The Development of a Legal System: The Bophuthatswana Experience

By *Carmen Nathan*

Introduction

The apartheid policy of South Africa thoroughly polluted the inherited Roman Dutch law and its further life in that part of the Continent that has come to be known as South Africa. The policy of separate development in turn gave birth to four infant Republics the world considers illegitimate as well as six national states within its own borders.

Legitimate or illegitimate these Republics exist. Furthermore each one has a legal system that is effective and indeed respected and enforced within its own borders. Each state adopted a Constitution of its own choice.

My adopted country, Bophuthatswana, adopted a Constitution with a Bill of Rights that is modelled on the European Declaration of Human Rights and has this much in common with the Constitution of West Germany.

Part of the complexity of the South African situation lies in the fact that there is a large body of black African people, probably at least half who have not lost their tribal identity and who are proud of their roots, who believe that they are as different from other black people as perhaps the Scotts, Welsh, Irish and Eritons feel they are different although they are all part of the United Kingdom.

However, they do at the same time firmly believe that all people are equal and that ethnicity should never be allowed to play down this greater truth of equality of all men and common humanity.

Because of apartheid many would therefore vociferously deny that their ethnic origins are of any significance. The fact that there are living different mother tongues, I leave to speak for itself!

For the lawyer two facts are important:

First, I may venture to observe that there are a number of groups of people, with value systems they would like to see reflected in the law, who also feel that they the have the legal right to self-determination. At the same time they concede that the right to self-determination at the best of times presents a problematic infinite process.[1] Secondly, separate development has resulted in a type of balkanization of the law applicable in the region we now call Southern Africa and the world considers South Africa.

1 See in this regard the incisive observations and comments by M W Reisman in International Law and Organisation for a New World Order: The Uppsala Model 39-40 (The Spirit of Uppsala, ed Grahl-Madsen and Toman (1984 Walter de Gruyter Berlin)).

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Why balkanization? The basic principle of International Law applies and the existing law which we refer to as the ›inherited law‹ continues until changed by the new sovereign power. To begin with, customary law prevailed in Southern Africa - the white man came and colonized and in so doing he transplanted his own law, the Roman-Dutch law and ignored customary law as a valid legal system although in some circumstances rules of customary law will have the force of law. Add to this the fact that the national states acquired certain law-making powers at different times in their development, and exercised these powers as and when their separate needs and desires dictated. Finally, the independent states were established and they have complete sovereign power, a power that once conferred can never be taken back not at any rate without going through a procedure that international law would recognize as suitable for the desired objective e.g. federation unification of consolidation or whatever.

It is in this context that I wish to talk about the development of a legal system in a new and developing country and I do this with special reference to Bophuthatswana, since this is the extent of my experience and study. I propose to look at the official development policy of Bophuthatswana, to describe the inherited legal system, to look at the lawyer who will be occupied with development, to look at the spirit of the inherited case law, ond the role of academic criticism, and then to examine the decisions of the very first court of the first Chief Justice, as well as the role of the legislature, executive and the academic in this nascent Republic. The role of the School of Law of the National university, UNIBO, runs like a thread throughout my address.

The development policy

The development policy of the law of Bophuthatswana is clear. It is also one that remains immutable, and, as such, has to be accepted as the basis of all the legal development that has and will take place. Thus, although it may well be necessary to review periodically developmental policies such as that of agriculture, medicine or education, the policy of legal development will remain constant. Furthermore, all other types of development have to conform to the legal policy since no development can take place outside of a legal context. The legal policy of the country is to be found in the Constitution of the Republic of Bophuthatswana, Act 18 of 1977. This Act contains the Bill of Rights, repealed and replaced the apartheid machinery and left in its wake a non-racial society that has integrated without one real problem. An example for the rest of Southern Africa that one can be proud to be part of.

It is my submission that the executive, legislative and judicial organs of state have an active duty to ensure that every aspect of the procedures and practices that appertain to the exercise of their powers and the objects of their powers, conform to the dictates of the Bill of Rights. Furthermore these organs of state not only have a duty to ensure conformity with the Constitution, but they also have an active duty to develop the inherited law so that it totally conforms with the principles and spirit of the Constitution. Even the para-statal organisations have this duty and if they do not see it as a legal duty, it is at the very least a

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strong moral duty. Perhaps I may be permitted to briefly describe our inherited system which is a necessary back-drop to my address.

The Inherited Legal System

The law of South Africa is the law that was transplanted at the Cape in 1652 and which spread from there to the rest of southern Africa, the Protectorates and Rhodesia (as they then were) as well as Namibia/ South West Africa. This law has been called the Roman-Dutch law to indicate its basis. It consists of the law of the Province of Holland of the Netherlands which received the Roman law in the centuries following on the re-discovery of Roman Law in the late eleventh century. This was a slow process that stretched over six centuries.[2] A similar reception took place in most European countries to a larger or lesser extent with the result that the South African system and that of Bophuthatswana have much in common with European legal systems and the countries they influenced.[3]

The Roman-Dutch law developed by way of the application of the principles of this system to modern circumstances and thus its incorporation into case law. At the same time, Roman-Dutch law in southern Africa was, to a large extent, influenced by another reception, a reception of English law, during the period of the British colonization. This influence was facilitated in many ways, notably through the imitation of legislation and the application of principles of the English common law by judges who, before the advent of the South African universities, were schooled in the United Kingdom. For us, the importance of the English influence is not only that our law was enriched in many respects but we are also able to find our way around the English common law and those legal systems that were influenced by it without too much trouble.[4]

Another source of our law is the lex mercatoria or law merchant, that medieval international commercial or mercantile law that applied wherever the merchant fairs were set up, and which eventually came to be incorporated in the legal systems of the European nations as well as those systems that followed the English common law, and even further afield. The importance for us is that the laws of trade that we know are universal.[5]

Today much of the transplanted and received law of South Africa is embodied in case law which depends upon the precedent system for its efficacy.[6] Our law reports too are a very

2 See Introdution to South African Law and Legal Theory by Hosten W J, A B Edwards, Carmen Nathan and Francis Bosman, Revised reprint 1983 and 1984 supplement (Butterworths) Chapter IV. The Roman-Dutch law is to be found in the writings of the Dutch jurists, fondly referred to as the old authorities. Although not originally the case, most university libraries and Supreme Court libraries house collections of these works. The South African Law Commission has commissioned the translation of some of these works and, together with individual efforts in this direction, a collection of translated works is slowly growing.

