A Virile Living System of Law: An exploration of the South African Legal System

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The phrase – a virile living system of law – was used to describe Roman-Dutch Law and came not from the mouth of a proud South African, as might have been expected, but from an Englishman. Lord Tomlin, a judge in the highest court of appeal in the United Kingdom (the House of Lords in its judicial capacity) was giving the judgment of the Privy Council in London (to which, before 1950, an appeal could be taken against any judgment of the Appellate Division of the South African Supreme Court[1]) in Pearl Assurance Co. v. Union Government[2] when he said:

> "Roman-Dutch law … is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society."

In this article, I will argue that the South African legal system, of which Roman-Dutch Law is a major component, is a precious institution of huge constitutional significance, to be nurtured and developed for the benefit of all who live and work in South Africa. It had an excellent base – the profound work of the great Roman-Dutch jurists, writing principally in the Netherlands in the 17th century who analysed and codified the principles of Roman Law which were received into western Europe after the Renaissance. This system was then applied at the newly established Dutch colony at the Cape, and subsequently, was developed and applied throughout South Africa, often by outstanding judges.

One profound feature of Roman Dutch law in South Africa has been the incorporation within it, when necessary, of appropriate principles taken from other legal systems to resolve disputes for which it itself could not satisfactorily provide. The ability of Roman Dutch law to look outwards and to be alive to the great potential benefits of borrowing from other systems, to be truly comparative in outlook, was well captured by one of South Africa's great 20th century judges, Mr Justice Van den Heever in the following terms:

> "Were we bound to follow Dutch writers and them alone, there would be no point in consulting French, Italian, German, Spanish and Belgian authorities; these are constantly quoted in our courts and rightly, for Roman-Dutch law is really a misnomer: that system was for centuries the common law of Western Europe"[3]

This point had been made in the previous century. Writing in 1887 of the law in the Cape Colony, Victor Sampson declared that "[t]o say that there is not a book of law in the whole civilized world which may not possibly be an authority in the Colonial Courts, is not to go beyond the truth"[4] Nor is this merely an historical phenomenon. While it may now be less true than it was, say a generation or so ago, a cursory glance through the arguments of counsel in appeal cases often revealed a huge variety of sources introduced – and welcomed – by the judges of the South African Appeal Court.

That Roman Dutch law should have remained the basis of the law at the Cape even after the British annexation, was secured by one of the first proclamations issued by the new colonial power, in 1806 – one which guaranteed the "rights and privileges of the burghers and inhabitants of the Cape Colony, as they existed under the Dutch government."[5] It is a curious fact that this British proclamation actually saved the Roman Dutch legal system, which, but for the British occupation and colonisation of the Cape in 1806, would almost certainly have been swept away by the Napoleonic codification of a substantial part of western Europe, including Holland.

This Proclamation did not mean that South Africa was to be immune from British legal influence. In fact, despite the Proclamation, British legal principles were increasingly imported into South Africa in the 19th century through the application by British born and educated judges, of legal principles derived from the English Common Law. By the 20th century, this process was well embedded, and was continued by South African born judges (many of whom still received some or even all of their education in England). Indeed, it may be argued that the crowning achievement of Roman-Dutch law in South Africa was the forging of a remarkable relationship with principles of the English Common Law. This relationship was not without its tensions, but there can be no doubt that Roman-Dutch Law, with its huge admixture of European influences and its incorporation of principles of the English Common Law, created for South Africa an enviable legal system. This system can claim, among other things, to have provided the principles, which would have resisted the worst excesses of political extremism, but for the welter of statutes which the South African Parliament enacted to overcome the essential humanity of the Roman Dutch Law.

