Pluralism or unification in family law in South Africa*

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Terminology

Legal pluralism entails the existence of more than one legal system in a country.¹ The basis for legal pluralism is the occurrence of different cultural or religious groups with their own legal systems.² Furthermore, legal pluralism also includes the law of a cultural or religious group which is practised by the group but not recognised by the state. Woodman refers to this high degree of pluralism as "deep legal pluralism" which can be distinguished from "state law pluralism", legal norms of the various groups recognised or adopted by the state.³

Legal pluralism is a feature of the countries of Africa and Asia, but is also found in other parts of the world.⁴ In the Republic of South Africa we find the following pattern of legal pluralism with regard to family law: the South African common law based on Roman Dutch law, English law and legislation of the central government, briefly referred to as common law; different indigenous legal systems which in particular circumstances are applicable to members of the indigenous groups; the Hindu and Islamic family laws which

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³Woodman "Unification . . ." 37 43.

⁴Compare Hooker Legal Pluralism (1975).
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There is a difference between unification and integration of laws. Unification entails a change in the condition of legal pluralism to unity of law. Complete unification means the creation of a uniform system of law which substitutes the existing legal systems completely. In the case of family law it would mean one system with the same rules for all persons and groups in the Republic of South Africa. The uniform system could be composed of elements of the different legal systems or the unification process could be the adoption of one system as uniform law for all persons and abolition of the other systems.

Integration amounts to partial unification, however small it may be. It means bringing together under one enactment the different laws with regard to a particular branch, for example marriage or family matters, in order that the different systems continue to exist but without conflict and that some elements thereof may be unified. Integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters which cannot be unified to the personal laws of the parties.

Harmonisation is also seen as different from integration. It seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately. An example of harmonisation would be to place the customary and civil marriage on an equal basis, that is considering both marriages as valid marriages with recognition and protection of the rights of the spouses and children.

Ethiopia is the only country in Africa which embarked on a full-scale project to unify every branch of the civil law. Other countries opted for the unification or integration of particular branches, such as criminal law (Kenya, Uganda, Nigeria), marriage (Tanzania, Zimbabwe, Transkei) and succession (Tanzania, Kenya, Bophuthatswana).

Merits of unification and pluralism

What are the arguments for or against unification? Are the arguments applicable in general, or are the context in which legal pluralism is found and the time at which unification is considered, important?


7See also Woodman "Unification . . ." 58–69 for a discussion of some of the arguments.
Normal legal position: legal unity or legal pluralism

Some regard legal unity as the normal position and accept that a country with legal pluralism must, without more ado, strive for unification. Earlier this view occurred reasonably generally and is based partly on the reputed general legal position in developed countries, namely the absence of legal pluralism. At the conferences on indigenous law in Africa held in London (1959–1960) and Dar es Salaam (1963) the delegates were in the main in favour of an early unification of certain legal areas and a temporary application of the indigenous law in other areas. At the 1963 conference it was reported that most African countries strove for unification, or at least integration in respect of all legal branches.8

This erroneous view does not hold water as countries with cultural homogenous communities and one legal system are the exception rather than the rule.9 Legal pluralism is found in Third World countries and in quite a number of developed countries.10 Moreover, the legal systems in modern federal states can also be seen as constituting legal pluralism. In most countries the basis of legal pluralism is present, namely the composition of the population from different ethnic, cultural and religious groups. In recent times special attention has been given to the incidence and official recognition of legal pluralism in highly developed countries. In the United States of America partial recognition of the laws of Red Indian tribes has been granted and in Canada negotiations are taking place between the government and community leaders for greater recognition of the Red Indians and other indigenous groups.11 In Australia, where indigenous law is not recognised, the Australian Law Reform Commission has been busy since 1977 investigating the recognition of certain parts of the indigenous law as a result of representations by the Aborigines.12

Legal pluralism is today even to be found in countries where the population earlier consisted of a cultural homogenous group. In the present United Kingdom with its different cultural and religious groups, the marriage

9Hooker 1–2.
laws of the Muslims, Sikhs and Hindus are observed. Strijbosch describes how the Moluccan communities in the Netherlands strictly observe certain marriage rules of their mother communities in Indonesia (pela relations). In recent times it is increasingly realised that the concept of legal pluralism is not to be rejected out of hand and that it will be found as long as different ethnic, cultural and religious groups live in a country according to their own laws.

