PRESENTATION TO THE CONSTITUTIONAL REVIEW COMMITTEE, REVIEW OF SECTION 173 OF THE CONSTITUTION, READ WITH SECTION 211 (3)// AFRIKAN LAW REFORM//31st OF MARCH 2023, VIRTUAL PLATFORM

INTRODUCTION

"I am tempted to think that it should start with the truth being told. That truth is- we should not perpetually pride ourselves in and with applying a foreigner's law. We should jam the brakes on the perpetuation of the capture." See page 18 of the submissions, bottom paragraph. On the same paragraph, it is stated the "letters patent practice, the imposition of the colonizers' laws on a captured society and others"[1] are what the colonizers used to solidify legal capture.

"[t]he continuation of the development and application of the colonizer's and oppressor's law turns a practitioner into a perpetual agent of capture". See top of page 19, of the submissions.

Yes, legal capture is a language our society is so intolerant of. It is not the language we should, though it is true, speak, for we may offend the Master, masquerading as an investor. You may destroy a man or woman or stifle his/her career mobility. Fortunately, the truth cannot be killed, and it will live to be told.

1. That is what you do when you attempt to solve a problem. It must be identified. Even if it is challenging to be specific, still, specificity may help. I am specific in this presentation.

2. For the above reason, one of the grounds for excluding Afrikan law is that it is law:

   2.1. which the oppressors never imagined governing them and their affairs, and
   2.2. of inferior nature and race. The operative mind of the person seeking to perpetuate, from the previously advantaged perspective,[2] the oppression of the "natives", should be so understood.

PART A- BASIS FOR REVIEW

THE COMMON LAW

Three sources of common law

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[1] "[W]e may also consider a judgment in the matter of Mabo, an Australian case law. Full citation- Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). Please note, not the 1988 judgment. If we consider the judgment.

[2] The opposite of previously disadvantaged is the advantaged. I take this from section 9 of the Constitution.

3. The common law has **three** components, namely-
   3.1. the **First**- in the past, it was sourced from European[3] authors/authorities;[4]
   3.2. the **second** part is courts' judgments,[5] and
   3.3. **thirdly,** legislation developed based on the two above.

OPPRESSIVE PAST- ***Afrikan law not applicable to Europeans***

4. Native "customs are not applicable to civilized people". See ***Mokwena v. Laub***, [**1943**] **W.L.D,** page 67.

5. "natives" refers to Afrikans,[6] mainly those of us who are referred to as Blacks. The civilized people referred to persons who observed the European way of life, mainly called Europeans at that time (1943).

6. Afrikan law was not applicable to Civilized people.[7]

OPPRESSIVE PAST- ***the reason for the above***

7. In colonial and apartheid terms, there were three groups of people, namely:

   7.1. the natives- who are not civilized;
   7.2. the Europeans- who are civilized people,
   7.3. any person who is deemed to be civilized- such people who, although not Europeans, have proved that they live according to European values.

OPPRESSIVE PAST- ***the Europeans' culture is superior***

8. For its primitive status, Afrikan law would not apply to Europeans. Conversely, for its civil status, civil law binds all. It is common to all. It is common law.

REASON FOR REMEMBERING HISTORY

[3] Judge Lamont, see page 17 of the submissions to the committee.
[4] They recorded their societies' customs and practices. Their recorded knowledge was applied in interpretation by Courts.
[5] Decisions arrived at by court, from the above, constitute a part of the common law. Judgments also from the interpretation of statutes.
[6] Including Coloured persons.
[7] Customs "... are recognised by the Native Courts where the liti-gants are natives." See page 67- ***Mokwena***. Further, in the *Mokwena* matter, *Solomon J* held, in summation, that a matter of law that did not arise under the civil law was not binding and enforceable against Europeans. The *Mokwena* matter arose from native law. Such law was not applicable to the defendant in the matter, since the defendant was a civilized and European person.

9. The current has to be understood in the context of where we come from. The current, all the time, is connected with and is always based on the past.[8]

10. In 2023, Afrikan law still applies not to the previously advantaged. Colonial arrogance still permeates our constitutional order.[9]

EXAMPLES OF SETTLED LAW

11. See paragraph 2, page 4 on examples of settled law:

    11.1. adversarial litigation,
    11.2. constitutional subsidiary.

INTENTION TO DEVELOP LAW

12. There is an intended law for a woman to marry two men, and she becomes their wife. Polyandry. Such is not Afrikan. However, it may become law.

