *Mayelane v Ngwenyam* 2013 (4) SA 415 (CC), *Shilubana v Nwamita* 2009 (2) SA 66 (CC), *Mthembu v Letsela* 2000 (3) SA 867 (SCA)). In all these cases, the courts aimed to eradicate the principle of male primogeniture in indigenous communities where males were considered superior to females in terms of succession and marriage. The common denominator in all these cases was the need to attain equality across all genders in order to realise the constitutional provision in terms of s 9, which prohibits discrimination of one person by another.

13 S 211 of the Constitution.

14 Rautenbach *Introduction to Legal Pluralism in South Africa* 62.

15 Amien and Moosa *Religious Legal Systems in South Africa* (2014) 57.

Currently, the consequences of such marriages are enforceable by South African courts in the case of monogamous marriages.[16]

3 OTHER FORMS OF FAMILY LAW AND THE CONSTITUTION

It is interesting that although other legal systems of a religious nature are not as yet recognised by South African law, certain consequences that flow from those relationships are given effect to or enforced by the courts.[17] In certain cases, legislative measures have expressly been enacted to give effect to these consequences or recognise the relationships for specific purposes.[18]

Fundamental changes in this field were brought about by the adoption of the current constitutional dispensation in South Africa. The Constitution now provides for the enactment of legislation aimed at recognising the following forms of marital relationship:

> "(i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."[19]

The road is therefore set for the recognition of marital relationships arising from other laws in South Africa. It has to be noted that currently only customary marriage is recognised in the same manner as civil marriage. The implication of recognition of whatever form of marriage is that it brings about a family that is worthy of protection by South African law.

The intention to make other forms of marital relationship valid is further endorsed in section 39(3) of the Constitution:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."[20]

The Recognition of Customary Marriages Act (RCMA) was the first step adopted in recognising one of these relationships as valid.[21] Enacted because of the constitutional provisions mentioned above, it provides for the recognition of customary marriages, whether monogamous or polygamous and whether contracted before or after its coming into operation. It lays down the requirement for valid customary marriages, their consequences as well

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16 See *Ryland v Edros* 1997 (2) SA 690 (C); *Amod v Multinational Motorvehicle Accident Fund* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* 2004 (5) SA 331 (CC)). In 2018, the Legal Resources Centre approached the High Court in Cape Town in order to persuade it to declare the non-recognition of Muslim marriages and the consequences that follow as unconstitutional because non-recognition violates the right to equality of women. To avoid judicial overreach, the application did not succeed but the applicants were ordered to approach Parliament to correct the defect.

17 Maithufi 1996 *THRHR* 298.

18 S 31 of the Black Laws Amendment Act 24 of 1936 and S 21(3) of the Insolvency Act 24 of 1936.

19 S 15(3) of the Constitution.

20 S 39(3) of the Constitution.

21 S 2 of 120 of 1998.

as the manner in which they have to be dissolved.[22] It also improves the status of spouses and children of the marriages.[23] The status of female spouses and their children is further enhanced by the Reform of Customary Law of Succeeding and Regulation of Related Matters Act.[24] However, the provisions of the RCMA have been challenged in a number of court cases, particularly when it comes to the protection of women in polygamous marriages. For example, it was found that section 7(1) of the RCMA still discriminates against women based on their gender and affords protection to men that is contrary to the equality clause.[25]

Currently, only customary and civil marriages are recognised as valid marriages. The other form of marital relationship, that has been afforded recognition, is a civil union in terms of the Civil Unions Act.[26] Although recommendations have been made with regard to the possible recognition of religious marriages, these have not as yet received full recognition.[27] However, South African courts have given effect to certain consequences of these marriages.

4 OTHER FIELDS OR BRANCHES OF LAW AND PROBLEMS ENCOUNTERED

Besides the law applicable to customary marriages, other fields of law presented by South African universities include the law of property, contract, delict, succession, inheritance and others. Various problems may be encountered by both lecturers and students in the interpretation of certain customary law concepts used in prescribed textbooks in these fields of law. These problems may relate, *inter alia*, to the following:

1. interpretation in the medium of instruction of concepts used;
2. lack of knowledge to describe concepts in a language other than English or Afrikaans, and frustration of students and lecturers; and
3. inadequate period of tuition.

An explanation of the problems and their possible solutions are discussed below.

5 THE PROBLEMS

5 1 Medium of instruction

For a long time, English and Afrikaans were the only two official languages recognised in South Africa. Tuition in South African universities was and still

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22 Ss 87 and 88 of 120 of 1998.