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Unsurprisingly, given the huge admixture of principles borrowed from other legal systems, the "South African legal system" emerged as one of the few so-called mixed legal systems, another being the Scottish Legal System (which blended principles of Roman Law with those of the English Common Law). To call it South African, in replacement of Roman-Dutch, was seen by some as obvious and others as the mark of a maturing nation, and the judges played their part. Judge President Claasen, declared that he considered "that the term Roman-Dutch law is confusing, for in fact the common law … is not Roman-Dutch law. It is South African common law."[6] Judge Holmes J.,[7] was more expansive,

> "Our country has reached a stage in its national development when its existing law can better be described as South African than Roman-Dutch. … No doubt its roots are Roman-Dutch and splendid roots they are. But continuous

> development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles of English Law, such as procedure and the law of evidence. The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards. Lot's wife looked back. Our national jurisprudence moves forward where necessary, laying aside its swaddling clothes."[8]

Two important distinctions should now be noted – first that between common law and statute, secondly, that between public and private law. The term "common law" is used to describe those aspects of a legal system, which derive from sources other than Acts of Parliament. Thus common law includes, for example, the writings of authoritative jurists and the judgments of the courts, both easy enough to understand in the context of the South African legal system. Acts of Parliament, or statutes, are also self-explanatory, although one feature merits some elaboration.

Parliament may disapprove of a particular principle of the common law (*habeas corpus,* for example or the South African equivalent[9]) and may then enact a statute suspending *habeas corpus* in certain circumstances. Yet, this statute will, most likely, come before a court when, for example, someone's incarceration is challenged as contravening this important common law principle. And the court, may, in the exercise of its function – to apply the law – decide that the statute enacting the suspension of *habeas corpus*, had, for example, laid down certain conditions for the suspension and that such conditions have not been satisfied. Bearing in mind that one of the fundamental principles of the Common Law is the strict construction of statutes where the liberty of the citizen is at stake, this is hardly a far-fetched example. Of course, there might then follow, further legislation either removing such conditions or – even more radical – altering the principles in accordance with which the courts interpret statutes. This dynamic interplay between courts and Parliament, between statute and the common law is not an infrequent occurrence in any developed legal system.

In the case of the distinction between public and private law, the former is, essentially, concerned with the legal principles which govern the relationship between the state on the one hand and the citizen on the other. Private law is concerned with the legal principles which govern the dealings between citizen and citizen. It is in public law that we see the law at its most political, where we can check to see whether the legal system protects human rights and how it wrestles with the Legislative and Executive branches of government in the great issues concerning the constitution of the country and its administration. In Public Law, Roman-Dutch law was certainly not wanting. Its essential humanity can be seen in the undoubted presence of what we know today as the Rule of Law, the built in principles which place the sovereign of the state under the law (*rex nihil potest, nisi quod iure potest*), the principle that in the interpretation of statutes any doubt should be construed in favour of the principle of equality and so on. There are stirring, genuine judicial dicta which pepper the common law of South Africa, testifying to the "absolute supremacy of the law",[10] and "the rights of everyone to equal justice before the law, the rule of law". These include, of course, the ancient Roman remedy of the *interdictum de homine de libero exhibendo*, expanded by the Roman Dutch jurists into a remedy as extensive in the protection of the liberty of the individual as the English equivalent of *habeas corpus*.

Private law does not lend itself to obvious, eye-catching observations of this kind. Yet, it is here where we can discern the maturity and sophistication of the legal system, and here, too, it is undeniable that the South African legal system passes all the tests. Indeed, given the immense strain placed by extreme political demands on the legal system, the liberal principles enshrining Human Rights were much more likely to bend or break, than were the principles of private law. In the twentieth century, the private law principles of the South African common law grew strong, coherent and reliable, whereas the public law principles were subject to continuing assault by the executive and legislative branches of government in pursuit of policies increasingly at odds with what disinterested observers would have been likely to describe as the legitimate aspirations of a substantial majority of the population.

This continuing assault had one positive effect – the emergence of a cadre of lawyers and judges whose ingenuity and courage pushed to the outermost limits the legal system as they attempted to protect dissenters against the overwhelming power and increasingly immoral position of those in government. The legal system and these courageous actors indeed showed the

best of the legal system, but too often in vain in terms of achievement of their ends.