13. Those who oppose this non-Afrikan practice are labelled in many ways. Weak, some surrender.

EXAMPLE OF COMMON LAW, INFORMING LEGISLATION

14. I turn to an example of the common law and how it was developed. Further, how it became statutory law.

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[8] For that reason, the German holocaust is discussed by many in the world not because it is liked by its victims. Both those victimized directly and those who become victims by reason of being associated with the aggressors should discuss such barbarism. They should remind each other why such should not be repeated. The same with our oppressive history. The law was at the centre of the oppression in this country. That is why I started with the *Mokwena* matter.

[9] Still about the past, in 2004, the Cape Division of the High Court recorded matters of history. The part of the recordal was not a subject of the last judgment in the matter, the Constitutional Court decision. In the High Court, *Bhe and Others v Magistrate, Khayelitsha, and Others*, 2004 (2) SA 544 (C), and obtainable from SAFLII- https://www.saflii.org/za/cases/ZAWCHC/2003/49.pdf at para 3, and records the following:

a. by the proclamation of Sir David Baird in 1806, the rights and privileges of the inhabitants of the Cape Colony, … were expressly reserved to them …
b. in this way Roman-Dutch Law was secured to the European people of South Africa.
c. As will appear below, the law from Europe was to be and is binding on Afrikans. Not Afrikan law was to bind Europeans before 1994. Afrikan law is not binding on the previously advantaged.
d. Colonial and oppressive arrogance grounded the belief that the law of the locals, natives, would not be binding on and to civilized people of Europe, in this country. The Statement was made in 1943, as appears in the *Mokwena* matter, above.
e. That statement applies even today. The language may have changed, in so far as the reference to "natives" and the "civilized people" is concerned.

Common law and marriages act, 1961- marriage

Definition

14.1. "Our common law defines marriage as a union between a man and a woman..."[10]

The origin- Christianity

14.2. The one man and one woman marriage is based on Christianity. See ***Nkambula v Linda*** 1951 1 SA 377 A, page 380 (A-D).[11]

14.3. A Christian marriage, during the dark days, was expressed as different to Afrikan marriage. The former was superior to the latter. The arrogance of the oppressor.

OUR HISTORY- REJECTING AFRIKAN MARRIAGES

15. Afrikan marriages were said to be repugnant to the moral principles of the people. For a man to marry two women was said to vitally affect the nature of the most important relationship into which human beings enter. It is disapproved of by the majority of civilized peoples.[12] Afrikans were not, in the oppressor's mind, civilized.

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[10] https://www.justice.gov.za/salrc/dpapers/dp104.pdf, SOUTH AFRICAN LAW REFORM COMMISSION DISCUSSION PAPER 104 Project 118 DOMESTIC PARTNERSHIPS, paragraph 2.2.23.

This is drawn from the English case- ***Hyde v Hyde and Woodmansee*** [1861-1873] All ER Rep 175. ***Fourie and Another v Minister of Home Affairs and Another,*** 2003 (5) SA 301 (CC), (31 July 2003), at para [3] - under the common law, marriage is the legal union of a man and a woman for the purpose of a lifelong mutual relationship and that the Marriage Act contemplates a marriage between a male and a female, to the exclusion of all others.

[11] The Judge quoted with approval ***Ngxozana v. Msutu***, 2 N.A.C. 190. It is a 1911 judgment. The Judge held, in summation, that the Christian marriage annuls customary union. See Page 380 (A-C), "Appellant was married by Native custom to two women. Some years ago he became a Christinian, and notified his second wife his intention of marrying the other wife by Christian rites: thereupon the second -wife, Buku, left him."

In 1905 appellant married his first wife by Christian rites, and by doing so annulled his marriage with Buku, the second wife, as by the Christian marriage he bound himself to keep to that wife only. Having by his own act cancelled the marriage ..."

[12]As one of the examples of our legal history, in ***Seedat's Executors v The Master Natal*** 1917 AD, page 307, the Appellate Division, as it then was, confirmed the non-recognition of non-civil marriages. I say Afrikan law because it permits more than two spouses, with only one man (however, Seedat's matter was a Muslim marriage).

Page 307, respecting a principle in terms of which a man may marry more than one wife, the Court held that such marriage "... It is reprobated by the majority of civilized peoples".

So, there were civilized and primitive people. The law of the primitive was to be and was assessed against the good law of the civilized people.

FAIL EUROPEAN STANDARD- NO GOOD LAW

16. Polygamy is "repugnant to the policy and the legal institutions of both Holland and England." See page 308 ***Seedat's Executors v The Master Natal*** 1917 AD.

EUROPEAN COURTS DO NOT CARE ABOUT ANYTHING WHICH OFFENCES EUROPEAN PRINCIPLES AND VALUES

17. I know of no case in which the Courts of either country (Holland or England) have given effect to a foreign polygamous marriage or recognized the resulting status of either of the parties to such marriage. See Seedat, page 308.