Alleged inferior laws

Is criticism of some of the legal systems in a pluralistic dispensation in itself a reason for unification? All manner of criticism is, for instance, levelled against the indigenous law — that it is uncivilised and primitive, that certain indigenous legal rules are in conflict with good morals, justice and Christian principles, that it is inferior, and that a study of the preservation of the indigenous law amounts to indirect support of the apartheid policy.

Allegations that indigenous law is uncivilised, primitive and inferior, are untrue and indicate both ignorance of and contempt for indigenous law, and the superior delusion of the Westerner or the slavish pursuing by an African of Western laws. It must be borne in mind that any legal system cannot be seen as being divorced from the social circumstances, values and religion of the community concerned. Furthermore, it is neither ethical nor possible by way of legislation to force the values and religion of one group on to another. To reject indigenous law because it was recognised under the apartheid regime and because diversity of legal systems fits in with an apartheid system is senseless: indigenous law derives its existence from indigenous communities, it at no stage formed part of apartheid legislation, and it is honoured spontaneously by the relevant communities.

Criticism of indigenous legal rules, such as the rules with an onerous and discriminatory tendency towards females, is not in itself a reason for unifica-

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tion, but rather a reason for the consideration of legal reform. Only when alternative rules for reform have been considered and it has been found that the rules of another legal system in the country are better, is there indeed a valid reason for reform which at the same time embraces unification.

Complexity of legal pluralism

It is alleged that legal pluralism places unnecessarily high demands on jurists and in particular on judicial officers. As a result of legal pluralism there is an involved set of internal conflict of laws and, furthermore, the courts have to apply unwritten indigenous law that is difficult to determine. In favour of unification it is argued that legal unity eliminates internal conflict of laws and offers greater legal certainty, thus easing the task of the jurist. In the criminal law sphere legal certainty is considered so important that in some African countries – like Uganda, Kenya and Nigeria – criminal law has been codified and unwritten indigenous law may no longer be applied. A further argument is that greater legal knowledge is expected from a jurist in a legally pluralistic country. The ordinary man is also largely uncertain about his position as he does not have knowledge of the internal conflict of laws and of all the legal systems that can control the relevant situation.

The complexity of a pluralistic legal dispensation must, however, not be exaggerated. With a proper system of choice of law norms and jurists who have respect for an interest in all the legal systems of the country, problems should not be insurmountable. It is doubtful whether the number of legal rules in a legally pluralistic developing country exceeds those in a highly developed country with a single legal system, but with increasing Acts and regulations. Recording of the unwritten indigenous law will undoubtedly contribute to greater legal certainty. The importance of legal certainty so far as it concerns legal pluralism in India was expressed as follows by Earl McAuly in the previous century

But, whether we assimilate those systems or not, let us ascertain them; let us digest them. We propose no rank innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this – uniformity where you can have it – diversity where you must have it – in all cases certainty.

Greater legal certainty can, however, not be achieved without the agreement and cooperation of the relevant communities. Caution should be exercised against cosmetic legal unity that results in problems greater than those arising from a measure of legal uncertainty; among other things deep

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21 As quoted by Allott The Merits . . . 7–8.
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legal pluralism and greater legal uncertainty so far as the ordinary person is concerned.

**Codification and unification**

Codification and unification are not the same. A code can contain uniform legal rules or rules of different legal systems. Furthermore, codification is neither necessary nor sufficient to achieve unification. One must also not make the mistake of thinking that codification will, without more ado, solve the problem of uncertainty in a legally pluralistic country. According to Allott an element of effective law is the law that is known and generally acceptable. He continues by saying that a code is in danger of being neither of the two.

**National unity and economic development**

After independence some African countries assumed that unification was necessary for national unity and economic development. It is argued that different legal systems and courts divide a country, and to build a nation every possible cause of national division must be eliminated. Furthermore, legal pluralism and certain indigenous legal rules, especially group rights regarding land and within the family context, are seen as obstacles to economic development.

However, it has not been proved that unification leads to national unity. In fact, unification against the will of the population will not only result in cosmetic legal unity, but also to dissatisfaction and instability among the population. To allege that individuality is a characteristic of a modern society and that indigenous law cannot promote economic development, is an erroneous conception. European legal development projects with a view to economic development cannot necessarily be applied with success outside Europe. With legal reform the different economic systems which exist alongside each other in an African country and the possible new forms of economic systems must be taken into consideration.