23 *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T); *Hlophe v Mahlalela* 1998 (1) SA 499 (T) and Himonga and Nhlapo *African Customary Law in South Africa* 21.

24 S 4 of 11 of 2009.

25 *Ramuhovhi v President of the Republic of South Africa* (CCT194/16) [2017] ZACC 41 (30 November 2017).

26 S 2 of 17 of 2006.

27 Amien and Moosa *Religious Legal Systems in South Africa* 64.

is conducted in these languages. This is despite current efforts to transform curricula and to eradicate Afrikaans as a medium of instruction and for English to be the single medium of instruction in South African universities. It was only after the adoption of the Constitution of 1996 that the other nine South African languages were made official languages.[28] None of these languages, however, are used as a medium of instruction by South African universities which may be grouped in the following categories according to their medium of instruction:

1. those that offer tuition in Afrikaans only;
2. those that offer tuition in English only; and
3. those that offer tuition in both English and Afrikaans.

All textbooks in the subject (customary law) are written exclusively in these official languages. It is therefore expected that all prospective university students be conversant with these languages. Considering the background from which the majority of prospective South African students are drawn, considerable time and effort on the part of educational authorities are required to ensure that students have a thorough knowledge of these languages.

All textbooks in customary law use certain expressions that are derived from some of South Africa's official languages, and which are not languages of instruction, to explain legal principles that cannot easily be translated into one of the languages of instruction. Examples from the field of family law are sufficient to indicate this: words such as *lobolo* (*bohali*, *bogadi*, *mogadi*), *ukuthwala*, *ukungena*, *phuthuma*, *seantlo* and others are frequently used by authors in customary law.[29] Both lecturers and students in this field should be sufficiently conversant with the expressions from these languages so that the lecturers may correctly describe the concepts for the benefit of students. This may be difficult to achieve since South African students, throughout their schooling years, are taught through the medium of English and Afrikaans, some without studying even the basics of other official languages. Moreover, some of the legal concepts in customary law may not be capable of being adequately translated into either English or Afrikaans. A student who is conversant with the concepts as used in the language of the people practising customary law may therefore be lost in studying these concepts as explained in the textbook.

The problems associated with the use of English or Afrikaans to describe customary law concepts has been described as follows:

> "The effort to express African concepts in English or Afrikaans may give rise to misunderstanding. Bennett discusses at length the misconceptions arising from calling customary land tenure communal. It is thus paramount to always keep in mind that a misconception regarding the true content of a customary-

[28] S 6 of the Constitution.

[29] Please refer to Bennett *Human Rights and African Customary Law*; Bekker *Customary Law in Southern Africa* and Himonga and Nhlapo *African Customary Law in South Africa*. In all these textbooks there is no single translation that clearly explains the terms or principles to students, creating difficulty for both lecturers and students, as already outlined.

> law rule could exist as a result of a difference between the language in which it is practised and that which is written down".[30]

5 2 Lack of knowledge to correctly define or interpret concepts and frustration of students and lecturers

The majority of South African law students study a course in customary law for a period of about four to five months; this compares unfavourably with the time allocated for study of the common law in private and public law (approximately four to five years). For example, a course such as criminal law, in most universities, is divided into two parts and is spread over a full year; and yet, customary law, which is such a broad course and also includes criminal law in its content, is taught for one semester, resulting in compromised teaching of the course. For both students and lecturers, the impression is created that customary law is not an important component of South African law. This is amplified by the fact that customary law is still under-developed after 25 years of the democratic dispensation.

The use of vernacular concepts, which may not have been properly explained in the textbooks used, usually leads to dissatisfaction on the part of students and lecturers alike. The cumulative effect of this state of affairs has drawn comment:

> "Add to this, the sometimes expressed, but more often implicitly communicated view of most law teachers that African customary law is not very important or does not really exist. By never or seldom referring to African customary law and by the tone of voice when African customary law is referred to the students view of the relative importance of the general law and customary law can only be reinforced".[31]

The use of vernacular language in explaining concepts in customary law may be useful to those who understand the language used. For those not familiar with that language (both students and lecturers), it may be an obstacle to understanding the legal concept that is explained. Surprisingly, most South African law students are capable of grasping the meaning of the Latin terminology regularly used to explain legal concepts in the common law, but fail to appreciate the meaning of the terminology used in explaining concepts in customary law. This is unfortunate in the new South Africa, bearing in mind that African customary law concepts or principles, like *Ubuntu*, among others, have something to contribute to social cohesion and nation-building beyond racial lines, which are fundamental in the new South Africa.[32]

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30 Rautenbach and Bekker *Introduction to Legal Pluralism* 25.

