Globalisation v glocalisation: no contest; legal comparison, mixed legal systems and legal pluralism

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Abstract

In this article the value of taking a less traditional approach to mixed legal systems, legal comparison, and a global perspective is be explored. The use of value-pluralism in comparative research to enhance harmonisation of laws is explained and its relevance to the South African context established. The article first deals with the theoretical basis for the views expressed. This introduction is followed by a brief overview of the South African legal system as a mixed legal system and an exploration of the approaches to the classification of legal systems. The article concludes with comments on the objectives of globalisation, value-pluralism, and harmonisation of laws.

INTRODUCTION

One of the founding precepts of legal comparison has been the ideal of the uniformity of law. While one encounters the somewhat idealistic and naïve belief that ' … [T]here would be less conflict if only humans thought alike, followed uniform moral standards and respected uniform human rights',[1] in reality, universal uniformity has proven illusive, and modern comparatists have begun to arrive at the conclusion that it is impossible to achieve[2] and may not even be desirable.[3] Uniformity is inherently repressive in that it regards the values, rules and norms of some as dominant and ignores those of others. It promotes the universal uniformity of law as being more just than locally specific laws. Menski, an important comparatist, questions this premise and poses two profoundly important questions:

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1 Menski *Comparative law in a global context* (2006) 3.

2 Legrand 1997 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44 61.

3 Menski n 1 above at 4; Van Niekerk 'The convergence of legal systems in Southern Africa' 2002 *CILSA* 308 318.

- whose values, rules and norms would be adopted to found such a uniform system; and
- to what extent are locally specific solutions more geared toward justice?[4]

Menski proposes that instead of promoting uniformity, legal plurality should be respected and different visions recognised. In his view, therefore, globalisation should be less about 'uniformisation' and more about 'plurality-conscious negotiation of competing perspectives in a spirit of liberality'.[5] To this end he indicates that the Eurocentric, legocentric[6] and positivistic approaches that support the monist,[7] statist,[8] and positivist[9] thinking that permeates legal comparison, must be shed to make way for a plurality-conscious perspective.[10] Such a perspective – which takes cognisance of the various legal traditions of the world and takes account of the views and values of others – is, in Menski's opinion, preferable to uniformity.[11] This is 'glocalisation' as envisaged by Menski.[12] This view is mirrored in the work of Legrand who accuses comparativists of attempting, through the pursuit of sameness, to explain away legal diversity.[13]

Philosophers who call for a liberal state premised on the concept of *modu*s *vivendi*,[14] may well find value in such a pluralist approach to the law. In terms of *modus vivendi,* the political philosopher is called upon to discard the concept of a rational consensus upholding the view that there is a single best way of life, and to shift towards a 'liberal ideal of tolerance' which can reveal a way to live together in pluralist or diverse societies.[15] Tolerance in this context means 'the search for terms of peace among

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4 *Ibid*.
5 *Id* at 5. See too 48–50.
6 *Id* at 6 & 25. Menski coins the phrase to mean 'focused on the allegedly central role of state made law in society and human development'.
7 Twining *Globalisation and legal theory* (2000) 232: One internally coherent legal system.
8 *Ibid:* the state has a monopoly of law within its territory.
9 *Ibid*: What is not created or recognised as law by the state is not law.
10 Menski n 1 above at 5. Menski again discusses the Eurocentric bias of leading legal theories on 18 & 33. This position is also supported by van Niekerk n 3 above at 314 & 318.
11 Menski n 1 above at 5–6. See too Glenn *Legal traditions of the world* (2 ed 2004); Twining n 7 above.
12 Menski n 1 above at 4. See too 25–37.
13 Legrand 'The same and the different' in Legrand & Munday *Comparative legal studies: traditions and transitions* (2003) 245–250.
14 Gray *Gray's anatomy* (2009) 21–51
15 *Id* at 1.

different ways of life'.[16] Liberalism, therefore, is a 'project for co-existence'[17] and in this form promotes the view that there is no single system or way of life that is superior to another. There are various systems that need not conflict with one another but are simply different.[18] In this article the argument is made that the modern-liberal application of value-pluralism to the study of law, as with the study of society in general, will reveal a diversity of legal systems that may happily co-exist. The continued existence of this diversity may be essential to the preservation of the various ways of life envisaged by modern-liberal thinkers.

