

ROMAN-DUTCH AND ENGLISH COMMON LAW: THE INDESPANSABLE LAW IN ZIMBABWE

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ABSTRACT

Since the British High Commissioner's proclamation of 1891, to the effect that the law to be applicable in the territory of the then Southern Rhodesia shall be the law applicable at the Cape of Good hope as at 10th June 1891, Roman-Dutch and English common law became an indispensable part of the Zimbabwean legal system¹. Despite several changes of governments in Zimbabwe from the Federation, the Unilateral Declaration of Independence, Internal Settlement, Independent Nationalist State, Unity Government and the Government of National Unity, Roman-Dutch and English common law has managed to find its way and survive in all the political dynamics of the country. Although there have been several attempts to reform the legal system by various models of governments that have ruled in the country, the Roman-Dutch and English Common Law has continually found its relevance and applicability in the legal system of Zimbabwe. This research will trace how Roman-Dutch and English common law has been preserved and survived in Zimbabwe.

Keywords: *common law, indispensable, Roman-Dutch Law, Zimbabwe*

Introduction

The sources of law in Zimbabwe and the general law making process are not simple. Although it is clear that Parliament is the only institution with primary responsibility to make law, many laws are still sourced from outside Parliament. Zimbabwe still recognizes the existence of common

¹L.Madhuku, An introduction to law in Zimbabwe: Frerdrich Ebert Stifung, Weaver Press 2010.

law as part of the law applicable. This law cannot be found in any statute of Parliament, but is all binding and applied everyday in the country to solve legal difficulties and challenges, as well as regulate and adjust the social and commercial life in Zimbabwe. This common law has grown with the development of the nation and has been continually used to face and deal with novel and changing circumstances of the country. Zimbabwe is an expanding society and demands an equally expanding common law. Because it is not written by elected politicians but rather, by judges, common law is also referred to as unwritten law (*lex non scripta*)

The common law applicable in Zimbabwe up to the present day is largely Roman-Dutch law fused with English law. This means that the common law in Zimbabwe is a fusion of Roman-Dutch Common Law and English law as well as many other legal principles including International Law. There has been a duelling and plural agenda perpetuated in Zimbabwe since the colonial era, whereby despite having the Parliament as the legislative arm of the State, there has been a strong and effective unwritten common law that has continued to shape and influence the legal system in Zimbabwe. The courts have continually been influenced by Roman-Dutch and English common law in interpreting and applying the law, more importantly the common law principles of equality, fairness, justice, legality and equity. There are many provisions in the Constitution of Zimbabwe as well as in the statute law in Zimbabwe that will be analyzed in this research in order to investigate how Roman-Dutch and English common law has remained relevant and influential in the Zimbabwean legal system.

Common law refers to that body of law that is applicable in a society to its entire people regardless of their race, tribe or any other distinguishing factors. The common element of this law is derived from the fact that the law is commonly applicable and binding to the entire country and to all people without regard to their inherent differences in background, level of education, custom and affiliations. It is imperative to understand the common law applicable because it is usually unwritten and is applied generally either directly or indirectly to influence the legal system, especially in the judicial system of a State. Because of various systematic and dynamic changes in the Zimbabwean governance system, its legal system has been largely infiltrated by several legal concepts adopted from its colonial history, its membership to the Common Wealth at some point, as well as its interaction with various countries. This research will therefore interrogate how, in all these developments, Roman-Dutch common law has

remained as largely the common law applicable in Zimbabwe, as well as the proof that indeed Roman-Dutch law is still applicable in the Zimbabwean legal system. This is very useful in that it gives a guideline on how the complicated Zimbabwean legal system can be better understood.

Theoretical Framework

This research is based on the common-law legal theory. This theory propounds that although the law is generally found in legislative statute made by legislative arms of governments, there still exists another body of invisible law.² This theory is based on the prepossession and presupposition of the existence of something called common law. The interstitial legislative principle in this theory is that although there is written law in existence, there is still the existence of fictitious law known by judges, and therefore judges are politically empowered in terms of the constitutions and various legislations to declare this abstract law in resolving legal issues. Common law is therefore supposed to be understood in terms of rules, reasoning and constitutionalism, and as such, the common law method, process and structure must be understood in terms of the three themes.