18. Afrikan law cannot apply in Europe. Just imagine it applying in Europe!!

COMMON LAW BUILT IN TWO SOURCES

19. The common law is built in two sources:

    19.1. Court judgments – the contribution of the European authors has made its way into judgments.

    19.2. Legislation – sourced from European authors and judgments, as shown above.

Current Common and Afrikan law

Still on marriages

Consequently, a person in an Afrikan "marriage" could marry someone else under the civil marriage. The civil marriage would apply, terminating the customary law marriage. See *Nkambula,* page 380 (A-D).

The underlining principle- whenever the two sets of law exist in a specific situation, the common law should apply.

'… no country is under an obligation on grounds of international comity to recognise a legal relation which is repugnant to the moral principles of its people. Polygamy vitally affects the nature of the most important relationship into which human beings enter. It is disapproved of by the majority of civilised peoples, on grounds of morality and religion, and the courts of a country which forbid it are not justified in recognising a polygamous union as a valid marriage. By a polygamous union, I mean one the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question. The fact that the man and woman contract on the basis that he shall be at liberty to do so differentiates their relationship from that which we give the name marriage, and stamps their union as polygamous.'

20. The main similarity between the old and the current system, in respect of marriages, is that the above marriages are recognized.

21. The main difference between the two marriages is that:

    21.1. only Afrikans may enter into Afrikan marriage, and
    21.2. all persons may enter into a civil marriage.

22. The origin of the main differentiation is that:

    22.1. Afrikan Law is primitive, and only those people at the lowest level should have it applicable to them, and

    22.2. the Civil law, of the civilized people, being common, should be applicable to all.

PROOF OF AFRIKAN LAW- EXPERT EVIDENCE

23. The High Court, in *Bhe* held that

    Afrikan law "to be proven by expert evidence as if it was foreign law."[13]

Afrikan law was subject to common law

24. Even in the case of such expert evidence, the Court held that section 11(1) of the Black Administration Act enjoined the court to apply African Customary Law, provided it was not repugnant to public policy or natural justice. Originally this proviso read – "not contrary to civilisation".

25. Public policy was grounded in European values. So, everything an Afrikan did had to comply with European standards.

CURRENT POSITION- CHANGES

26. Post 1994, the above philosophy has not changed, in so far as the practice of the law is concerned. The language, however, is not in express terms, as was the case before 1994. Expert evidence still needed to prove Afrikan law. [14]

[13] See bottom of page 5, in so far as the online version is concerned.
[14] See *BHE*, ***it is still required that*** "African Customary Law to be proven by expert evidence as if it was foreign law", and I submit that, relying on *BHE,* the Common Law is ***not*** to be proven by expert evidence in that it is ***not*** foreign law.

27. Even at this stage, Afrikan law is not applicable to persons who were called Europeans. An oppressor's design is continuously given life.

28. Reason- the same as old. The law of the uncivilized people cannot apply to the civilized people. This is not how to say it, intellectually, I acknowledge.

AFRICANS SHOULD HAVE KNOWLEDGE PRODUCED FOR THEM

Pages 4 to 5, paragraphs 3-5, of the submissions

29. In essence, Africans are reduced to children, who have to, in formal and conventional education, learn European ways/knowledge.

30. This includes an LLB program. It is a study program for students to learn European law, imposed, adopted and developed over many years.

31. The exception may be "customary law". Whose material, still, from which students study? Who are the authors?

RACISM

32. We should not say that the above is grounded in racism. We will sound racist. Well, we say it.

33. The Constitution, it appears, protects a racially discriminatory practice. That is section 173.

SECTION 173

34. The above is evinced by the fact that the Higher Courts have inherent jurisdiction to develop the common law. It does not such in respect of Afrikan law. See section 173.

35. The above means that to develop:

    35.1. Afrikan law, a person called an expert must give evidence of the relevant law,

    35.2. Common law, the law is known by Judges, and no expert shall be called.

Practical effect

36. The law of Europe is easy to develop. Not the law of Afrikans.

37. Funds would be needed for experts, to develop Afrikan law. So, it is expensive to develop Afrikan law. No experts regarding the meaning and development of Common Law.

Section 211 (3)

38. Afrikan law is only applicable when legislation exists. Not with regard to the Common law.

39. That legislation must be dealing with customary law. Still, even if legislation exist/s, it will apply only to and amongst Afrikans.