3 Hosten, Edwards, Nathan and Bosman op cit. III esp at 3.4.

4 Hosten, Edwards, Nathan and Bosman op cit. III. 4.3 and the references there cited.

5 Hosten, Edwards, Nathan and Bosman op cit. XI. 1-3 and the references there cited.

6 See further Hosten et al, op cit. IV 4. A precedent system is only possible with a hierarchy of courts and an official or semi-official case reporting system, both of which South Africa and Bophuthatswana have. The Law Reports of Bophuthatswana were begun by Chief Justice Hiemstra (as he then was) and are now continued under the editorship of Professor John Redgment under the auspices of the School of Law in conjunction with Chief Justice Stewart, and with the co-operation and financial backing of the Department of Justice.

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necessary vehicle for legal development and legal certainty; judicial precedent houses the wisdom of centuries and in Bophuthatswana we feel we must carry on the tradition and heritage for future generations.[7]

In a nutshell then, the inherited law of Bophuthatswana consists of the Roman-Dutch law and lex mercatoria as further developed by legislation and judicial precedent, together with the traditional law of the Batswana, an ›unofficial‹ but living legal system that found its enforceability in the conduct and consciousness of many of the people and which was and is enforced in the courts of the chiefs and headmen, and in some circumstances, the civil courts as well.

The Republic of Bophuthatswana Constitution Act allows the courts to take Tswana customary law into consideration whenever this is deemed relevant so that the civil courts as well as the traditional courts can apply this law.

The customary system lives in the traditional courts but as yet the Supreme Court has never been seized of a matter involving such a custom. The possibility for a synthesis of legal systems is however very real. In South Africa the customary law has never been recognized as a system. Customary law has only been allowed to play a limited role within the civil as opposed to traditional courts and this has led to a so-called legal dualism. The main instrument of this legal dualism is section 11(1) of the Black Administration Act of 1938 of South Africa which creates a specially created hierarchy of black courts, i.e. the Commissioners' Courts (which has an appeal to the Black Appeal Court) the discretion to apply customary law in all proceedings between black people involving a tribal custom provided only that any such custom is not contrary to public policy or natural justice and that it has not been repealed or modified by legislation.

The current reform movement in South Africa includes the possibility of one hierarchy of courts for all people. To this end, we are told, the power to administer and control these courts has been transferred to the Department of Justice away from the Department of Co-operation and Development that concerned itself with black affairs and which has been replaced by the Department of Development Aid that will concentrate on developing the National States of South Africa.[8]

Legal Development and the Law-Developer

In order to carry out the policy of legal development the law-developer must be identified. In the broad and literal sense of the word, this would be the executive, the legislature and the judiciary who all play a direct and active role in shaping and moulding the law.

In the narrow and technical sense, the law-developer must be a lawyer who is able to advise on the legal aspects of development so that the law can:

7 See also Hahlo HR and E Kahn, The South African Legal System and its Background, 2nd impression (Juta) 1973, VII. This rich source of law and legal certainty is not invariably respected and nurtured by other southern African states.

8 S 2 of Act 91 of 1985.

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1) be brought into conformity with the Constitution;
2) keep abreast of development generally and ensure that a lawful climate exists to facilitate that development;
3) set the stage for development by anticipating change and carrying out relevant and necessary research.

In our situation, we are not concerned with reforming a legal system but rather with developing a common law for a new country. A common law that will take note of its rich heritage but discard that which conflicts with the national spirit. Borrowing from the preamble to the American Constitution what is desired is a common law of Bophuthatswana made by the people of Bophuthatswana for the people of Bophuthatswana!

The law must be developed scientifically and in a spirit of all due humility and always in consultation with those closely concerned. As Hahlo and Kahn state:

> ›Law is the warp and woof of social life, and so far from being concerned with a narrowly circumscribed area, is all pervasive. It is not only concerned with the pathology of society, but with its physiology as well.‹[9]

No matter how unimportant an aspect of law might appear, it is part of the totality of community life and it must fit into society's perspective of its life and its appreciation of the national spirit. To hold otherwise is to hold the law above the people but in the wrong sense. The people are subjects of the law, true, but they are not there for the purposes of the law. On the contrary, the law, like the Government, is there to serve the people! There is an awareness of this in the community. This is part of the spirit of the country. The people were part of an oppressed society for too long not to be conscious of their changed constitutional position.

It is my submission that law-developer must first, constantly be looking back to find the law and then he must state it. The state of the source material of the inherited law is such that this can be a very awesome and, at times, almost impossible task.

Secondly, in looking back to find the law, the law-developer must recognize and acknowledge from whence, and from whom it has come, because he has to note the reasons for the historical development of the aspect of law he now seeks to find and develop, so that he can test the political philosophy and social acceptability that it embraces. The effect of a foreign or out-dated value system may well indicate that the law concerned needs reshaping, repealing or simply that something very new is necessary.[10]

Thirdly, the law developer must then pause and note his immediate environment; in other words he must appreciate his present social and total legal environment. The needs of society and the value system of society are important and cannot be overlooked. It is only then that the law-developer can begin to think of developing the law. It is only with com-

9 Hahlo and Kahn op cit. 1.

10 Roscoe Pound, Dean of Harvard Law School from 1916–1936 maintained that the application of legal rules involves taking cognizance of social facts since the law must cater to society's needs rather than to attempt a modification of legal precedents which are based on grounds that have become irrelevant in the contemporary situation. See also Hosten et al op cit., II 4.1.2.

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plete conscious awareness that the law-developer can attempt to cater for the needs of the society he desires to serve. He can only appreciate these needs in the total context of the legal system. This means a sophisticated specialist could constitute a danger as a law-developer, especially one from another system. He has to see his work as an aspect of the total system in order to succeed since law development should not take place as an ad hoc exercise. The legal system has to develop into a mosaic which will reflect a picture that is the Bophuthatswana his story. The adhesive holding each piece of the mosaic in place, its very foundation that forms its substratum, is the Constitution itself.

Fourthly, the law-developer must frame the new law in accordance with the rules of legislative drafting. The rules of legislative drafting are important from the point of view of appreciating, as far as is possible, what the courts will understand when they read the new law. In the final instance, it is what the courts say,[11] that is the law since the court is the final interpreter. It is for this reason also that our law-developer, when looking back to ascertain the inherited law must understand and appreciate the spirit or philosophy in an historical context, of the judiciary responsible for the inherited case law.