The private law principles of the legal system on the other hand can be said to have gone from strength to strength. Some might argue that given the overall political context, this, too, was immoral because it gave the misleading appearance of normality. Far better, they would argue, for the private law system to have failed as well so that then the whole system could have been laid bare and reformed for the benefit of all.

I reject this nihilistic position. Throwing the baby out with the bathwater is not only a guarantee that you lose the baby, it is also the wilful destruction of that infrastructure which will be so desperately needed when political trust, fairness and justice return. This is not to say that the development of the private law principles of South Africa throughout the twentieth century was without its tensions. At one stage – in the 1950s and 1960s, it became a forum for the wider political tensions in the country. It was ready made for this purpose given its derivation in large measure from two sources – Roman-Dutch law and English Common Law – which had once represented bitter mutual hostility and enmity.

In truth, it seems that this tension in the legal system was present for much of the 20th century, through the establishment of the Union and at least up to the period in the 1960s when the wider political hostility just referred to, was played out through the content of the legal system. The succession to the chief justiceship in the 1950s – itself a stirring story directly related to the constitutional crisis brought about by the issue of the coloured male vote – brought to the post L C Steyn, who went straight from being the government Chief Legal Adviser to the bench, first for a few short years on the Transvaal bench and then straight to the appellate division. The unique nature of the appointment – the invariable practice until then was to appoint judges from the senior ranks of the practising Bar – fuelled the strong suspicion that this was a political move on the part of a government increasingly bent on rolling out its radical apartheid policies.

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Unsurprisingly, L C Steyn C.J.'s tenure as Chief Justice is a matter of some scholarly debate,[11] but many would agree with the assessment by Justice Edwin Cameron, a current senior and highly respected judge in the South African Constitutional Court,

> "The record shows … that L C Steyn had a towering but parsimonious intellect; that he was a scrupulous but ungenerous judge; that his attempt to rid South African law of its unique and fundamental connection with English law was not only jurisprudentially and historically unjustified, but ultimately quixotic; that he was an unfettered but – of his own volition – executive-minded judge; and that during his term of office a legal temperature, already chill for the survival of human values and the preservation of fundamental freedoms, turned several degrees colder."[12]

A further general point needs to be made in relation to the development of private law in the South African legal system. There can be little doubt as to the hugely impressive learning and scholarship that characterised the appellate division of the

immediately post-union period and few would dispute that there has been a long continuous thread of such learning in the upper levels of the South African judiciary, although some might argue that this thread ran rather thin from time to time.

But as impressive as are these riches of scholarship, especially on the part of the judges, it does raise the question of who were – or were to be – the beneficiaries thereof. In his deeply scholarly but at the same time hugely entertaining "The Making of the South African Legal Culture",[13] Professor Martin Chanock tells the story of what appeared in the Appellate Division Law Reports for 1919 as *Mapenduka v. Ashington*, on appeal from a decision of the Eastern Districts Local Division.[14]

The set of circumstances which led to this august end was a contract for sale between the two named parties, who were, respectively, a black African farmer and a white trader. As Professor Chanock points out, it was rare for a contractual dispute involving an African to attain the distinction of being decided by the principles of Roman-Dutch law, and this could only arise where the other party was white. Disputes between Africans were generally decided under the principles of African customary law, "believed", as Chanock puts it, "to be more suited to their [that is the Africans'] stage of evolution".

This already raises a serious question. If Chanock is right and Africans were considered not yet ready for Roman Dutch law, why should they have been subjected to it when a white person was the other disputing party? Happily, for two reasons, we can sidestep this question, first because it is one for a competent historian and secondly, whatever else the new South Africa has achieved or not achieved in its 16 or so years, it has rid itself of having to face questions such as this.