Understanding the philosophy on common law exposes some complications surrounding the contemporary understanding of common law across cultures. As alluded by Edlin, common law must be understood around the nature of the law and the legal reasoning in a particular society as well as the foundations of political authority and the sovereignty concept of law making by the respective government³. This theory explains common law as the common justice rules and principles developed into a unique, cohesive national body of law, developed and set in writing by judges over time. Although not to be found in the written record of the realm, common law is well known as it is coeval with civilization and was formed from time to time by the wisdom of man.⁴ Common law is thus;

“...to be found in the records of our several courts of justice, in books of reports and judicial decisions and in treaties of learned sages of the profession, prescribed and handed down to us

² E.Moglen. Legal Fictions and Common Law Legal Theory, Some Historical Reflections: Tel-Aviv University Studies in Law, August 14 1989.

³ D.E Edlin. Common Law Theory .Cambridge Studies in Philosophy and Law; October 2010

⁴ R v Rusby(1801) Peak’s NP Case 192

from the times of ancient antiquity. They are the laws which gave rise and origin to the collection of maxims and customs which is known by the name common law...”⁵

The common law legal theory celebrates the perfection of the rationality and integrity of institutions such as courts, in making correct decisions basing on reasoning and analogy. It is based on the assumption that there is an unwritten law known by judges. This legal culture is founded on the principles that judges use this law to adjudicate on some facts before the court.

Historical overview of the Common Law in Zimbabwe

Zimbabwe is a former British colony, which attained its independence from colonial rule on the 18th April 1980, after a protracted liberation struggle. Prior to independence, Zimbabwe had fallen into the governance of the British South Africa Company settler regime, a federal regime combined with present day Zambia and Malawi, the Unilateral Declaration of Independence (UDI) and the internal settlement regime. The British High Commissioner’s proclamation of 1891 marked a permanent feature in the colonial legal system of Zimbabwe. This was the first official acknowledgment of the real existence and applicability of common law in Zimbabwe. The British High Commissioner made a pronouncement that the law that was to be applied in present day Zimbabwe was to be the law that was applicable and in force at the Colony of the Cape of Good Hope on the 10TH June 1891 as subsequently modified.⁶

The questions to be asked regarding the British High Commissioner’s proclamations are basically:

- I) Which law was applicable at the Cape of Good Hope on the 10th June 1891?
- II) Who was applying the law at the Cape of Good Hope on the 10th June 1891?
- III) What was so special about the law applied at the Cape of Good Hope on the 10th June 1891?
- IV) Why the law applicable at the Cape of Good Hope on the 10th June 1891 and not any other law?
- V) Where was this law applicable at the Cape of Good Hope on the 10th June 1891 to be found?

⁵ E. Moglen, op.cit 2.

⁶L.Madhuku, op.cit 1

- VI) Who was going to be responsible for identifying this law applicable at the Cape of Good Hope on the 10th June 1891?

The answer to the first question is that the law applicable at the Cape of Good Hope on the 10th June 1891 was largely Roman-Dutch common law, heavily fused with English common law. The content of the law applicable at the Cape colony has got a rich history. Roman –Dutch common law is a fusion of Roman law and medieval Dutch customs which occurred in Holland (now part of Netherlands) over a considerable period of time and was completed by the end of the sixteenth century.⁷ This legal system appears to have been formally identified by the label Roman-Dutch law (*Roomsch-HollandschRecht*) by Simon Van Leeuwen in the 17th century in his book title. The Germanic inhabitants of Holland were conquered by Romans under the Emperor Julius Caesar for approximately five hundred years.⁸ Except on issues regarded by Roman authorities as either criminal or unacceptable, the people living in Holland were allowed to follow their own customary way of life, including applying their local laws to determine disputes amongst themselves, in what has been described by Hahlo and Kahn as:

“In conformity with their usual practice in dealing with conquered territories, the Romans did not attempt to force Roman law and institutions on their new subjects. Five hundred years of Roman rule could not however, fail to leave their impression on laws of the Germanic tribes. The superstructure of government and administration was Roman. Roman garrison towns were founded and large Roman country estates established. Roman civil servants, officers and businessmen constituted the ruling class. As labour tenants on Roman estates, as domestic servants in Roman households, as soldiers in the Roman army and clerks in Roman business firms the members of the subjects races picked up the ideas of their masters and took them back to their tribes. The history of the late Roman Empire was characterized by the Romanization of the provinces and by the barbarization of Rome”.⁹

Roman –Dutch law was therefore created as a result of gradual infiltration and assimilation of Roman law and Dutch customs. Even after the end of Roman Authority in Netherlands, the patterns of wisdom, simplicity, clarity and scientific nature of Roman law in contract law, family

⁷Shillington. *History of Africa* (2004)406

⁸Simon Van Leeuwen: *Roman-Dutch law (Roomsch-HollandschRecht)*

⁹ *South African Legal System/ The South Africa Legal System*, Cape Town, Wynberg, Johannesburg, 1968.

law and trade law resulted in the adoption and voluntary use of Roman law and its deliberate fusion with Dutch customs, which process was completed at the end of the sixteenth century.¹⁰ The codification of Roman law made it more accessible and preferable in Netherlands.

In 1652, Jan van Riebeeck and his crew of Dutch settlers took charge of the Cape of Good Hope. They were coming from Holland, a place where Roman-Dutch law was the legal system. These settlers knew no other law except Roman-Dutch law, which was applicable in their home country, and as a result they brought with them and established a legal system at the Cape of Good Hope, that was based on the law applicable in Holland, which was Roman-Dutch law. Until 1795, Roman-Dutch law was the law that was applicable at the Cape of Good Hope.

In 1795, after the Anglo-Dutch war, the British took occupation and control of the Cape of Good Hope as its colony.¹¹ At the time of occupation of the Cape by the British, Roman-Dutch law had already been long established and effectively applied. Roman-Dutch law was a scientific and effective legal system, which the British viewed as civilized, although it was different from English law. There were however some areas of Roman-Dutch law that the British were not happy with, especially on contract law and the law of delict and these were the areas that the Roman-Dutch common law was replaced by English common law principles such as equity. Some judges were imported from Britain by the British Authorities at the Cape of Good Hope, who were trained in English common law and they began to apply it, thereby influencing some legal aspects in the colonial territory. There was formal and informal infiltration of English law into Roman-Dutch law at the Cape of Good Hope. The formal influence was done through legislative frameworks such as the Orders- in-Council and other legislative mechanisms where some aspects of Roman-Dutch law were directly repealed and replaced by English law. The informal admission of English law was through the judicial processes of interpretation and development of the common law at the Cape of Good Hope. English law did not replace Roman-Dutch law at the Cape of Good Hope but largely influenced it. Therefore by the 10th June 1891, the law applicable at the Cape of Good Hope was Roman-Dutch law with substantial English law

¹⁰G.J van Niekerk. Constitutional Protection of common law: The endurance of the civilian tradition in Southern Africa. UNISA Press pp115-134 2012.

¹¹Ibid.

grafting thus, Roman-Dutch law is the basis of the law applicable at the Cape, bearing in mind that some considerable aspects of English law were also applicable.¹²

The answer to the second question relating to the application of the law at the Cape of Good Hope is also directly linked to the historical and political events at the Cape from 1795 up to the 10th June 1891. The British authorities did not overhaul the judiciary when they took over political authority but merged Dutch judges with a compliment of English judges to the bench to administer the hybrid legal system that was prevailing at the Cape Colony. The law applicable at the Cape included decisions of the courts up to that day, which decisions were now influenced heavily by the hybrid law prevailing at the Cape. Of those judges who were administering justice at the Cape, there were several who set out principles of Roman-Dutch law as well as those who also worked to set out English law principles where they felt that the justice of the cases before them required that. The English law trained lawyers and judges who were working at the Cape were well versed and familiar with English law and they easily resorted to it in mere practical convenience as the relevant law.