Law is socially embedded.[19] It cannot be denied that most, if not all, modern societies reflect various ways of life, value systems, and virtues,[20] yet traditional jurisprudence has marginalised social aspects of the law so excluding a full understanding of the role of law within the full social spectra.[21] Despite this, however, the relationship between law and other aspects of life cannot be denied.

The values, needs and demands of different ways of life are in many respects incompatible and thus no 'best-for-all' legal system can be created. Conflicting values must be accommodated to promote peaceful co-existence.[22] Furthermore, both the legal and the non-legal must be explored to achieve a true understanding of 'law'.[23]

Bearing this in mind, globalisation movements promote the 'uniformisation' of laws.[24] Menski cautions against viewing globalisation as world domination, Westernisation, or Americanisation as, he stresses,

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16 *Id* at 22.
17 *Ibid*.
18 *Id* at 25.
19 Menskin 1 above 7 & 32. Legrand in Legrand and Mundayn 13 above 275–278 clearly illustrates the social embeddedness of law. Van Hoecke & Warrington 'Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law' 1998 *ICLQ* 495 498 & 532.
20 Gray n 14 above at 24. Baxter 'Pure comparative law and legal science in a mixed legal system' 1983 *CILSA* 84 stresses that it is the cultural diversity within South African law that gives it its richness.
21 Menski n 1 above at 7. See too Legrand 'Comparative legal studies and commitment to theory' 1995 *MLR* 262 263. Van Hoecke & Warrington n 19 above at 496–497 note with approval Legrand's criticism of the failure to situate legal rules within their socio-economic context.
22 The writer's extension of the views of Gray n 14 above at 25 on different ways of life.
23 Menski n 1 above at 16. Twining n 7 above at 10 emphasises the interrelatedness of law and all aspects of life.
24 *Id* at 3–4.

what may appeal to some leaves others dissatisfied.[25] Certainly there are some, such as Glenn, who view uniformist visions as fundamentalist, seeking to impose one truth or tradition on all others.[26] Complex legal traditions such as those examined by Glenn, are not, however, universal and must accommodate other complex traditions.[27]

Globalisation must be prevented from destroying diversity and undermining democratic values.[28] For this reason, if globalisation – or, as would appear to be preferable, glocalisation – is to take place in an environment conducive to peaceful co-existence as opposed to subjugation of one legal system by another, it is vital that world demographics be acknowledged. A significant proportion of the world's demographics is located in the southern hemisphere[29] and thus the southern voice and southern perspectives will have to feature prominently in any 'globality-conscious legal scholarship' and this scholarship will have to cast off its Western mantle.[30]

Globalisation as Westernisation, may be viewed as ' … [a] cultural bombardment on the developing countries by the western modernity – capitalism, industrialism and the nation-state system'.[31] Doshi indicates[32] that non-western nations regard globalisation as nothing other than a new imperialism within the fields of economy and culture. He states further that in the south there are multiple globalisations and the process must ensure no loss of identity or importance for nation states subjected to it.[33]

To this end Menski proposes that plurality-conscious approaches to globalism must promote equity and casuism as the route to justice and

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25 Menski n 1 above at 10*ff*. See too Glenn n 11 above at 2000 51–52.

26 Glenn n 11 above at 356 see too Legrand in Legrand & Munday n 13 above at 250–260.

27 *Id* at 355–357.

28 Menski n 1 above at 12–13; Robertson *The three waves of globalization: a history of a developing global consciousness* (2003) 3.

29 www.indexmundi.com/world/demographics_profile.html (last accessed 12 January 2012).

30 Menski n 1 above at 16–17, 26 & 35. At 37 Menski notes that colonialism bred a sense of Western superiority and paternalism. Likewise, on 48 he notes that there is a hidden assumption of the superiority and civilised nature of Western laws which has denied non-European cultures the opportunity to develop appropriately. On the Southern voice see also 55–58. Van Niekerk n 3 above at 315 & 318 stresses the fact that Western values have dominated the harmonisation process to date and have driven a unification agenda rather than a harmonisation or convergence agenda in Southern Africa.

31 Doshi *Modernity, postmodernity and neo-sociological theories* (2003) 352.

32 *Id* at 367–8.