When unification and legal pluralism are considered the connection between the law, economy and other cultural divisions must be considered. A legal system too far ahead of the economic and social circumstances is just as ineffective as one that is archaic. Unification must take place with the assent and cooperation of the community involved. A government cannot eliminate

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22 Compare Woodman “Unification . . .” 60.
23 The Merits . . . 22–23.
legal pluralism with the stroke of a pen, that is to say not all economic and social changes can be made by way of legislation. 28

If the new law is too strange, substitutes existing law that is highly appreciated, or is unacceptable for some other reason, it will not be observed. The following are examples of this: the reception of modern Western codes in many countries of the Third World is partly effective only; 29 long after the acceptance of the Ethiopian Civil Code the indigenous communities still adopted children in terms of the repealed indigenous law; 30 in the cities of Nigeria the indigenous population give precedence to the unofficial tribunals for the speedy, simple and effective solution of their problems; 31 at the Bulsa of Ghana the administration of justice is still managed by traditional institutions despite its having been abolished by the national authority; 32 the Kuria of Tanzania ignores the statutory enactment in connection with marital goods. 33

The equality principle

It is sometimes advanced that equal rights for all inhabitants of a country require uniform law and that legal pluralism transgresses on the equality principle by differentiation between the various groups and the sexes. 34 Galen explains that non-Africans have certain rights that Africans do not have and that men have more rights than women. 35 The issue that legal pluralism may be in conflict with the principle of equal rights is an important dispute in the debate surrounding the recognition of indigenous law in Australia. 36

Equality of treatment does not necessarily include uniformity of treatment. Therefore, there is no violation of the equality principle where different legal systems apply to different groups, provided that a group is not prejudiced for this reason. Prejudice is present where a group does not receive the same benefits of treatment from the state as other groups, for instance, non-recognition of a marriage for pension and tax purposes. The fact that the one

29 Van den Bergh 30 31 33 39.
34 Woodman "Unification ... " 61-63.
36 See Crawford "The Australian ... " 313; Kirby 329.
legal system grants less rights than the other legal systems or discriminates against females, may be sound reasons for legal reform, but not for unification. What is of further importance, is that the internal conflict of laws must offer the same choice of law to members of the different groups and to males and females, otherwise there will be a violation of the equality principle.\(^{37}\)

**Rights of the minority groups**

Nowadays there is international interest in the official recognition of the indigenous law and in international law literature reference is made to the laws of minority groups regarding self-determination.\(^{38}\) Internal self-determination comprises the creation of own political institutions, development of own economic resources and the control of own social and cultural development.\(^{39}\) The International Labour Organisation Treaty 107 of 1957, also states that indigenous groups in independent countries be allowed as far as possible to maintain their customs and institutions, including their criminal law.\(^{40}\) In the African Charter on Human and Peoples’ Rights (1981) recognition is given to the right of internal self-determination of a minority group.\(^{41}\)

The recommendation of the United Nations Sub-committee for the Prevention of Discrimination and Protection of Minorities in connection with the rights of ethnic minority groups is also of importance.\(^{42}\) This increasing international interest in the official recognition of the laws of ethnic and religious groups is a realistic and positive approach to legal pluralism. How strongly an ethnic minority group feels about maintaining its laws, is properly illustrated by the strongly-worded statement by the indigenous population of Rangpur, India, namely that it is their democratic right to maintain the *Lok Adalat* (people’s tribunal) and to handle their own affairs, that they do not interfere with the social organisation and lifestyle of the “developed” classes, and that they will not tolerate interference in their affairs.\(^{43}\)

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\(^{39}\) Sohn 50; Rich 125; Kiwanuka 94.

\(^{40}\) Nettheim 253.

\(^{41}\) Kiwanuka 88 92–93.

\(^{42}\) See Capotorti 600 per 596.

Traditionalism

There are governments in Africa who are in favour of the reduction of the modern Western law because of its foreign source and irreconcilability with the indigenous culture, and the reinstatement of the traditional indigenous law because of its origin. When this policy is coupled with non-state activism it offers arguments in favour of the free continuation of legal pluralism. One must be realistic with regard to tradition versus modernisation; on the one hand there is the natural human and collective need for authenticity born of a fear that own traditions will be estranged, and the need, on the other hand, of modernisation in economic and political areas. The preservation and reform of the indigenous law in certain areas, especially family law, is desirable, but in other areas, especially commercial law, it may be useful to take over modern foreign law or to use it as basis for the new law. In cases where the indigenous laws are amended or replaced, the cooperation of the indigenous population is, however, necessary.