This case will remain fascinating, though, for the bizarre mismatch between the relatively simple folk and issue involved on the one hand, and the extraordinarily profound and sophisticated learning which they engendered. The legal issue was whether the creditor, Ashington, who had taken a pledge (of six oxen, a cow, a calf and a horse) to secure payment of the purchase price of seed, which he had sold to Mapenduka, could claim ownership over the pledged assets when the debtor (Mapenduka) defaulted. The parties had clearly agreed that in the event of a default, the ownership of the pledged property would pass to the creditor. But did the law allow for such a result? English law, for example, viewed its corresponding remedy (called foreclosure) as very harsh and made its application subject to stringent conditions on account of the abuse to which this might give rise. On the other hand, the issue of public policy was not one-sided. No less an authority than the great nineteenth century English judge and jurist, Sir George Jessel, was relied on by the creditor (Ashington), or rather the creditor's lawyer! According to Jessel, "if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

But the Appellate Division was far from satisfied with the lack of research of the lawyers who argued, and the judge who decided this case in the court of the Eastern District Local Division. One appeal judge after another excavated the old authorities, going back to the Emperor Constantine, stopping to consider a rescript of the Emperors Severus and Antonius, probably, according to Acting Judge of Appeal de Villiers "altered by Tribonian", Justinian's Code itself, and then moving seamlessly through a number of the Roman Dutch authorities before going on to the jurists of France and Germany, including Carpzovius's Law of Saxony, Thoasius and Huber, as well as van Gluck and Pothier. The one saving grace of this huge mismatch between judges and litigants is that Ashington would probably have been as much at sea as Mapenduka.

There is a serious point here. However incongruous such situations are, the actions of the judges do endow the law with a certain majesty, and this in turn, can lead to a respect, which is all important if the legal system is to play a role in securing the stability of the society. On the other hand, if the gap is huge and the effect is unfairness, it may have the opposite result. I think we are in a position to make one judgment in this regard. The huge flowering of learning in South Africa's law schools came about quickly enough to ensure that part of the population, at least, was ready soon enough to appreciate the effort which the early judges had invested in trying to ensure that in relation to the body of *private law principles*, South Africa had a legal system which was based on principle and allowed for reasonable certainty in predicting the result of particular day to day operations. It goes

without saying that such predictability, too, was – and is – an essential component of a credible legal system.

In my view, however, it is more important to read the Mapenduka case for what it might say about the South African legal system as a whole, and for its public law in particular. How, it may be asked, can this absurd private law dispute be of any positive relevance to the more political branch of the legal system? In negative terms it speaks to the huge mismatch between the legal system and the overwhelming bulk of the population. Undoubtedly, it is a serious dereliction of the duty of any administration that there are citizens deprived of the protection of the legal system, but happily, while this was once clearly the case in South Africa under the *ancien regime*, we can say with confidence that the country is moving well away from this aspect of its dark past. Then we may look to this decision as illustrating a commitment to seek appropriate solutions by exploiting the riches of the legal system and – given the latter's built-in flexibility and internationalism – the riches of other systems. Such a commitment can have a profound influence in continuing the positive development of an inherently liberal and humane system.

In his cool but devastating analysis of the contribution of Chief Justice Steyn to this erosion, Judge Edwin Cameron draws attention – both expressly and by implication – to the great liberal principles of the South African common law which might have been – but weren't – deployed to protect the citizen against an oppressive government.

Nor can there be any doubt of the accuracy of this description for the South African common law. Indeed this could be observed with devastating clarity during the period of its radical erosion under the *ancien regime*. In his cool but devastating analysis of the contribution of Chief Justice Steyn to this erosion, Judge Edwin Cameron draws attention – both expressly and by implication – to the great liberal principles of the South African common law which might have been – but weren't – deployed to protect the citizen against an oppressive government. Judge Cameron's conclusion is as important today, as it was when first published in 1982, as important in its assessment of the *ancien regime*, as it is as a beacon for the new regime.