33 *Id* at 352.

equality. This requires the application of a methodology based in deep pluralism, which would uphold situation specificity in all cases.[34] This can be achieved only through the application of socio-legal approaches to law and globalisation.[35]

In view of the importance of southern perspectives to any acceptable globalisation or glocalisation of legal systems, it is proposed to now examine the South African legal system as a mixed legal system, to assess the value in using a tradition-based approach to classification of the system, and the value that can be added to legal comparison by the application of a pluralist approach to legal comparison within the South African context.

THE SOUTH AFRICAN LEGAL SYSTEM

South Africa hosts a multicultural, multi-ethnic legal environment that cries out for a pluralist approach to globalisation and respect and appreciation for the different. South Africa as a 'rainbow nation' celebrates diversity and, if this identity is to be maintained, it must resist global universalism.[36] This article therefore calls for the application of a strict definition of mixed legal systems, a legal-traditions approach to the classification of legal systems, and a pluralist approach to legal comparison in South Africa.

For South African jurists much of what is stated in the next few paragraphs may be trite. However, it will be of value to other readers and the information is vitally important if the further discussion is to be meaningful.

Overview

The South African legal system is complex and defies easy description. The complexity is a consequence of the vast array of influences upon South African legal development. The South African legal system has been described as a three-layered cake, the three layers being Roman,

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34 Menski n 1 above at 14 & 25. Here deep pluralism requires the comparativist to take note of all legal systems observed within a jurisdiction, as distinct from state pluralism which notes only those legal systems prevailing within a jurisdiction that are recognised by the state: Van Niekerk n 3 above at 313; Legrand in Legrand & Munday n 13 above at 271–272 calls for legal comparatists to cease subordinating difference and to pursue difference.

35 *Idem* 15–16 & 29.

36 Bekker, Labuschagne & Vorster (eds) *Introduction to legal pluralism in South Africa* (2002) Part 1, Customary Law.

Roman-Dutch, and English law. These subsequently crystallised into Roman-Dutch, English and African indigenous law.[37] Recognising the need also to recognise indigenous law influences, Zimmerman and Visser refer to the Roman-Dutch, English and indigenous law influences as 'the three graces' of South African law.[38] This descriptor, however, does not take full account of the rich heritage of South African law that must, in the writer's view, at least reflect a fourth layer in the form of the human rights developments so instrumental in shaping the current legal climate in the country.

South African law thus exhibits a character shaped by Roman-Dutch law influences brought to South Africa in 1652 with the arrival of the Dutch. The Dutch ruled the Cape Colony in accordance with the principles of Roman-Dutch law as applied in the province of Holland.[39] On arrival at the Cape, the Dutch came into contact with the local indigenous hunter-gather populations whose laws they simply ignored and whom they quickly brought under the jurisdiction of the Roman-Dutch law.[40] The Europeans acquired vast tracts of land, whether through *occupatio* or as a consequence of a compact between the colonists and the indigenous population in terms of which trinkets and beads, and other items of relatively little worth, were exchanged for land.[41] The indigenous populations were regarded as uncivilised and their law of little or no consequence.[42] The two periods of British occupation led to the introduction of strong English law influences, especially in relation to formal law.[43] The English also treated the indigenous law as inferior and gave limited recognition to it in certain circumscribed circumstances and subject to a repugnancy clause.[44] The effect of this was to entrench the

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37 Hahlo & Kahn *The South African legal system and its background* (1973) 584–585; Hosten, Edwards, Bosman & Church *Introduction to South African law and legal theory* (1995) 272*ff*.

38 Zimmermann & Visser (eds) *Southern-Cross civil law and common law in South Africa* 1996 12; Palmer *Mixed jurisdictions worldwide the third legal family* (2001) 8 n 12; Church, Schulze & Strydom *Human rights from a comparative and international law perspective* (2007) 52 n 25(Church *et al*).

39 See the discussion of Roman-Dutch law offered by Fagan 'Roman-Dutch law in its South African historical context' in Zimmermann & Visser n 38 above at 33–64. See too Farlam & Zimmermann 'The Republic of South Africa (report 1)' in Palmer n 38 above at 83– 143 and Van der Merwe, Du Plessis & De Waal 'The Republic of South Africa (report 2)' 145–199 where the authors briefly explore the development of the South African legal system and the impact of that history on the law today.

