

Editorial: Special Edition Engaging with African Customary Law: Legal History in Contemporary South Africa

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Abstract

This special edition consists of a selection of contributions delivered at an event on "Custom, Oral History and Law: Writing South African Legal History", co-hosted by the Law School, University of Edinburgh and the Faculty of Law, North-West University.

Keywords

Legal history; oral tradition; sources of South African law.



Editorial

In 2015, the National Research Foundation (NRF) awarded an IRG-UK / South Africa Researcher Links Grant to the School of Law, University of Edinburgh and the Faculty of Law, North-West University to host an event on "Custom, Oral History and Law: Writing South African Legal History". The aim of the grant was to hold a workshop exploring certain aspects of the South African "common law" (i.e. the unenacted component of the South African legal system) in light of recent pronouncements of the Constitutional Court in South Africa.

The South African common law (a mixed jurisdiction of Roman Dutch and English law), combined with African customary law and unrecognised religious legal systems (Hindu, Jewish and Islamic law) provides a unique object of study.¹ Since law is a product of society and is intimately connected to the culture of that society, the mixed nature of the South African common law provides unique insights into the evolving nature of the South African legal culture post 1994. While the nature of the mixture remains undisputed, it is only really the Roman-Dutch and English components of this tradition that have thus far been studied in any detail.

The relationship between these two (essentially Western and European) traditions and the African customary as well as religious traditions remains largely unstudied. As a starting point, the organisers of this workshop chose to focus on African customary law as one of the traditions within the South African common law. Only a few attempts have been made to write an African legal history and sometimes these histories relate to a specific issue or time.² There is a need to now explore the interaction of the South African

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¹ Sections 8, 15(3), 39, 173 and 211(3) of the *Constitution of the Republic of South Africa*, 1996; see also Humby *et al* (eds) *Introduction to Law and Legal Skills* 46.

² For example, Chanock *Law, Custom and Legal Order*; Kuper and Kuper (eds) *African law: Adaptation and Development*; Gluckman (ed) *Ideas and Procedures in African Customary law*; Du Plessis 1992 *De Jure* 289-307; Khunou *Mountains of Spirit*; Visser (ed) *Essays on the History of Law*.

common law (and by implication also South African legal history as a field of study) and African customary law.

On several occasions the Constitutional Court has indicated the need to establish what the living law is. Since the past and the future are in constant dialogue in any legal system (and especially inasmuch as it concerns unenacted bodies of law), legal history has a vital role to play in establishing such living law. Recent events in South Africa also demonstrated the need for young South Africans and future legal scholars to understand and know the legal history of South Africa. Much of *metajuridica* (i.e. both legal history and also legal theory) has suffered under curriculum reforms in Law Schools in South Africa in recent years. To those interested in the practice of law only, these subjects may seem less directly relevant than a course in Human Rights law or Employment law. The reality is, however, that the study of *metajuridica* remains vital for connecting positive law with society. It is the conduit through which the living law travels.

The School of Law, University of Edinburgh and the Faculty of Law, North-West University hosted the workshop 26 to 27 May 2016 in the Paarl, Western Cape. Academics and students of the University of Edinburgh, University of Cape Town, University of Stellenbosch, North-West University and representatives of the National House of Traditional Leaders attended the workshop. The purpose of the event was, amongst others, to host a multi-disciplinary workshop featuring a group of legal scholars from South Africa and the United Kingdom who specialise in the complex relationships between law, society and history and to explore the methodologies that inform these histories. The idea was to determine how these methodologies could contribute to the writing of a representative and inclusive South African legal history. Another aim was to publish a selection of reworked peer reviewed papers presented at the workshop. The Potchefstroom Electronic Law Journal made it possible to host a special section of their 2017 edition to host these contributions.

The editors of this special edition of the PER have chosen five articles as representative of the main conclusions of the workshop. They are written by a range of scholars, both early career and more established, and deal with fundamental questions in connection with the topic. While the reader may wish to dip in and out of this collection, we recommend that the articles should be read in the following order (in which they appear in the volume of the journal). The first article, by Griffiths, sets the scene for the volume and argues for a broader approach to the teaching of law that takes into account more than merely positive law, but connects it also to other methodologies

in the social sciences. Himonga and Diallo take this further by framing the debate concerning the teaching of law against the backdrop of the calls for the decolonisation of law teaching in South Africa. Their article makes various important points concerning the clash of paradigms between the various components of the South African common law and how these could be overcome. The third article, by Khunou, is a case study of traditional headmanship and shows the importance of cultural context in the study of African custom. The final two articles, Rautenbach and Du Plessis, ask important questions about the relationship between the law of evidence (developed in a Western and European paradigm) and the complexities of proof in relation to oral custom and history.

This is by no means the last word on the subject. In this workshop, we have merely begun the conversation. There is much more work to be done, not just on African custom as a component of the South African common law, but more generally on the different paradigms of thought operative within this body of law. Then there are also the elements of religious law that need to be examined in much greater detail. But all of this can only be done so long as Law Schools in South Africa continue to support metajuridica, and especially legal history. Without subjects such as legal history and legal theory, the dialogue between past and present cannot occur. And, as recent events have made it clear, such dialogue is vital for the evolving nature of the South African legal system.

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