The law that was applicable at the Cape on the 10th June 1891 was special in many material respects. This law was a hybrid of Roman-Dutch law and English law and these two legal systems had been tried and tested for centuries. That body of law had been refined and civilized over the years and had also been interpreted on critical aspects and principles by renowned scholars and jurists over a long period of time. This law was therefore well developed and easier to apply in the new territories where there was no written precedence. The Zimbabwe colony established in 1891 only had customary law which was not written anywhere except in the hearts and minds of the indigenous community leaders and was only much of an informal system where, even if the white settlers would have wanted to learn it and apply it, there was no scientific source of the law in form of text books, statutes, law reports or codes. It would have required more time to establish a completely new legal system in Zimbabwe than to simply import an already existing and well established law at the Cape, which law had then been blended to suite both the Dutch and English settlers. It was therefore inevitable for the British settlers to settle for the hybrid law applicable at the Cape. The British preferred the law

¹²L. Madhuku. op.cit 1.

applicable at the Cape and no other law because they had familiarized with it and they were satisfied that it was the most appropriate system to apply.

The law applicable at the Cape of Good Hope was to be found in the writings of great scholars, and also mainly in judicial precedents. There is an indispensable need for certainty, predictability, reliability, equality, uniformity and convenience that is expected of any law or legal system. When anyone wants to know which law is applicable in their situation, they must be able to know where to locate this law. The people who were responsible for administering the law in Zimbabwe were to source and be guided by what had been decided at the Cape of Good Hope, on or before the 10th June 1891. Any rules and principles of law which had been established and adopted at the Cape of Good Hope at the time, whether they were Roman-Dutch law or English law, was to be found and applied in Zimbabwe as long as they could be established to have been the law at the Cape of Good Hope on the effective date. So in every instance where there was no specific statute applicable, the administrator of the law in Zimbabwe was supposed to establish what the law was like at the Cape on the effective date.

The Common law in Zimbabwe under the Lancaster House Constitution

From 1891 up to 1980, the common law applicable in Zimbabwe was the law applicable at the Cape of Good Hope as at the 10th June 1891. The early history of Zimbabwe is set out in **In re Southern Rhodesia (1919)**. Before 1923, Rhodesia was a territory by conquest, but in that year it was annexed as a Crown colony by an Order in Council, which order set up the 1923 Constitution and provided for an elected legislature and Cabinet of government and the High Court, with the responsibility of administering the law. The creation in 1953 of the Federation of Rhodesia and Nyasaland and its dissolution in 1963 did not change the position of common law, although the English common law texture increased. The Southern Rhodesia constitutional Order of 1965 modified the 1961 Constitution, but left the greater part of the law intact and the Judiciary remained untouched and common law remained applicable as it was. After a protracted liberation war of independence, Zimbabwe attained its independence from colonial oppression resulting in the adoption of the Lancaster House Constitution in 1980, where under section 89 it reads:

Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, High Court, and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

This was an inheritance of Section 49(2) of the Southern Rhodesia Order in Council of 1898, which read that:

the law to be administered by the High Court and the magistrates' courts hereinafter mentioned shall, so far as not inapplicable, be the same as the law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, except so far as the law has been modified by any Order in Council, Proclamation, Regulation, or Ordinance in force at the date of the commencement of this Order.

From the legal and historical background of the law applicable at the Cape Colony, the law was no longer purely Roman-Dutch law, since English law had already made inroads into the legal system through the Charters of Justice 1828 and 1832 which changed formal law and court structures fundamentally, through legislative enactments, education, language, commercial policies, and most notably through the judiciary.¹³ Section 19 of the British High Commissioner's Proclamation was the first to formally introduce European law into the territory of Zimbabwe, wherein, it expressed that "the law for the time being in force in the Colony of the Cape of Good Hope" was to be applied.

The applicability of both Roman-Dutch law and English law was buttressed in the Lancaster House Constitution in terms of the requirements for appointment of judges, in terms of Section 82(1), which prescribed that for a person is eligible to be appointed a judge if:

- a) He is or has been a judge of a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language; or

¹³GJ van Niekerk, op.cit 1

- b) He is and has been for not less than seven years, whether continuously or not, qualified to practice as a legal practitioner-
- I) in Zimbabwe
 - II) in a country in which the common law is Roman-Dutch and English is an official language; or
 - III) If he is a citizen of Zimbabwe, in a country in which the common law is English and English is an official language.