40 *Id* at 38–40.

41 *Idem* 36–37.

42 *Idem* 40–41; Church *et al* n 38 above at 58.

43 Zimmermann & Visser *idem* 49–51.

44 Church *et al* n 38 above at 58–61.

civil law/common law mix and to stultify the development of indigenous law and limit its influence on the development of the generally applicable legal system.[45]

The influences on South African law were not without their tensions, and the twentieth century saw a 'neo-Civilian renaissance' when a real attempt was made by the purists to rid South African law of its English influences.[46] Despite this, the system does not readily fall into the category of either purely civil or truly common law.

Classification in a legal family

Comparative lawyers have, for convenience, made use of the legal family as a tool for effectively surveying legal systems worldwide.[47] When viewing legal families from a traditional perspective, the South African system does not fall squarely into any of the traditional families.[48] The reason for this appears to stem from the bases upon which legal systems are classified as belonging to a particular family. Allocating legal systems to a particular legal family is a complex issue that has formed the basis of considerable discussion amongst comparatists who have applied a number of classification techniques to this process.[49]

Whatever basis of classification is applied, however, it remains clear that South African law does not belong to the common law or the civil law family, to the Romano-Germanic, or the English law family, or indeed to any other established family. Palmer, Zimmermann, Reid, and others, have recognised the need to identify and actively engage in comparative analysis of the legal systems that readily fall within the family of mixed legal systems.[50] For these modern comparatists, legal comparison is not solely an intellectual pursuit; it is a useful mechanism for the development of modern private law, both transnationally and nationally. As Rabel puts

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45 Zimmermann & Visser n 39 above at, especially at 58–60; Church *et al* n 38 above at 58 & 63 – 6.

46 Church *et al id* at 56; Zimmermann '"Double cross": comparing Scots and South African law' in Zimmermann, Visser & Reid *Mixed legal systems in comparative perspective: property and obligations in Scotland and South Africa* 6 &13; Zimmerman & Visser n 39 above at 60–64.

47 Church *et al* n 38 above at 25; Zweigert & Kotz *An introduction to comparative law* (3ed 1998) 63–64.

48 Church *et al* n 38 above at at 33–34.

49 *Idem* 28–34 where a number of approaches are briefly set out. See too Baxter n 20 above at 93 where he argues for classification on the basis of socio-economic structure.

50 Palmer n 39 above at 17

it: … '[A] healthy national law, just as a normal human being, can only develop on the basis of constant social exchange with its companions.'[51]

Some comparativists such as Zweigert and Kotz, do not recognise the family of mixed legal systems preferring rather to speak of hybrid systems that cannot easily be absorbed into any one of the seven legal families they identify.[52] Others recognise that mixed legal systems exist, but fail to reach consensus on the nature of such systems.[53]

South African law as a mixed legal system

It has been accepted that South Africa presents a mixed legal system, identified as such because it is crossbred and has suffered the isolation common to the other mixed legal systems separated from each other, geographically, culturally and in a diversity of other ways.[54] What constitutes a mixed legal system is not, however, as simple as it may appears.

Some jurists regard all legal systems as mixed. And argue that it is the degree to which they are mixed that may vary from system to system.[55] Church, Schulze and Strydom assert that all sophisticated and complex legal systems would be mixed in this sense.[56] McKnight defines mixed systems as those with 'substantive attributes (and those of method) derived from two or more systems generally recognised as independent of others'.[57] Thus, despite the fact that most legal systems have developed through borrowing of one kind or another, and that borrowing will not inevitably lead to mixing.[58] For mixing to take place the legal system must exhibit substantive and procedural attributes of the contributing legal systems from which it derives.[59] That said, Palmer has posited the view

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51 Rabel *Gesammelte Aufsätze* vol III (1967) 21 in Zimmermann, Visser & Reid n 47 above at 33.

52 Zweigert & Kotz n 47 above at 66.

53 Church *et al* at n 38 above at ch 4.

54 Palmer n 39 above at 3. See too Church *et al* n 38 above at 46–47; Baxter n 20 above at 93.

55 Zimmermann, Visser & Reid n 47 above at 3.

56 Church *et al* n 38 above at 46. Mixtures may be, as Zimmermann Visser and Reid, n 47 above at 3, put it, covert, overt, stable or in transition.