Finally, an important aspect of the social environment in our context and one that has an influence on law is the religious life ofthe people. The Constitution is said to be enacted' in the spirit of humble recognition of the sovereignty of the Almighty God'[12] and it dictates and recognizes that all people shall be equal and that no one shall be prejudiced because of his religious beliefs.[13]

Our courts will one day be faced with the question as to whether our predominant Christian society should seek to impose its religious convictions through the law and thus through the authority of the State on those who do not share their beliefs.[14] For example, when a couple marry according to Mahommedan rites and the ›husband‹ and father claims legal guardianship, will he succeed in a court of law? According to the law of the Republic of South Africa, a marriage that is potentially polygamous is void.[15] Our court, if seized of this question, will have to look to the Constitution. What will it say? I could perhaps mention that recent law reform recommendations made by the South African Law Commission include giving legal recognition to the ›customary union‹ so that it will be recognized as a legal marriage.

The Judeo-Christian approach accords with the approach I advocate for the law-developer. Both the Jewish and Christian religions take into account new moral, economic, political and cultural conditions as well as new ethical insights and attitudes. The Bible then knows neither in the Old nor New Testament of an unaltered law of God but only of His restless word which must be made real to each generation.

11 See further infra 12 et seq.

12 Preamble to the Bophuthatswana Constitution Act 18 Act 1977.

13 Section 9.

14 See ›The Place of Law in Contemporary Society‹ by Anthony Phillips South African Outlook January 1981 5.

15 Seedat's Executors v The Master (Natal) 1917 AD 302; See also Carlos A Esplugues ›Legal Recognition of Polygamous Marriages‹ CILSA (XV) 302.

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The view of Roscoe Pound[16] seems also to accord with this. For Pound jurisprudence is not much of a social science but a technology, and he used the analogy of engineering in regard to social problems. He paid little attention to conceptual thinking regarding such matters as sovereignty and rights and duties, dear to the hearts of analysts. For him the creative role of the judiciary was in the forefront, and he expressed the plea for a new legal technique directed to social needs. He called for a new functional approach to law based on sound theorising as to its purpose in our present age.

In sum, the law-developer must look back, restate, look around at home and internationally, look ahead, consult, reshape, mould, discard or create, formulate alternatives, recommend, if necessary alter and finally draft but in the final analysis, like the architect he can only be as good or as bad as his client will allow!

The law-developer is not the usual type of lawyer that we have been training and become accustomed to. He is a very special general practitioner in one sense and an expert in another sense. He cannot afford to be an ivory-tower academic in the traditional sense, since he must have an intimate knowledge of the practical workings and needs of the legal system he must serve.

The role of the University known as Unibo in the development of a common law of Bophuthatswana is very real.

Because Unibo and a School of Law were established so soon in the lifetime of this young Republic, experts in many fields were drawn to Bophuthatswana all committed to the philosophy of human rights, and, with this basis, a community-minded team have begun to take shape as development-lawyers. It is my belief and my hope that these lawyers with a conscious duty towards the community, will form the crux of what is to come, and that is a school that will become expert in, and known for both development lawyering and the practice of public interest law. At the moment we would thus appear to fall within the ambit of the American School of thought fathered by Roscoe Pound. There has been a distinct shift away from the traditional South African approach of positivism to the more sociological approach of American jurisprudence.[17] ›Responsive Law‹ is a term that can be used to describe the approach of our School. Then, as Pound would have it, we can label our development-lawyer ›a social engineer through law‹.[18]

That law can be used as an instrument of development is a recognized phenomenon. The Consumer Affairs Act which revolutionizes the inherited law of the market place for the man in the street is evicence of this.[19] Today it has become clear that there is no doubt that research into method and training in this area of the role of law in development has become crucial.[20]

16 See Dennis Lloyd explaining Introduction to Jurisprudence 2nd ed (now in 6th ed) 1965, 230 relying on Pound's ›Introduction to the Philosophy of Law‹ revised ed, 1954 Harvard UP.

17 Ibid.

18 See Law and Society in Transition: Toward Responsive Law Phillip Selznick and Philipe Nonet (1978) Colophon, New York.

19 Act No 34 of 1984.

20 That others have noticed this need there can be no doubt: The University of London has introduced this the LLB programme.

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The Constitution imposes duties on the organs of State that are directly responsible for the development of the legal system. I begin with the judiciary.

For many centuries judges have hotly denied that they play a role in the law-making process. Students at southern African universities were and most still are traditionally taught judices jus dicere non jus facere: it is the function of the judge to declare the law and not to make the law.[21]

The leading text book on statutory interpretation[22] written by Mr Justice LC Steyn, a legal draftsman who rose to become the Chief Justice of South Africa, expounded this maxim to the extent that one was left with the feeling that this was the major premise upon which the rules involved were to be applied.

Our Roman-Dutch forefathers never denied this law-making function of the judge: Van der Keessel[23] said that where there is no legislation in point, no precedent and no custom, judgement must be given secundum ius et aequitatem naturalem: judgement will have to be given in accordance with natural law and equity. At this stage, I would like to stress that our Constitution is in its nature essentially a natural law exposition.

In a famous dictum, Mr Justioe Oliver Wendell-Holmes of the Supreme Court of the United States of America said:[24]

> ›I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say »I think the doctrine of consideration a piece of historical nonsense and shall not enforce it in my court.‹ «

In the International Court of Justice in one of the South-West Africa cases Judge Tanaka of Japan put it this way:[25]

> ›We cannot deny the possibility of some degree of creative element in ... judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm.‹

Hahlo and Kahn sum this up as follows:[26]

> ›In short, then, it is only in a secondary sense that a judge makes law. He fashions it as far as possible out of materials at hand. He does not conceive himself as having, like Parliament, a tabula rasa, a blank sheet on which he may write as he wills. By training and tradition, he damps down the law-creative side of his activities.‹

But why is that a judge does not profess to enact law but to decide cases, though in the process he may, within the fabric of the law, as we all know, fashion a new rule, a new rule that may well grant or deny a right or a fundamental freedom?

21 See Hoston, Edwards, Nathan and Bosman op cit. IV 4.4.1.
22 Uitleg van Wette Juta 1946.
23 In his Dictata ad Grotius 1.2.22 [Th 5] (Pretoria Ed I p 29).
24 Southern Pacific Co v Jensen 244 US 205, 221.
25 See Hahlo and Kahn op cit. 306.
26 Ibid.

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The nature of the judicial process is well known but allow me to state that studies of South African case law show that, generally speaking, judges profess to reason deductively yet they often extend or restrict legal rules and principles and they often argue by way of analogy. Where there is no settled rule, no major principle involved that can be applied deductively, a judge may be involved in an inductive process of inferring a general rule or principle form a collation of particular instances that have common feature and in the final resort a judge constructs a rule out of consideration of one or more of several desiderata, some of which may compete with others. Ronald Dworkin[27] calls these desiderata, principles and policies which form part of the law and as such cannot be ignored, they must be balanced and weighed and selected. They do indeed indicate that the judicial process is often one of making choices. Hahlo and Kahn cite the following desiderata:[28]

›justice, equity, social utility and trends, public and individual interests, moral standards of the time, convenience (both commercial and communal), common sense, equality, freedom of the person, the safety of the State and the upholding of international good relations‹.