Although the provisions of Section 89 and 82 of the Lancaster House Constitution were very clear that the applicable common law in Zimbabwe was the law that was applicable at the Colony of the Cape of Good Hope as at the 10th June 1891, which law was clearly a hybrid merger of Roman-Dutch law and English law, there still appeared to be a general misunderstanding by the Zimbabwean judiciary on the exact law applicable. In the case of **Book v Davidson**, Dumbutshena CJ held that:

“Mr. Robinson contended that it was not wise to abandon English law which has been consistently followed by the courts in this country as the law applicable in Zimbabwe in cases involving contracts in restraint of trade. Should this court decide that the correct approach is the one urged upon us by Mr. Robinson, the fact that the South African Appellate Division had decided otherwise on the question of onus will not matter because the decisions of the Appellate Division are not binding on this court. This court cannot however, lightly ignore the decision in *Magna Alloys and Research v Ellis* because Zimbabwe is a Roman-Dutch common law country. Decisions of a court in another Roman-Dutch law jurisdiction have, in related cases, a very persuasive authority. It is therefore the duty of this court to weigh on the scales of justice, the approaches of English law and Roman-Dutch law....”¹⁴

There is no legal basis upon which the finding that Zimbabwe is a Roman-Dutch common law country was made because the provisions of the Constitution did not say that. Although the law applicable at the Colony of the Cape of Good Hope was largely Roman-Dutch, law, it was not purely Roman-Dutch common law because it had been seriously influenced by English law. Also, there is no basis of weighing between English law and Roman-Dutch law on the scales of

¹⁴1988(1) ZLR 365(SC).

justice, because what the court is to find is the principle of law that was applicable at the Colony of the Cape of Good Hope on the effective date and check whether such principle has been subsequently modified by statute, or not before applying it.

The common law applicable in Zimbabwe as per the Lancaster House Constitution was not a comparative application of English law and Roman-Dutch law, but simply ascertaining the exact legal principle that was applicable on the effective date and apply it as it is, be it English or Roman-Dutch common law principle. What is persuasive to the Zimbabwean courts is how the said principle that was applicable at the Colony of the Cape of Good Hope was derived and developed, and not the Roman-Dutch legal position as applied in perceived Roman-Dutch common law jurisdictions. It is therefore imperative to note that although not binding, decisions of both English common law jurisdictions, and those in Roman-Dutch jurisdiction are persuasive, purely depending on which of the principle was applicable at the Colony of the Cape of Good on the effective date. The reason why both English and Roman-Dutch qualification was accepted in terms of the Lancaster House Constitution was simply because both systems were deemed applicable and relevant to the law administered in Zimbabwe. Either English law or Roman-Dutch law is applicable in terms of the provisions of Section 89 of the Lancaster House Constitution, as long as there is proof that the legal principle to be applied was applicable at the Cape Colony on the effective date.

What is the current common law applicable in Zimbabwe?

Zimbabwe adopted a new Constitution, which is home grown and arguably people driven, cited as Constitution of Zimbabwe Amendment (No.20) Act, 2013, which repealed and substituted the Lancaster House Constitution. In terms of Section 192 of the new Constitution:

The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.

This provision brings to life or resurrects Section 89 of the Lancaster House Constitution, as the applicable common law. Zimbabwe still accepts and uses common law as part of its law applicable in the courts and, to remove any doubt on the applicability of common law, Section 46(2) of the new Constitution is relevant, which reads:

When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

This is a clear acknowledgment that common law is still applicable in Zimbabwe by our courts and this position is buttressed by provisions of Section 176 of the new Constitution, which reads, thus:

The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.

The drafters of the Constitution make reference to common law and do not attempt in any way to elaborate the type of common law being referred to. This invites the administrators of the law to look into the common law applicable on the effective date. The common law that the courts are invited to develop is the one that was applicable at the Colony of the Cape of Good Hope on the 10th June 1891, as subsequently modified.