57 Baxter n 20 above at 92–93.

58 Zimmermann, Visser & Reid n 47 above at 3; Church *et al* n 38 above at 49.

59 Church *et al* n 38 above at 49. For a further discussion of what it means to have acquired substantive attributes of another legal system see Palmer n 39 above at 3–10 where he indicates that the structure of the legal system, its court structures, the role of judges, the underlying jurisprudence, the approach to legal sources and interpretation, and manner of reasoning and the like are such attributes. At 83–136 the attributes of the South

that mixed legal systems in the 'true' sense[60] are a group of legal systems that share certain traits.[61] It is in this sense that mixed legal systems will be viewed for purposes of this article. These systems remain important in comparative terms because they are 'mutually intelligible';[62] they share a knowledge and understanding of both the common and civil law systems. Hence their legal culture, that is their attitudes, values and opinion of law, are not alien to one another, despite the great social and cultural diversity that they serve.[63] Thus, despite diverse external factors, Western influences are common to all, although these influences may constitute only one layer of any given legal order.[64]

Palmer identifies fifteen political entities belonging to this family.[65] Some are independent countries, like South Africa and the Philippines, while others, such as Scotland and Louisiana, are legal systems within a larger country characterised by mixed legal systems.[66] Palmer stresses the importance of such legal systems given that they govern approximately 150 million people worldwide.[67]

The catalyst for mixing has varied from foreign imposition, as in the case of South Africa, where colonisation was the precipitating factor,[68] to internal developments within a country that led to a choice to become mixed, for example, Israel. [69]

In South Africa the mix is easily discernable in descriptions of the legal system such as this by Hahlo and Kahn:[70] 'Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting made in England'.

African legal system are explored in some detail by Farlam & Zimmermann and at 145–199 by Van der Merwe, Du Plessis and De Waal.

60 Zimmermann asserts that this is the narrow sense: Zimmermann, Visser & Reid n 47 above at 3.

61 Palmer n 39 above at 7–10.

62 *Id* at 4.

63 *Ibid*.

64 *Ibid*. On this point see Legrand in Legrand & Munday n 13 above at where he deals with sameness and difference.

65 *Ibid*.

66 *Id* at 4–5.

67 Palmer n 39 above at 4; Church *et al* n 38 above at 48.

68 Palmer *id* at 5.

69 *Ibid*.

70 Hahlo & Kahn n 38 above at 585.

Although defining a mixed legal system is difficult, especially given the vast array of divergent systems that belong to this family, Palmer proposes that three characteristics are common to all such systems and must be present for membership of the family to be established:

- The legal system must be built upon the twin 'foundations' of common law and civil law. This requirement eliminates purely pluralistic legal systems that lack the civil/common law building blocks from the family;[71]
- The civil and common law foundations must be clearly observable.[72] Palmer does not quantify the extent to which these foundations must be relied upon to found the requisite mix but leaves this assessment to the observer; and, finally,
- In all cases, the legal structure will divide public and private law along civil law/ common law lines.[73]

As mentioned above, there are no legal systems in the world that have entirely escaped external influences.[74] This fact has complicated the identification of the 'true' mixed legal systems. For this reason, the application of Palmer's three characteristics is a valuable mechanism for their identification. Orucu, Attwooll and Coyle have proffered an alternative view of mixed legal systems, in which they posit that such systems should be identified on the basis of the mixing itself, rather than the content of the mix. This widens the scope of the family to include pluralist legal systems which embody 'layering', irrespective of whether or not they exhibit the characteristics Palmer regards as essential.[75] Palmer rejects this wider approach as meaningless for purposes of fruitful comparison.[76] Neither approach is entirely satisfactory.

Certainly, vertical approaches to classification have no real value here. Such classifications allocate legal systems based upon the parent legal

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71 Palmer n 39 above at 7–9.

72 *Id* at 8.

73 *Id* at 8–10. Palmer stresses that the public law will not be free from civil law influences or the private law from common law influences. He indicates that influences from both the common and civil law foundations will be found in both, however, the civil law and common law will determine the character of the public and private law respectively. Church *et al* n 38 above at 50.

74 *Id* at 11.