Mr. Justice Cardoza, a great American judge[29] in a now famous passage described the progress as follows:

›Logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired‹

Why is it that, with very few exceptions, judges so often in paying lipservice to iudices jus dicere non facer? In South Africa this attitude or approach accords with the positivist legal tradition of Austin[30] a philosophy that was exported to the Cape in the 19th century along with British rules of procedure and conceptions of justice which from then on increasingly secured a firm foothold in South Africa overriding the basic natural law philosophy of the Roman-Dulch Law. Instead of highlighting the ideals of equity and justice the philosophy encouraged the divorce of law from legal values and moral standards. The South African judges have stressed the distinction between the functions of the legislator and that of the judiciary.[31] Thus it is that judges feel that it is their duty to analyse and interpret the will of Parliament but not to reason why. This has enabled South African judges to apply the laws of apartheid, and may result in a failure to realize the extent to which technical rules of interpretation may be invoked to moderate the law's inequities.[32] As Sanders says:

27 Taking Rights Seriously, (1977) Cambridge: Harvard University Press.

28 D Workin op cit.

29 The Nature of the Judicial Process (1928) 112.

30 John Austin published his work The Province of Jurisprudence Determined in 1832. See further Hosten, Edwards, Nathan and Bosman op cit. II 3.3.

31 Montesquieu's theory Esprit des Lois (1748) reinforced this - he believed that an individual would only be free if the three functions of state were clearly separate.

32 I have not had time to mention the few South African judges of great stature who were not part of the positivistic school - such as Mr Justice O Schreiner who made a valiant and lonely last stand in the Collins decision that ended the so-called constitutional crisis cases of the 1950's that culminated in the coloured people being removed from the voters' role.

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›For the courts to ignore the natural law component and to pass the buck to the legislature is more than just a breach of tradition; it is an abdication from their inherent function to dispense justice.‹[33]

Dugard is of the view that ›rigid adherence to the distinction between law as it is and law as it ought to be leads to a rejection of legal values – as opposed to legal rules – which results in the neglect of considerations of human dignity, freedom of speech, freedom of movement and assembly that, together with other principles, comprise the value system upon which the South African legal system is founded‹,[34] by which he means the Roman-Dutch law, which recognized legal values such as are to be found in the Constitution of West Germany and Bophuthatswana. Certainly Roman-Dutch law recognized the principles of freedom of persons and equality before the law (although it had a deeply rooted sexist attitude) and accepted that the sovereign was not above the law but bound by it‹.[35]

Legal positivism results in statutory interpretation being seen as a mechanical operation in which value judgements play no part but as Dugard has highlighted, judicial positivism cannot eradicate inarticulate premises. ›As long as the judicial function is entrusted to men, not automatons, subconscious prejudices and preferences will never to completely removed from the judicial process. They will only be concealed. This is the message of the American school of legal realists which views law as simply the prediction of what the court will do; of how the judges will behave in a particular situation.‹[35]

Mr Justice Claasen[37] referring to English judges has said they ›are undoubtedly the most eminent judges in the world‹ but they have often been guilty of concealing their inarticulate premises from the public gaze behind the fig leaf of positivism.[38]

Finally, Mr Justice F N Broome, JP of Natal from 1951 to 1960[39] after he retired, said:

›The judge's mental make-up must necessarily influence his judgement, and the influence is, of course, nearly always subconscious. Nearly every judge who has anything of a

33 De Rebus 1985, 15.

34 John Dugard Human Rights and the South African legal Order (Princeton University Press 1978), 38.

35 Ibid; H R Hahlo and J A Maisels ›The Rule of Law in South Africa‹ (1966) 52 Virginia Law Review 1; A vd S Centlivres ›The South African Constitution and the Rule of Law‹ 1956 Butterworths South African Law Review 3 at 10–12.

36 Dugard, op cit. 374-6, who quotes Mr. Justice Cardozo:
›Deep below consciousness are . . . forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge . . . There has been a certain lack of candour in much of the discussion of the theme, or rather in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.‹ and Professor Edward McWhinney:
›. . . the real danger of the whole positivist approach . . . is that it is those judges who strain hardest in their search for the logical intensity of words . . . who are most likely to be governed by »inarticular major premises« – concealed judicial preferences for one or other set of consequences flowing from a particular decision. The vice of legal positivism here would be, not that it leads to value-orientated decisions . . . but that the values operate covertly producing results that are both undemocratic . . . and also inefficient (in so far as the judicial weighing of values and interests is at best impressionistic, without full and adequate consideration of the policy alternatives actually available to the court).

37 ›Retain the Bar and the Side Bar‹ 1970 (87) SALJ 25.

38 See also Dugard op cit. 376.

39 Published in a paper entitled Not the Whole Truth, Pietermaritzburg Union of Natal Press 1962 262.

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judicial personality . . . may be placed in one or other of the two categories which are difficult to describe precisely but which may broadly be called the conservative and the liberal, the right and the left, the category of those who lean towards the rights of the State and the category of those who lean towards the rights of the individual. I have no doubt that I belong to the former category . . . I may add that of all the judges with whom I have ever sat I can pick out only one whom it would be difficult to place in either category . . .‹

It is appropriate at this stage to mention that there are a few outstanding exceptions, judges who have strained and stretched legislation in order to arrive at a just and fair decision. In his preface to his book, the Right Honourable Lord Denning MR (as he then was) states that ›the principle of law laid down by the Judges in the 19th century – however suited to social conditions of that time – are not suited, to the social necessities ans social opinion of the 20th century. They should be moulded and shaped to meet the needs and opinion of today.‹ This great jurist sees the importance of development of law in society. In Bophuthatswana there is a society with its own values with an inherited law developed by another and different society. To aggravate the situation, that other society chose to remain bogged down in 19th century British philosophical thinking because it had become so comfortable. The judge is a law-developer par excellence and as such must look back and see from whence he has come in order to cater for the needs of the society he now serves. The value considerations that motivate the judicial officer should be expressed most clearly so as to negate any suggestion of arbitrariness, bias or favour. Where the value consideration does not find an echo in the value system of the people concerned, those people will be quick to say, in their natural and human way ›He is a bad judge!‹ This would be the way of the people of Bophuthatswana – the traditional system has its own checks and balances and a judge that is felt to be unfair would be whispered about until the tribal elders felt a need to react. Our courtes must be aware of the inarticulate premises that may exist in inherited case law especially those that conflict with our national spirit – South African precedent cannot be followed blindly.