31 Visser *The Role of Legal Education in the Conflict of Laws: The Internal Conflict of Laws in South Africa* (1990) 68.

32 *S v Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

5 3 Inadequate period of tuition

Many South African universities do not devote adequate time to the study of customary law when compared to other branches of the common law. As already mentioned, when customary law is recognised as an independent course or subject, it is offered for a period of approximately four to five months. Some universities have decided not to offer customary law as an independent subject and teach it in conjunction with other courses or subjects dealing with the common law. For example, the customary law relating to marriage may be taught together with common-law marriage, and the customary law of succession with common-law succession. The problem with this approach is that most textbooks discussing common law do not adequately address the provisions of customary law, the conflicts that may arise from the application of these systems of law, or possible solutions.

As a result of the limited time set aside for the study of customary law, dissatisfaction may spread among lecturers and students. All are pressed for time to write and prepare for tests and examinations during this limited period. Again, the medium of instruction raises its ugly head as a problem for those students who may not be conversant with customary law legal concepts as well as those not conversant with the language of instruction.

Lamenting the limited time devoted to the teaching of customary law and the attitudes inculcated thereby, Visser had this to say:

> "Just think of how the simple fact of time devoted to the teaching of law, other than African customary law, in the typical South African curriculum must convince a student that the general law is more 'important' than African customary law. Generally, it takes a student four to five years to attain the LLB degree. During this time, he or she is required to do four or five courses in private law, one or two courses in commercial law and at least one course in Roman law, criminal law, criminal procedure, civil procedure, conflict of laws, interpretation of statute, administrative law and jurisprudence. All these courses add to the Eurocentric nature of the general law."[33]

This has resulted in students not being equipped to tackle cases in practice in the area of customary law. Nonetheless, the role and importance of customary law in the legal fraternity is emphasised and this is made clear when the Judicial Services Commission (JSC) interviews candidates for the position of judges. Recently, during the interviewing process of prospective judges, the JSC commissioners posed questions on customary law and knowledge of indigenous languages. Candidates who lacked understanding of customary law and indigenous languages were criticised for their inability to contribute meaningfully to the bench when confronted with customary law disputes, among other things. In most instances, candidates appear to be weak in this area of law. Universities must heed the call to address this shortcoming in teaching customary law, and work to equip candidates with enough knowledge and skill for practice, while at the same time helping courts to fulfil the constitutional obligation of developing African customary law in South Africa.

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[33] Visser *The Role of Legal Education in the Conflict of Laws* 69.

6 CONCLUSION AND RECOMMENDATIONS

This article has dealt with some of the problems relating to the offering of customary law in South African universities. Customary law used to be one of the “other laws” that were observed, but not recognised, in South Africa. However, it received full recognition as a legal system in South Africa when the current constitutional dispensation took effect. Examples of problems encountered by lecturers and students in the teaching of customary law are found in almost all known fields of the law. This is reflected in the fact that textbooks on customary law are written in either English or Afrikaans, which serve as the mediums of instruction in South African universities. In these textbooks, one finds words or phrases that are neither English nor Afrikaans, which may lead to translation and interpretation difficulties for lecturers and students who are not conversant with the language used. Is it not time to require lecturers in customary law to have at least a working knowledge of some of the other official languages recognised in South Africa? It is submitted that this would go a long way to avoiding problems that may arise in interpreting concepts known only in customary law. Although apparently a radical and difficult proposition, it is not impossible to achieve in the present-day South Africa.

Accepting that South Africa is a multicultural society is an important stepping stone to realising that its legal system cannot be made up solely of the common law. This is of pivotal importance to all stakeholders involved in the provision of legal education so that customary law can be placed in its rightful position and given the respect it deserves as a component of South African law. It should not be difficult to resolve the problem related to the period devoted to teaching customary law, which appears inadequate to cover the most important concepts in this field. Are South African universities and all stakeholders involved in the provision of legal education prepared to extend the teaching of customary law? Universities could consider inviting people who practise customary law to give guest lectures and seminars to impart knowledge about this field of law, bearing in mind that it is unwritten. This would in turn mean that people who practise customary law, not only as a system of law but as a belief, are involved in the shaping of the curriculum, which could prevent distortions of customary law and also lead to the development of this important legal system.

The development and preservation of customary law teaching depends on the involvement of a variety of people, including students, lecturers and people who practise customary law. It is submitted that customary law is indeed communal and various people should be involved in shaping this important legal system. Although this may have an impact on the tuition fee for the course, it is not impossible to achieve. The importance of this legal system in South Africa should be recognised in the drive towards curriculum transformation in higher learning and in the process contributing towards nation-building.