75 *Ibid*. Orucu, Attwooll & Coyle (eds) *Studies in legal systems: mixed and mixing* 1996 discussed in Zimmermann & Reid n 47 above at 3.

76 Palmer n 39 above at 11–12. Baxter n 20 above at 94 states that the purpose of such comparison should not be for the purpose of identifying 'impurities' but for developing a theoretical understanding of law as a social phenomenon.

system and are unhelpful in cases of mixed legal systems, characterised as they are by more than one parent system.[77] Palmer advocates the use of a stylistic approach, based upon Zweigert and Kotz's approach to classification but applied horizontally. Such an approach, he avers, would lead to the comparison of these legal systems with each other and the exposure of their stylistic commonalities.[78]

Whatever classification technique is applied, it should be borne in mind that classifying legal systems into legal families is no more than a mechanism for study. As such, these families are not cast in stone. Classification will thus depend on the aim of the jurist doing the classification. The researcher exercises a series of choices in classifying and he/she must be aware of the choices he/she has made. South African law certainly meets the requirements of both the narrow and the wide approach to identification of a mixed legal system. The twin foundations of civil and common law are clearly discernable, despite the fact that South African law rests on four pillars rather than two. Mixing is patent throughout South African legal development and, in the writer's opinion, it is at the heart of the diversity experienced in South African law today.

Mixed legal systems, dualist legal systems, and pluralistic legal systems must not be conflated. Pluralism involves the attributes of two or more systems existing in a country but applying within different cultural or religious contexts to different groups of citizen.[79] Dualism relates to official application of more than one legal system within a country.[80] and is most often characterised by the fact that the systems do not enjoy equal status. One is regarded as superior to the other(s) and acts as the general legal system while the other(s) acts as special or personal law(s).[81] South Africa boasts a mixed legal system in the classical sense, a pluralistic legal system, and a dualist legal system.[82] As the mixed legal family, classification has traditionally given little cognisance to indigenous components in a legal system, classifying South African law only as a mixed system in the strict sense is potentially problematic for the

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77 *Id* at 13–14; Church *et al* n 38 above at 50.

78 Palmer *id* at 14.

79 Church *et al* n 38 above at 49; De Cruz *Comparative law in a changing world* (2ed 1999) 24; Griffiths 'What is legal pluralism?' 1986 *Journal of legal Pluralism* 1 38. See too Palmer n 39 above at 11 .

80 *Ibid*.

81 *Id* at 49–50.

82 The dualist nature of South African law is evidenced by state recognition of both the national law and the indigenous customary law.

comparatist given the driving need to take greater note of the indigenous African component of the law.[83] For this reason an alternative means of approaching legal families is perhaps desirable. Glenn's legal traditions approach discussed below, offers a viable and, in my opinion, exciting alternative means of identifying legal systems capable of meaningful comparison.

South Africa as a complex legal tradition

In looking at legal traditions, Glenn warns that care should be taken to avoid the negative connotations associated with the term 'traditional' when it is contrasted with progressive, innovative, or modern.[84] In this context 'tradition' simply means the shared history that allows the past to 'speak to us today'.[85] Glenn stresses, however, that a tradition must exhibit an 'historical continuity within the social context for it to be a tradition of that people, otherwise it is merely someone else's tradition.'[86] Furthermore, concerns surrounding the perpetuation of traditions that have justified and maintained inequality and injustice must be addressed.[87] Such concerns are especially relevant in the South African context where apartheid was entrenched through legal means and justified by reference to historical factors. Clearly traditions must not be adhered to blindly. The law must develop and remain appropriate to the prevailing social climate.

'Oral traditions', where information is passed down through generations by word of mouth, are an important example of a tradition. This tradition is especially important in South Africa where the African indigenous/ customary law has followed an almost exclusively oral tradition.[88] Glenn points out that oral traditions are subject to difficulties associated with the fallibility of human memory, but that which has persisted through the ages is that which was worthy of remembering and keeping.[89] Writing offers some advantages over oral traditions in being precise and detailed, but

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83 Church *et al* n 38 above at 52–53; Church 'The convergence of the Western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years' 1999 *Fundamina* 8 10.