I now turn to the importance of academic criticism. Criticism of decisions that involve private law or commercial matters are welcomed if they are written in a scientific and responsible manner but judges tend to shy away from criticism of the Executive since this could be seen as an involvement in politics – which is seen as most unseemly and criticism of decisions of this kind are similarly not welcomed – they are not considered fair, objective or called for. In 1966 Matthews and Albino analysed[40] three RSA AD decisions on the 90 day detention law and concluded that, in each case, the court should have adopted an interpretation favouring the individual rather than the security police. Their criticism was answered in 1967 by none less than Chief Justice Steyn[41] who, he said, expressed his regret at the ›intemperate, derogatory language‹ of the critics, who had by implication accused the

40 ›The Permanence of the Temporary‹ 1966 (83) SALJ 16.
41 Regsbank en Regsfakulteit 1967 (30) THRHR 105-107.

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court of ›something in the nature of a dereliction of duty, due to an inadequate concern for basic rights and liberties.‹ He went on to suggest a neutral approach, since, he said, it would be an evil day for the administration of justice if our courts should deviate from the well recognized tradition of giving politics as wide a berth as their work permits.‹[42]

Academics listened and were silenced until the late Professor Barend van Niekerk wrote an article ›. . . Hanged by the Neck until You are Dead‹.[43] He set out to show that justice was meted out on differential basis to the different races and was charged with contempt of court. He was acquitted by Claassen J because the necessary intention to commit the crime was fount to be absent.[44] The judge took the opportunity to rebuke Dr van Niekerk (as he then was). The effect of this case was that not only academics but also editors of legal journals became very nervous of judicial criticism when it related to human rights which were seen to be ›political‹.

The next criticism came from Dugard, and especially in a book published in 1978. When Dugard wrote his book,[45] he gave it to an American publisher because he reasonably but wrongly feared that it would be banned – that was the climate in 1978. He was thought to be a radical in some circles because he examined and commented on the judicial manner of thinking and criticised the fact that the judiciary of South Africa had lost sight of the Roman-Dutch law legal values by subservience to legal positivism. He drew favourable attention to Mr Justice V G Hiemstra who, even earlier, in 1971, had tentatively endorsed the call for a Bill of Rights for South Africa to halt the excesses of parliament supremacy.[46] Dugard himself in 1978[47] had stated that, until recent times, ›the judiciary has been singled out for praise and characterized as a liberal institution in an illiberal community‹. He also noted that many of South Africa's harshest critics had carefully excluded the judiciary from the structures‹.

The point that needs to be made now is that, in this climate, when the words ‚human rights' were thought to be dirty words in a South African context, the Constitutional Fathers of the friendless Republic of Bophutatswana fearlessly commited themselves to human rights and entrenched them in a written constitution. Judge Hiemstra, after thirty years on the South African banch, come to Bophutatswana and thereby squarely alligned himself with the human rights movement which was a mere academic whisper in his own homeland, despite the fact that the roots and principles of the international human rights movement are found in the school of natural law as expounded and developed by the Roman-Dutch jurists and which later transformed into human rights.[48]

42 See further op cit. 291.

43 1969 (86) SALJ 457; 1970 (87) SALJ 60.

44 S v Van Niekerk 1970 (3) SA 655 (T). A full transcript of the trial was published by the Law Faculty of the University of Cape Town ›Contempt of Court‹ 1970 Acta Juridica 77.

45 See also ›The Judicial Process, Positivsm and Civil Liberty‹ 1971 (88) SALJ 181; Contra Jeremy Gauntlett ›Aspects of the Value Problem in Judicial Positivism‹ 1972 (2) Responsa Meridiana 204.

46 See 1971 SALJ (45) 47.

47 Dugard 279.

48 Ius translated as law and as right like the African reg. For the historical evolution see Hosten, Edwards, Nathan and Bosman, Chapter II and especially 2.4.

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The human rights movement was part of the 20th century revival of natural law and thus had the same basis as the Roman-Dutch law. This revival gave rise to new theories or jurisprudence, but South Africa managed to remain almost untouched by the new jurisprudential thinking.[49]

After Dugard's book on Human Rights in South Africa, we have had one other incident of note. A bright young South African lawyer, and Rhodes scholar, in al legal article based on his study of all the published judgements of the late Chief Justice Steyn, surveyed the ›Steyn Court‹ and came to the conclusion that Judge Steyn had been an ›executive-minded‹ judge.[50] This article gave rise to academic criticism[51] as well as support[52] and to an oral rebuke by Chief Justice Rabie in his opening address of the Southern African University Law Teachers Conference at the University of the Western Cape in February 1983.[53] Professor Raymond Walker of Natal[54] has recently, in his published inaugural address, gone so far to appeal to South African judges to resign in protest against the unjust laws they are required to administer. Dugard,[55] in reply, is of the view that this would be going too far since if this was so, all officers of the court which included many legal academics would have to resign.

Hugh Corder, a distinguished scholar has just published Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910-1950.[56] Corder draws a number of interesting conclusions from his examiniation of judicial decisions on socio-political issues. The judges were liberal on freedom of speech and the rights of arrested people but when it came to women's rights, sexist. When it came to discrimination on the grounds of race, they carried out the legislative and executive will to the full and made little attempt to mitigate the harsh effects on the oppressive laws. Corder's view is that the Appellate Division's record in these areas shows ›a strong commitment to legislative policy and the ideology of the

49 In this respect, Dugard states that she resembles post-World War I Germany where positivism was the only legal philosophy acceptable to the legal profession; this was exploited by Hitler and resulted in the debasement of the German legal system: op cit. 395.

50 ›Legal Chauvinism, Executive-mindedness and Justice - L C Steyn's Impact on South African Law‹ 1982 (99) SALJ 38.

51 Adrienne van Blerk ›The Irony of Labels‹ 1982 (99) SALJ 365.

52 David Dyzenhaus ›L C Steyn in Perspective‹ 1982 (99) SALJ 380; see also ›Positivism and Validity‹ (1983) 100 SALJ 454.

53 Although he chose to leave Cameron nameless.

54 ›Judges and Injustice‹ 1984 (101) SALJ 266.

55 ›Should Judges Resign? - A Reply to Professor Wacks‹ 1984 (101) SALJ 286. Dugard maintains that there is still scope for judical manoeuvre and creativity in support of human rights and that judges who act in this manner, act in accordane with their judical oath. To this Wacks ›Judging Judges: A Brief Rejoinder to Professor Dugard‹ 1984 (191) SALJ 295 has, correctly according to Davis see infra at 118, replied that the liberal legal model does not correspond to the reality of the South African legal system. For a point of view from the other side of the fence, see Mr Justice Cecil Margo ›Reflections an Some Aspects of the Judicial Function‹ Fiat Iustitia, Essays in Memory of Oliver Deneys Schreiner Ed Ellison Kahn, Juta 1983.