Possibility of unification

Is it realistic to unify the different legal systems of a country? In replying to this question the similarity of the legal systems and the particular branches of the law is of importance. Complete unification of indigenous legal systems is possible in the areas where fundamental similarity of the laws and social circumstances of the different groups exists. The marriage and succession laws of the different tribes in Kenya are unified according to ethnic group and region. Although this unification took place merely by restatement, it is considered successful as it was done with the assent of the representatives of the tribes and two text-books, regarded as authoritative, are used in all the courts. Where the law and the social organisation of groups differ appreciably, unification appears to be only partially possible. In Tanzania the law of succession of the groups with patrilineal and matrilineal succession systems could not be unified completely.

Unification of the indigenous law and common law based in African countries on the Western law, is more difficult owing to the differences between the law and other cultural components. For that matter, complete unification of all the branches of indigenous and Western law has not been undertaken in any African country and it would appear that it is not possible

49See also Scaglion Customary Law in Papua New Guinea (1983) vii.
at this stage.\textsuperscript{50} The modern common law, based on Western law, has not been abolished in any African country. With the exception of the Ivory Coast, the indigenous law has not been abolished in any African country. In 1964 the government of the Ivory Coast adopted legislation, based mainly on the French law, to substitute the indigenous law, such as the marriage law, adoption and succession that still applied in certain areas. Unification of a religious law and secular law is even more difficult than unification of the indigenous African law and Western law. Substitution of the Islamic laws with laws that are in conflict with Islam is not possible.\textsuperscript{51} This problem came to light in a recent Indian case. In \textit{Mohamed Ahmed Kahn v Shah Bano Begum} (1985) the Indian Supreme Court held that section 125 of the \textit{Indian Criminal Procedure Code} also granted the right to maintenance to a divorced Muslim woman, notwithstanding that in terms of the Islamic law she is only entitled to maintenance during the period of the \textit{idda} (period of three menstrual cycles after the \textit{talaq}). The judgment created such an uproar among the Muslims that the Indian parliament was compelled in 1986 to deprive divorced Muslim women of maintenance in terms of the provisions of section 125 of the \textit{Indian Criminal Procedure Code}.\textsuperscript{52} Nadvi expresses the following views about the application of laws on Muslims that are in conflict with the Islam

No amount of official coercion, arbitrary legislation and legal modernism can succeed in altering or mutilating Islamic personal law. Islamic law is an integral part of the Revelation and cannot be replaced by secular uniform codes.\textsuperscript{53}

Unification of the law is easier in certain areas than in others.\textsuperscript{54} It is realistic to unify the commercial law, incorporeal property law, the law of contract, criminal law and the law of delict as the indigenous law lacks in these areas or is not adequately regulated or the common law provides better for the needs of the modern economy and social circumstances. These areas of the law are also viewed as the emotionally neutral areas.\textsuperscript{55}

Unification of family law, inheritance and succession law and the law regarding land tenure is not regarded as feasible at this stage as it forms an integral part of the individual’s private life and is still observed daily.\textsuperscript{56} The

\textsuperscript{50}Opoku 11–12.
\textsuperscript{51}Allott \textit{The Merits} . . . 6.
\textsuperscript{52}For a discussion of the case see Moosa \textit{Application of Muslim Personal and Family Law in South Africa} (1988) 2–4.
\textsuperscript{53}Nadvi 23.
\textsuperscript{56}Twining \textit{The Place of Customary Law in the National Legal Systems of East Africa} (1964) 19; Ndulo “Customary Law and the Zambian Legal System” in Takirambudde (ed): \textit{The
problem of unification of family law is further impeded by the great difference in the marriages: polygyny, a characteristic of the indigenous, Islamic and Hindu law, is punishable as a crime under Western law; the competence of a man under Islamic law to terminate his marriage unilaterally, is totally unacceptable in a Western-orientated community. Where unification is not possible in these circumstances, integration could be considered. Uniform law is not necessarily achieved by integration, but elements that clash in the legal systems and lead to inequity are reconciled.

**Unification of indigenous family laws**

Unification of the family law of the different tribes in a self-governing territory should be considered. The creation of a uniform family law for the tribes with similar legal and social systems would be possible, would advance legal certainty, and could facilitate the integration of the South African common law and indigenous law.