84 Glenn n 11 above at 1.

85 *Id* at 2 & 8. De Cruz n 79 at 4 above describes legal traditions as being 'deeply rooted' and 'historically conditioned attitudes' about a multitude of things such as the nature and role of law, the organisation and structure of a legal system, how law should be made, applied, *etcetera* and as the glue that binds the legal system to its cultural context.

86 *Id* at 12.

87 *Id* at 18.

88 See, *inter alia* Thomas, Van der Merwe & Stoop *Historical foundations of South African private law* (2ed 2000) 8.

89 Glenn n 11 above at 8–9.

while the written word must be interpreted and can be physically destroyed, memory cannot.[90]

Choice again plays a role in allocating a legal system to a legal tradition: choice in defining the legal tradition; evaluating its importance; determining its origins, *etcetera*. The process of choice will separate one tradition from others and, that which does not form part of the tradition either supports, compliments or opposes that tradition.[91] Each complex legal tradition, be it chthonic, civil, common law, Islamic, or whatever, is subject to internal traditions.[92] Furthermore, there are lateral traditions that run across major traditions such as casuistry, analogical reasoning, equity, universalism, tolerance, and others.[93] Internal and lateral traditions may well cause tensions within a complex legal tradition, for example, the tensions between tolerance and universalism – a tension that influences the view of each tradition regarding its expansion and its need to reconcile with other legal traditions.[94]

South African law is a distinct legal system within which there has been 'a synthesis between two important legal traditions...mixed legal systems, … can combine the best as well as the worst features of civil law and common law'.[95] This descriptor overlooks the fact that in addition to the blending of the civil and common law traditions within the South African legal system, the system also exhibits influences from a plethora of both internal and lateral traditions.[96] It is thus, to use the words of Armstrong[97] 'a fused mass of simple traditions …. the set of simple traditions that make up a complex tradition will have a certain unity'. Certainly, within the South African legal system certain traditions are secure, but others are developing, being modified, created or abandoned. In an environment such as South Africa where change is endemic, it is to be anticipated that such a complex tradition would be found. Complex legal traditions reflect multivalent thinking in which western clear logic and clear boundaries are set aside in favour of a more inclusive, less defined thought process where 'fuzzy logic' – depending upon expanding knowledge – applies. SA, as a

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90 *Id* at 9.
91 *Id* at 344.
92 *Id* at 344–346.
93 *Id* at 346–7.
94 *Id* at 347–348.
95 Zimmermann, Visser & Reid n 47 above at 14.
96 For a discussion of what constitutes a complex legal tradition see Glenn n 11 above at 348–350.
97 Armstrong 'The nature of tradition' in Armstrong *The nature of the mind* (1981) 89 at 102 as discussed *by* Glenn *id* at 349 n 12 above.

complex legal tradition must thus reconcile different simple traditions within a single unified complex tradition.[98] This process demands tolerance, in the sense of building real bridges rather than permitting things that might ordinarily have been viewed as unacceptable.[99] Tolerance here means creating an environment of reconciliation by true acceptance rather than a simple failure to exclude. To this end, Glenn stresses the constant need for dialogue between all elements within complex traditions.[100]

Just as complex legal traditions reflect a unity of internal traditions, so too must they interact with one another. Although these complex legal traditions are often seemingly too disparate to reconcile, lateral traditions which may be common to more than one complex tradition, can be applied as a means by which to link them. Lateral traditions thus offer a basis for sustained diversity both within a legal system, such as the South African and between legal traditions themselves.[101]

If one accepts that Glenn's legal traditions approach is sound, then one must also accept that legal traditions may well exist that have not yet been fully investigated but may prove to be of primary importance.[102]

Based on the discussion above, the South African legal system should be seen as a complex legal tradition rather than as a mixed legal system. Such a classification recognises not only the civil/common law mix in South African law, but also the pluralistic nature of the society the legal system serves. This view of the legal system will encourage further legal development both internally and in relation to other legal systems worldwide.

A strict adherence to traditional western thinking could potentially undermine the objective of 'tolerance' in the true sense of the word and lead to unnecessary competition between the various internal traditions, so

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98 Glenn n 12 above at 353.

99 Idem 353–354. Curran 'Dealing in difference: comparative law's potential for broadening legal perspectives' 1998 *AJCL* 657 658 stresses that receptiveness towards underlying differences in legal cultures is desirable in an environment characterised by non-discrimination and inclusivity.

100 *Id* at 354.