56 C.Com LLE (UCT) LLB (Cantab) D.Phil (Oxon) Advocate of the Supreme Court of South Africa and a Senior Lecturer in Public Law at Stellenbosch; See also D M Davis ›Positivism and the Judical Function‹ SALJ 1985 (102) 103 and his earlier article ›The Scandinavian Realists - A Way Out of the Positivistic Impasse?‹ 1981 (98) SALJ 388; See also Christopher Forsyth and Johann Schiller ›The Judical Process, Positivism and Civil Liberty II‹ 1981 (98) SALJ (218).

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ruling group‹ (at 229) and he goes on to dismiss the widely held assumption that the pre-1950 judiciary ›performed some kind of »guardian of justice« role in government‹ as being ›misconceived‹.[57]

That the South African judges are all drawn from one race group is an additional factor I can safely leave to speak for itself.[58]

Bophuthatswana has seen the retirement of its first Chief Justice 1977–1984 and was most fortunate in attracting Judge Victor Hiemstra, a cholar of great note and one of the few judges to align himself with the human rights movement in a very hostile climate. Since 1971 he advocated for a Bill of Human Rights for South Africa.

Dr. John Hund[59] recently noted the following:

> ›it is interesting to note that, in his speech before the opening of the first criminal session of the High Court of Botswana in February 1981, the Chief Justice Hayfrom-Benjamin had castigated the »attitude of unquestioning reliance on South African precedents that has developed in Botswana«. After mourning the death of the late Justice Mr O D Schreiner, a great South African judge, the learned Chief Justice noted that »the South African judiciary has produced no Mansfield, Atkion or Denning, no Marshall, Holmes Brandies.« »Why«, he went on to ask, »has it produced none of those bold spirits« of common law who could »use law as a weapon to ameliorate inequalities and inequities?« The American model of judicial intervention may not be workable here. Yet there are other aside from Hayfrom-Benjamin and Professor Dugard who would wish to see it so. In his opening address to the first South African Law Reform Conference the Chief Justice of Bophuthatswana, the Honsurable Mr VG Hiemstra argued that »here in Bophuthatswana, you find yourself in a free country. Drafted into the Constitution of this country is a Bill of Rights; which could be a powerful instrument in the hands of a fearless and progressive court.« He then called upon the court to »play an activist role in the political field«

and referred to the Warren court of the United States of America and its social engineering. Yet in 1984, five years later, a legal academic was moved to state with reference to the Judge Hiemstra that ›he remain locked into the positivist tradition‹, adding that ›It is to be hoped that the Bophuthatswana Appellate Division will not see fit to follow his approach to interpreting the Bill of Rights and thereby diminish the effectiveness of that document of faith and hope‹.[60]

There are four telling decisions where the Hiemstra court lost opportunities to promote the spirit of the Bill of Rights and gave off a positivistic hue.

First, there is S v Tlhoaele.[61] The appellant had been four guilty of the theft of money earned by his wife, a public trader, in her ›own‹ business. They were married in community

57 At 242 of the work cited.

58 Chris Forsythe has just completed a thesis which has not yet become available dealing with the judicial process from 1950 onwards.

59 ›Aspects of Judical Review in Southern Africa‹ (XV) CILSA 1982, 276 note 14 at 279.

60 Stephanie Luiz ›The Entrenchment of Human Rights in Bophuthatswana‹ 1984 (101) SALJ 435, at 442.

61 1979 (2) SA 328 (B).

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of property. They were estranged and he had removed the money from her separate place of residence. The Court found that money earned by her as a public trader was part of the joint estate and the marital power gave him sole and exclusive control and administration over it. Hiemstra C J (as he then was) also stated that the wife had no such power so that if the position was reversed and she acted in the same manner in regard to money made by him, she would be guilty of theft! He was found not guilty of theft.

The judge relied on old and modern authorities to come to this decision inter alia Hoston, Edwards, Nathan and Bosman,[62] who state:

> ›Although the community assets belong to both spouses, it is the husband who, by virtue of his marital power, has full control over the joint estate and he alone performs the juristic act pertaining to the estate . . .‹.

And, of course, all this was quite correct, but correct for South Africa, not for Bophuthatswana, because section 9 of the Constitution guarantees the equality of the sexes and section 8 imposes a duty of the judiciary to enforce this right to be equal! The Constitution was completely ignored although section 7 makes it the Supreme law of the Republic.[63]

In the Federal Republic of Germany, the enactment of the Constitutional Basic Law of 23 May 1949 contained a similar provision. The effect of the law was to force the courts to adapt the old family law to new rules conforming to sexual equality.[64]

Our court however had not, on the issue of sex, de-colonised its mind. The court must of its own accord take cognizance of the Constitution. The advocate who argued against the appellant and thus for the State should also have drawn the attention of the court to the Constitution directives. This illustrates the importance of the standard of advocacy[65] in the field of human rights.

The court missed a golden opportunity to shape and mould the family law to conform with the Constitution. The result is legal uncertainty in some quarters. The Constitution says one thing, the former Chief Justice said something else. The Law Commission, under the Chairmanship of the present Chief Justice, has applied its mind to the matter and proposals for legislative action have been made so that the Constitutional Fathers, blessedly still with us, can attend to the matter in direct and explicit terms.

The second and third important human rights cases that came before the Hiemstra court are now the famous Marwane and Smith decisions.[66] A Constitutional court of eleven South

62 At 307 (1977-1979 BSC 63).

63 Section 7 (2) refers to a law passed . . . which infers legislation - but this I submit is to show that, despite our legal heritage, we did not consider the legislator supreme as was the case in the RSA. Sections 8 and 9 are part of Chapter 2, whereas section 7 is part of Chapter 1 and sections 8 and 9 are not subordinated or connected to section 7 in any way.

64 Until the so-called ›Equality Act‹ was passed in 1957; See further The Reform of Family Law in Europe ed A G Chloress (1978) 115.