For efficient law it is vital that a study of indigenous law be undertaken and consensus of the groups concerned be obtained before the unification legislation is drafted. Genuine law reform entails social reform and therefore the legislator must consider the needs and values of the groups concerned.

The methods used in Tanzania in consulting the relevant groups for the purpose of unification projects could be considered. In unifying the law of the Sukuma through restatement, Cory first interviewed a panel of informants to obtain the unwritten indigenous law. Secondly, he discussed his first draft text with a clear indication of the general and divergent rules with a panel of eight chiefs, delegated by the Sukuma Federal Council, and their advisers. Proposals regarding the unification of the different rules were made on the basis of adopting the rule which appeared to be the best one, and not on the basis of the most corresponding rules. Thirdly, the unified draft was then laid before a full council of chiefs and their advisers. Fourthly, a Swahili text was prepared and copies sent to the chiefdoms for their comments. This project entailed a unification of the private law of the different groups of the Sukuma Federation only and the result was a text-book and not legislation.

Tanzania's official project for unification of the indigenous laws started in 1961. In terms of legislation a district council may, and where the minister so requires shall, record the local customary law, and the minister may promul-
gate such recording as the uniform local customary law. The following three councils were consulted in the unification process: tribal representatives chosen by the district council; a national panel of experts on indigenous law; the district council concerned. The first Local Customary Law Declaration contains uniform rules with regard to marriage, divorce, marriage goods and the status of children, and applied to eleven districts. Three of the eleven district councils preferred to include variant rules for their groups. The standard declaration on the law of succession for patrilocal groups was adopted by 37 district councils in 1964.

Integration of the indigenous, South African common, Hindu and Islamic family laws

At this stage a uniform family law for all the people of the country does not seem possible because there are deep differences in the legal systems and cultures of the relevant groups of which the following are examples: monogamous versus polygynous marriages; equal status of the spouses versus the inferior position of the wife; maintenance during the marriage and after divorce versus communal care on the ground of membership of the husband’s group and no care by the husband’s group after termination of membership of this group; dissolution of a marriage through a divorce decree of the court against the informal dissolution of a marriage within the families concerned; division of matrimonial assets upon divorce and taking into account the housewife’s contribution in the running of the household against no division of the matrimonial assets.

Instead of unification, consideration should be given to the recognition of the different marriages in a single Act for the purpose of giving full recognition to all the types of marriage and treating the different marriages on an equal basis. It is fair and essential that, for example, the rights of the spouses of a customary marriage be recognised and protected in all cases of adultery or other impairment, and that in all circumstances the husband is recognised as the guardian of a child born from such a marriage.

In such an integration process of the different marriages some reform of the marriage laws should be considered. An important aspect which needs reform is the position of a wife of a customary marriage, in particular her personal status and her competence to acquire, hold and control her individual property. Recognition of the competence of a wife, including one of a customary marriage, to acquire and control her separate property was granted

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61 Local Customary Law (Declaration) GN 279 of 1963; Cotran “Integration . . .” 120 123 note 77.

62 Local Customary Law (Declaration) GN 436 of 1963; Cotran “Integration . . .” 120 123 note 78.
through legislation in Tanzania and Transkei. In Tanzania, where equal recognition was given to all types of marriage, as well as equal status to all wives irrespective of the type of marriage, a housewife's services can also be regarded as her contribution to the assets acquired during the marriage for the purpose of a judicial division of the assets upon divorce. Zimbabwe has a similar provision regarding the division of the assets upon dissolution of the marriage.

In the light of the changing social and economic circumstances consideration should be given to permit spouses of a monogamous customary marriage to change their matrimonial property system in making the Matrimonial Property Act (88 of 1984) applicable to their marriage by way of a declaration before a judicial officer. This might also be considered for application to a monogamous marriage in Hindu and Islamic law.

Finally, it is desirable that the self-governing territories consider adopting the Matrimonial Property Act of the Republic of South Africa in their territories, together with the provision that no person may contract a civil marriage during the existence of his or her customary marriage except in the case of the conversion of his or her monogamous customary marriage into a civil marriage. This will at once be an adaptation of the optional matrimonial property systems of a civil marriage to the modern social and economic conditions and an enhancement of the status of a customary marriage.

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64 See in particular Rwezwaura "Division . . ." 58-63.