101 *Id* at 355–357. See too Van Hoecke & Warringtonn 19 above at 502–513 where the authors make an appeal for application of a cultural families approach which is not unlike the legal traditions approach of Glenn and which envisages intra-cultural and cross-cultural comparisons.

102 *Id* at 343–344.

denying South Africa the ability to evolve its legal system to accommodate diverse harmonisation.

Zimmermann described South African private law as 'a particularly stimulating example of a truly European law prevailing outside of Europe'.[103] Certain aspects of South African law, most notably succession and property law, evince a very strong emphasis on the Roman-Dutch law, while procedure displays a strong English law bent. However, the legal traditions evident in each of these fields is not purely one or the other. The law of obligations is an area in which the blending of the two traditions is clearly evident.[104] Thus it is clear that the mechanism of traditions is a useful one that can be employed gainfully in comparing the South African legal system with other legal systems.

The mixed legal systems of the world, South Africa included, may have important lessons for one another but, more importantly, for other legal systems grappling with the difficulties associated with the approximation of civil and common law with a view to developing transnational legal traditions. The mixing of such legal traditions can, if one takes South Africa and Scotland as examples, certainly take place in a meaningful manner. The growing interest in mixed systems evidenced by international symposia and research projects conducted over the last decade or two, bears testament to a growing awareness of what these systems have to offer the rest of the Western world.

Unfortunately, in South Africa customary law remains isolated from the general law and despite constitutional imperatives, is yet to take its rightful place.[105]

CONCLUSION

If one accepts the legal traditions approach to legal comparison there is definitely scope for African indigenous customary law to be accommodated in an appropriate manner to enhance the prevailing South African legal culture. Tolerance of the values, cultures and history underlying this legal system will enrich the South African system still further. As development of this area of South African law is of paramount importance to the people of South Africa, a mechanism for legal development that permits inclusivity and a place for all components of the

103 Zimmermann, Visser and Reid n 47 above at 4
104 *Id* at 6–7.
105 *Id* at 7.

law and thus all the peoples of the country, is vital. Such a mechanism is available if the legal traditions approach is accepted and the narrow view of mixed legal systems is informed by it. Deep pluralism will permit the retention of the distinctiveness of various South African legal cultures and facilitate the embracing of difference. Furthermore, uniqueness and distinctiveness of individuals, communities and their law must be preserved and embraced.

Opposition to Roman-Dutch traditions in South Africa is easily understood. In this context, a rationalist approach that places law squarely in the present and future and rejects 'lessons' of the past, although tempting, must be resisted. Solutions offered in the present may, as Glenn puts it, be remembered[106] and will also acquire a 'pastness'. Furthermore, rationalism is itself a tradition and its lessons must be appreciated and the information offered adapted to suit the current social context. This process must be informed by constant interaction between various traditions of which there are a number in South Africa, each informing the other. No hierarchy or primacy of a particular tradition should be promoted. This will allow the traditions to act as a 'bran-tub'[107] and become a catalyst for change. So it is that within South Africa, just as globally, there is a need to harmonise the various legal cultures and traditions to celebrate diversity and to allow an harmonious, though not necessarily uniform, approach to law.

Value-pluralism[108] is of considerable value for any society in which diverse ways of life co-exist.[109] Cultural pluralism spawns legal pluralism.[110] State pluralism cannot explain South Africa's social reality or provide for the unofficial laws that prevail – such as people's law and living customary law. Deep pluralism accords with the trend towards tolerance of unofficial laws.[111] As Robertson states, globalisation is little more than an attempt to homogenise the world and to eradicate diversity, marginalise people, and undermine democratic rights.[112] Globalisation has become the realistic future, with glocalisation at its core. Citizens of the world, with a global consciousness will be central to future legal

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106 Glenn n 11above at 19.
107 *Id* at 13–23.
108 Gray n 14 above at 28.
109 *Id* at 31
110 Van Niekerk in Bekker, Rautenbach & Goolam (eds) *Introduction to legal pluralism in South Africa* (2 ed 2006) 5.
111 *Id* at 5 & 12–14.
112 Menski n 1 above at 12–13; Robertson n 28 above at 3.

development in Africa. With this in mind, what all people need is understanding and tolerance. This will only be possible within the context of value pluralism.