65 Supra n 51 at 287. Mr Justice Margo reminds us that ›The interaction between the minds of counsel and the judge . . . is best induced by pointed submissions presented simply, lucidly, logically and in a form that enables every material proposition to be tested in discussion.‹

66 G E Devenish ›S v Marwane - An Historical Human Rights Judgment‹ Melao a Unibo Bulletin; see Christopher Forsythe ›When Should a Quorum of the Appellate Division Consist of Eleven Judges?‹ 1983 (100) SALJ 371; Gretchen Carpenter 1983 (46) THRHR 93; Stephanie Luiz 1983 (46) THRHR 231; E F Ndaki ›A Bill of

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African Appellate Division judges, in a majority decision of seven, gave effect to the spirit of the Constitution and held that the inherited security legislation was unconstitutional and found in favour of the individual, and in so doing, overruled the Hiemstra court wich had held otherwise, being of the view that the Constitution only applied to post-independence legislature. In the Smith judgement we are told by the former Chief Justice Hiemstra court that:

> ›The Court helps to shape the Declaration of Human Rights with great deference to the legislature. A court which is overactive in striking down legislation can destroy the exalted instrument it is trying to bring to life, it can incur the resentment of the Legislative and cause the Declaration, which was meant to be a character of freedom, to become a clog upon the wheels of Government. That must be for the sake of the Constitution itself and for the sake of the stature of Parliament as the highest law-making forum of the nation. In the course of reasoning along these lines, the court will for instance not create an embarrassing lucunae within the legislative structure if it is all possible to avoid such a result. On the other hand, the court dare not abdicate its function as upholder of the longterm and ideals of the Constitution‹.[67]

The accent is on legislative power and effectiveness whereas it should have been on the hallowed fundamental rights of the individual. Nevertheless, Smith succeeded in his contention that the Act in question was unconstitutional. The statement just quoted was thus not necessary; it is an obiter dictum, and as such, not part of the actual decision - this means that the concurring judgement of Judge Stewart (as he then was) does not, I believe, extend to the obiter statement.[68]

Finally, the fourth' example. In Maluleka's case the court failed to take advantage of a provision of the Constitution which would have allowed it to find that the pre-independence agreement between the Republic of South Africa and Bophuthatswana promulgated after independence conferred rights upon citizens. The result of this is that the vital agreements are relegated to the status of mere treaties which means that the individuals affected merely have the power of diplomatic protest as against the power to enforce the rights safeguarded, in a court of law. Thus, for example, someone who had an accrued right to a social pension who lived in Bophuthatswana when it was part of the Republic of South Africa no longer had such a right in that the agreement purporting to preserve his right after independence is now seen as no more than a treaty which means that the pensioner is forced to rely upon the whim of the relevant department of state[69] to give affect to his claim.

The new court, the Stewart court, has begun with a spirit of responsive pragmatism and one seems to discern a learning towards responsive lawyering. For example the court has

Ritghts: The Bophuthatswana Experience‹ 1983 De Rebus 449; G N Barrie ›Marwane's Case: Echoes of Marbury v Madison on the Arid Plains of Africa‹ 1983 TSAR 288; Andrew Beck ›Judge Hiemstra's Last Stand‹ Lawyers for Human Rights Bulletin No 4.

67 199 C-E.

68 At this early stage it appears that the Stewart court is open to ›responsiveness‹ and ›social engineering‹. See for example Modise v IGI Incorporated General Assurance Ltd (as yet unreported) of 221, 1984.

69 Citation of case, reference to agreement and to M J Lowe's two articles in De Rebus.

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refused to follow the attitude of South African courts in regard to third party insurance claims that have prescribed due to the portraited negotiation policy by the insurer - the court has taken notice of unconscionability of the procedures and came to the rescue of the bona fide insured.

The nature of my function as a legal academic is such that I am duty-bound to place these views of the Hiemstra court on record. For this reason I do not apologise but I do express the hope that what I have said will be received objectively since the attitude of the judges to criticism is vital to the healthy development of any legal system especially in a new and developing country. Like the executive and legislature, the judiciary must be exposed to some check and it also needs and deserves support where it upholds unpopular cases. If the executive or legislature act in a manner thougth wrong by the people, they have an obvious remedy - they will vote for other representatives. If the judges ignore the value system of the people or act wrong in their eyes without committing any action that could be construed as the type of misconduct that would lead to dismissal, there is no check. The independence of the judiciary is sacred and the legislature and executive cannot criticise the decisions of the court. For the purposes of judicial decisions the executive is simply there to give effect to those decisions. Who else but the legal academic then to act as critic and supporter of the overseers of constitutional rights.

There are three further ways in which the academic assists the court in the administration of justice and legal development.

First, the School of Law members assist in the administration of justice by acting as accessors and taking pro deo briefs where the indigent accused faces the death penalty.

Second, in many countries - for example South Africa, America, Germany - the academic is often called upon the judiciary for an opinion needed for a judgment where academic research is necessary to find the law, especially where the court may wish to review other legal systems for comparative purposes.

Third, academic writing has become a persuasive source of law. Modern research[70] has shown that modern academic writing is often utilised by the courts.

Legislature

The role of the legislature in the development of our legal system is clear. They too must play their role in giving effect to the ideals of the society the represent. That the legislature is sincere about the dictates of the Constitution, there has been no reason to doubt. There are a few provisiors in Acts that have been passed that may well give rise to constitutional argument before the courts but this is all part of the growing process and progress and will, in the face of active and creative judicial interpretation, give true life to the spirit of the Constitution.

70 ›The Irony of Labels‹ 1982 (99) SALJ.

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The American Experience has shown that a well-conceived written Constitution, like a piece of good poetry, will live and grow over a period of hundreds of years. There are still matters that will advance our freedoms in future years that no-one can presently conceive of. In sum, the legislature can be said to have a positive duty to ensure that the value system epitomized by the Constitution is filtered throughout the legal system of the country.

Executive

The role of the executive is in a sense more active and creative than that of the legislature. For the short period of time the country has existed, they have, with the resources available, made remarkable progress.

As far as the very necessary rationalization and nationalization of inherited legislation is concerned, this is underway. A most useful tool has been the Law Commission. At the outset, it was charged with investigating the inherited security laws and its recommendations were accepted with alacrity.[71] A noteworthy recommendation of the Law Commission that gave effect to the mores of people and which has caused a stir in legal circles, including as Law Commission enquiry in the Republic of South Africa,[72] is an amendment to the criminal law,[73] that holds any person who has intentionally or negligently consumed alcohol or taken drugs, responsible for his actions where intoxcation would otherwise have been a defence. [The South African law encourages those that take alcohol to keep brandy bottles in their cars, in case they have an accident while slightly drunk, so that they can very drunk, and in this way avoid conviction.]