> "What is certain is that [L.C.Steyn] … was appointed in 1955 to an appeal court which had gained a reputation throughout the Western world for its fearlessness and for championing fundamental rights rather than acquiescing in their impairment. He did not leave it so. In a country which has a legal system abundant in refinement and flexibility and which offered at least the opportunities for preserving the non-statutory fabric of justice vigorous and resilient in its protection of fundamental values, that is epitaph enough"[15]

Nor is he alone. Among other great contemporary South African lawyers, Sir Sydney Kentridge Q.C. has written of the South African legal system as composed, in part, of

> "a system of common law, derived from the Netherlands, the Roman-Dutch law, which has a strong underlying presumption of the equality of all citizens before the law, and a simple and effective *habeas corpus* procedure, which has been judicially interpreted as meaning that every arrest is prima facie an interference with the liberty of the individual and must be justified in court by the arresting authority."[16]

And the first president of the new South Africa's Constitutional Court, Arthur Chaskalson, has remarked that:

> "… we will come to appreciate that we owe much to our [old order] judges … they have somehow … kept alive the principles of freedom and justice which permeate the [Roman-Dutch] common law … the notion that freedom and fairness are inherent qualities of the law lives on … This is an important legacy and one which deserves neither to be diminished nor squandered."[17]

Certainly we can agree with Lord Tomlin that the South African legal system was in 1937 a virile living legal system. Roman-Dutch jurists bequeathed a platform of depth and breadth on which, happily, the great judges of this country built a great edifice. The fact that some of their lesser brethren and some of the legislators pursued narrower concerns should not detract from this handsome legacy. Nor is this simply an exercise in surveying what has been and remarking how pretty things once were. It is, in my view, a vital exercise in ensuring the retention of a system well equipped – not forgetting its capacity for change and development – to meet the testing times of a difficult and complex society. No society, today, which hopes for stability in which to meet the needs of the substantial majority of its citizens can do without a well tested and respected legal system. South Africa is very fortunate to have one in place and the big challenge is to ensure it is not only maintained but, enhanced.

NOTES

1 The former description of what is now South Africa's Supreme Court of Appeal

2 [1934] A.C. 570, 579

3 van den Heever J.A. sat on the Appellate Division in the 1940s and 1950s and this quote came from his *Partiarian Agricultural Lease in South African Law*, (1943) p. 7; like many of his judicial colleagues, van den Heever J.A. had great intellectual gifts well beyond the law. Among his other publications is a charming book of essays, Gerwe uit die Erfpag van Skoppensboer. Another example of this intellectually gifted judiciary was Unwin Barrett J.P., judge president of the Transvaal Provincial Division in the 1930s, who composed a verse translation into English of Vergil's Aeneid (published by Schaik, Pretoria in 1937).

4 Sampson, op. cit. p. 109

5 Victor Sampson, Sources of Cape Law [1887] 4 Cape LJ 109, 110

6 In *R v. Goseb* 1956(2) S.A. 696.

7 He was then in the Natal Provincial Division of the Supreme Court of South Africa; he was later to become one of the very distinguished judges of the Appellate Division.

8 In Ex Parte de Winnaar 1959 (1) S.A. 837, 839.

9 See below

10 Innes C.J. in *Krohn v. Minister of Defence* 1915 A.D. 191, 196

11 See Cameron, "Legal Chauvenism, Executive-Mindedness and Justice – L C Steyn's Impact on South African Law" [1982] 99 South African Law Journal 38 (and see reference in footnotes 2 – 5); Dyzenhaus, "L C Steyn in Perspective" [1982} 99 South African Law Journal 380.

12 Cameron, *op. cit.* at 40

13 Cambridge University Press, 2001.

14 1918 EDL 299.

15 Cameron, *op. cit.* at 75

16 "Bills of rights – the South African Experiment", [1996] LQR 237 at 238 (footnotes omitted).

17 "Law in a Changing Society" (1989) 5 South African Journal on Human Rights 293 at 295.