40. The resources of the country are dedicated to further developing a developed source of law. See ***Carmichele v Minister of Safety and Security*** (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC), paragraph 39. The general duty, as recorded in the judgment, does not exist in so far as Afrikan law is concerned.[15]

SOLUTION

41. Only one set of law should be applicable. That law should be the law of Afrikans, subject to the Constitution. The common law should be an alternative.

42. More than 300 years of the development of the European law is sufficient. It needs to be stopped.

43. Many years of the development of Afrikan law should be the solution.

44. Professionals should lead change. However, it is everyone's constitutional obligation and responsibility.[16]

45. The absurdity in section 173 should be taken away. This:

[15] It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a "general obligation" because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.

[16] ***City of Tshwane Metropolitan Municipality v Afriforum and Another*** (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016), paragraph 8. See also ***Soobramoney v Minister of Health*** (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), para 8- The duty to "transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."

a. for the local law to be central to the legal system and ground it. Like any law, subject to it being consistent with the Constitution;

b. for European law to be borrowed only when it is necessary;

c. for Afrikan law practitioners to be able to practice the law that is part of them, and

d. for Afrikans to have some science they teach and practice. Teach even those who, under the oppressive system, could not be taught by Afrikans, unless the education happens without some acknowledgement of an Afrikan's contribution.

Benefits of applying Afrikan law

46. One of the Afrikan principles easy to develop into law is-

"Molomo ge o eja o roga o mongwe" - (no one should eat alone, and must share.

PART B- THE PROPOSED AMENDMENT

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47. See pages 3 and 4 of the submissions

PART C- DISCUSSIONS FOCUSED ON THE AMENDMENT

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48. Paragraphs 8 to 23.

49. Recommended amendment- paragraph 23.

PART D- DEMONSTRATION OF HOW AFRIKAN LAW MAY BE RECORDED

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50. Establishment of a Commission

Paragraph 24, of the submissions

50.1. This should be legislated for.
50.2. Purposes- development of African Law.

50.3. The research entity in Parliament (South African Law Reform) noted, we need an institution dedicated to the development of African law.

51. Outcome of the work

Paragraph 26, of the submissions

51.1. The outcome of the work of the Commission should be the source of law.

51.2. The same approach as the common law was developed. We should note that the experiences of persons from societies in Europe were recorded by individuals. Those individuals, having been taught by their societies, and having observed how those societies functioned, produced written work. They reduced to writing their societies' customs and practices. Following their work, law was developed.

51.3. We need new authorities. However, this time from Mankweng, Mapulaneng, amongst other places.

51.4. The commission should collect African law sourced from lived experiences of Africans. It should be collated into books, on different subjects.

52. Pro/Pan-Afrikanist

Paragraph 28.1, of the submissions

We need to have a pro-Afrikanist or Pan-Afrikanist content of the law and a different LLB content

CONCLUSION

53. Under the rubric, the foreign nature of the law, the report of the Constitutional Commission of Uganda, at paragraph 17.25, states:

"Most of Uganda's laws are derived from English law, and in the past were used by the colonial masters to rule Uganda. Following independence, the whole legal system should have been transformed to suit our own culture, norms and customs. The opportunity was never taken and so much of our law has remained

foreign to most of the people of Uganda, both educated and non educated, with the exception of members of the legal profession."[17]

54. The situation in Uganda is the same as in this country. The oppressor's law remains. How, then, are Afrikans to be liberated? Only for political rights? No, we say.

55. This necessitates change:

> "South Africa still looks very much like Europe away from Europe … This does not reflect but rather belies a commitment by all to the spirit of genuine unity, transformation and reconciliation"[18]
>
> Too, the law still looks like we are in Europe away from Europe.

56. Our Constitution enjoins us to move "[F]rom wickedness to equality", wrote former Chief Justice, *A Chaskalson*. We need to move away from the common law as the central law to Afrikan law being the central one.

57. Afrikan law is certainly not equal to and with the common law. The latter is treated as superior. Therefore, the work to be done is that Afrikan law should reach a stage of equality, and go beyond that. It must be the main law applicable.

58. It should be a change from:

    58.1. from the ***Romans*** to Batlokwa, Vha-Vhenda and others;

    58.2. the authorities should begin to be the above-mentioned, Shona people and others;

    58.3. not Romans, nor Dutch. Not the English! Not people from Europe nor European values, and

    58.4. we should not further persue learning from people who oppressed us.

59. Amending section 173 and 211 (3) may be one of the steps.

Ke bontlokwana bjo re naho le bjona.

THOBELA!

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[17] http://citizenshiprightsafrica.org/wp-content/uploads/2016/06/Uganda-Constitution-Commission-1995-report_missingchaps7-14_and24-1.pdf

[18] ***City of Tshwane Metropolitan Municipality v Afriforum***, paragraph 12.