That the executive is also well aware that the law can be used to instigate development is clear from the enactment of the Consumer Affairs Act of 1984.[74] It is my contention that the Executive is aware of its Constitutional duty to ensure that legal development takes place conscientiously and that as little legal uncertainty as possible exists. To this end, use is sometimes made of the academic, for example on Commissions and Boards[75] and grad-

71 An interesting comparison can be made to the State of Israel and the inherited Security Law which took almost thirty years to carry out such an exercise. See Harold Rudolph Security, Terrorism and Torture - Detainees' Rights in South Africa and Israel: A Comparative Study. Juta 1984 ch 3.

72 Offences Committed under the Influence of Liquor and Drugs, January 1984.

73 A St Q Skeen ›Intoxication is no longer a complete defence in Bothuthatswana: Will South Africa follow suit?‹ 1984 (100) SALJ 707 and the articles therein cited is our Criminal Law Amendment Act of 1984 (14 of 1984). A controversy in South Africa between the pragmatists and the legal purists seems to be holding up progress of reform in that country, the latter would see the law look pure and ignore the feelings of society.

74 34 of 1984. The instruction of His Excellency, the President, to me to create a consumer council that would develop the law in the market place in order to give the man in the street an opportunity to participate in the free enterprise in a meaningful and constitutional manner and to see that the people are ›economically‹ educated, gave rise to the Act which is designed to hit out at and control unconscionable acts, practices and transactions, so that the man in the street and the honest entrepeneur can participate in a free enterprice system devoid of deceit and other misrepesentations.

75 For example, Law Commission, various ad hoc commissions, Rent Board, Land Allocation Board, Censorship Appeal Board, the Consumer Council and its Legal Committee.

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ually the idea seems to be taking root that the development-lawyer is a necessary member of all development project teams.

The attitude of the Executive towards human rights was made clear by the way it reacted to the Marwane and Smit cases.[76] In a speech delivered by the President at the official farewell banquet given to honour Chief Justice Hiemstra upon his retirement,[77] the President referred to the Marwane case acknowledging that the RSA Appellate Division's decision ›did much to enhance our image in the outside world and did prove for all of us here and those elsewhere that our Constitution is a very serious one, and one with a living spirit, a spirit that can only live, and will live on through sound judicial interpretation and application, and executive mindfulness‹.

The President highlighted the practical effect of the difference of opinion between Judge Hiemstra and the Appellate Division majority of seven judges, and stated that:

> ›Unless the National Assembly resolves this difference of opinion as to whether or not the Constitution applies to all legislation (meaning the inherited as well as enacted), the matter will remain uncertain.‹

At the next parliamentary sitting, the Fathers of the Constitution introduced an amendment to the Constitution and the National Assembly had no problem accepting it. The people themselves spoke and gave effect to the spirit of the Constitution by inserting retroactively the word ›before‹. The result is that all legislation is subject to the scrutiny of the court on constitutional grounds and not as the Hiemstra court would have had it, only post-independence legislation of the Bophuthatswana Parliament.

The practical reality of the legal development movement is that there is not yet sufficient expertise to formalise everything initiated and desired by the Executive. The School of Law is mindful of this and, in co-operation with the Department of Justice, a course in Legal Draftsmanship is being run[78] for the high-placed government legal people and academics. A reservoir of talent is being fostered and the training and research expertise of the academic is being exhanced.

Important aspects of legal development, especially in the constitutinal sphere is the quality of the profession, the professional future of graduates of law, legal services for the indigent and education for all members of the community.

Jurists of the highest standing from all the world, be they academics, judges or practitioners, agree that almost as important as an able and independent judiciary is an able and independent Bar. The University is convinced that it has a duty towards the community it serves and to its graduates in a way acceptable to the profession of southern Africa since our students must have freedom of movement in the larger economic community to which we belong.

The trend in South Africa seems to be that the Law Clinics now established throughout that country should play a more decisive role in professional training. We are forced to follow

76 See supra.

77 17 November 1983, Mmabatho.

78 Mr Danie van Zyl, the Government Law Advisor, at Unibo.

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this lead. We can longer turn a blind eye to the fact that professional training has become an urgent matter, since the system of articles is both unsatisfactory and hard to come by for black people and women of all races. This same problem has led to a lowering of professional standards in other African countries.[79]

Our duty to the community extends even further since we recognize a direct duty to the individual as well and it is here that the Law Clinic plays a role. It is the ambition of the Law Clinic to reach out to the 7000 villages and few towns that make up the country so that people will learn to exercise their constitutional rights.

Although the main function of the University is to educate aspirant lawyers, we are interested in legal education at all levels. We are mindful of the needs of other professions and disciplines. The words of Sir William Blackstone at the opening of the Vinerian Lectures, 25 October 1758 still hold good. I quote:

> ›For I think it an undeniable position, that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of every gentlemen and scholar: a highly useful, I had almost said essential, part of the liberal and polite education‹.

We got further than this and play an active role in reaching out to the community with legal education. Bophuthatswana radio and television beam into the most densely populated black areas of South Africa so that the educational contributions have a very wide audience.

The other side of the same coin is the value to us as law academics at being part of this development process. This cannot be overstated. To have indulged in academic theory and comparative study, to have been exposed to the practice and then to have an opportunity, as part of a team, to attempt to right the wrongs that one believes the law to have strayed into, and then to be involved in the practical application of the legal development, is to know a total legal life and is professional fulfilment. There is no other place that I know of that offers an academic such academic freedom, encouragement and opportunity.

Conclusion

In conclusion, I would like to end with a quotation from that famous and respected American Judge, Oliver Wendell Holmes, who said the following on the opening page of his famous work The Common Law:

> ›The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.‹

79 See 1985 De Rebus 116; and Ramarumo Monama, Bophuthatswana in Urgent Need of the Practical Training Facilities for Candidate Attorneys (to be published soon); and J C von der Walt and K A Wilson, The Training of Candidate Attorneys in South Africa for information on practical schools in New South Wales.

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The Development of a Legal System: The Bophuthatswana Experience

By *Carmen Nathan*

Disregarding the fact that the legal status under international law of the south African republics (the autonomous ›homelands‹) is widely disputed, their mere existence justifies a survey on the evolution of their legal system. Their unique history makes the study of their legal development even more interesting.

Looking at the example of Bophuthatswana, the study starts at the basis of the present legal system which is formed by Roman-Dutch law. It was introduced in the Cape provinces in 1652. The adoption of Roman Law in the Province of Holland in the eleventh century thus had a late effect on the Cape colony.

Another external contribution influenced the legal development in southern Africa: the English common law which had followed British colonization. Today, both foreign laws, together with the inherited traditional law of the Batswana, form the legal system of Bophuthatswana.

The study evaluates the influence of the judiciary and the executive on the development of the Bophuthatswana legal system with special regard to case law. It points out that both these branches of government are of great importance for the progressive development as well as for the cohesion of the legal system.

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