There is sufficient proof that the applicable common law in Zimbabwe has not changed, and this more fully appears in the qualification requirements for Judges of the Constitutional Court, the Supreme Court, High Court, Labour Court and Administrative Court. An assessment will be made on the qualifications of judges in each of the above mentioned courts and how, in the circumstances, the common law is entrenched.

The Constitutional Court of Zimbabwe is established in terms of section 166 of the Constitution, and its jurisdiction is founded in Section 167 of the same Constitution. It is the highest court on Constitutional matters, and its decisions bind all other courts. Amongst many other functions, provisions of Section 167(3) of the Constitution provides that the Constitutional Court is empowered to validate the constitutionality of all subsidiary legislation to the Zimbabwean Constitution, it also has powers to validate the constitutionality of the conduct of the President, or parliament, as well as the Constitutional validity of decisions made by other courts. The judges responsible for administering this court must be qualified in terms of Section 177 of the Constitution, which qualifications include the one in Section 177(1) (a), which reads:

he or she has been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English , and English is an officially recognized language;

The aforementioned provision must be read together with provisions of Section 177(1) (b) (ii) reads that:

for at least twelve years , whether continuously or not , he or she has been qualified to practice as a legal practitioner in a country in which the common law is Roman-Dutch or English and English is an officially recognized language;

As already demonstrated in this paper, the background of judges influenced the content of the law applicable at the Colony of the Cape of Good Hope, which is still applicable even today, with the same effect. Therefore, the Roman-Dutch or English law background for the Judges is a clear demonstration of the common law applicable in Zimbabwe, which is a hybrid of the two laws. It therefore means that in interpreting the Constitutionality discourse in the Zimbabwean legal system, the Judges are still guided by the common law background, which they are empowered to administer, modify and develop. Consequently, the Zimbabwean common law constitutional order has not been changed, and it thus remains as it was in the previous constitutional order.

The Supreme Court, being the final court of appeal in Zimbabwe, except for constitutional matters, is established in terms of Section 168 of the Constitution and its jurisdiction is founded in section 169 of the Constitution. All general litigation matters end with the Supreme Court, and therefore all common law application, administration, and development is finalized in this court, except in instances where the Constitutional Court has jurisdiction. General Law, including common law is dealt with in this court, and therefore, it holds a very important role in interpreting the principles of common law applicable in Zimbabwe. What the Supreme Court finds to be the principle of law applicable, is binding on all the other courts, which are subordinate to it, such as the High Court, Labour Court, Administrative Court and all other inferior courts and tribunals. What the judges of the Supreme Court rule to be the applicable legal principles become the universal principles applicable to the entire legal system in

Zimbabwe. Their qualifications, experience, background and knowledge are therefore very critical because they affect their judgmental value and persuasion.

Section 178 of the Constitution of Zimbabwe provides for the qualifications of the judges of the Supreme Court. The provisions of Section 178(1) (a) provide that:

he or she has been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English , and English is an officially recognized language;

And Section 178(1) (b) (ii) reads that:

for at least ten years , whether continuously or not , he or she has been qualified to practice as a legal practitioner in a country in which the common law is Roman-Dutch or English and English is an officially recognized language;

The provisions of the Constitution of Zimbabwe in relation to the Supreme Court continues to cement the position that Roman-Dutch or English law is the relevant and applicable common law. What the judges have learnt, known and experienced in terms of either Roman-Dutch principles or English law is emphasized as relevant to their suitability to hold the office.

The High Court is a superior court of record and is established in terms of Section 170 of the Constitution and has original jurisdiction over all civil and criminal matters throughout Zimbabwe in terms of Section 171(1) (a) of the Constitution. It has general and inherent jurisdiction to deal with general law matters including the application of common law. The qualifications for appointment as judge of the High Court are provided for in terms of Section 179 of the Constitution. Section 179(1) (a) provides that:

he or she has been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English , and English is an officially recognized language;

This position is also supported by the provisions of Section 179(1) (b) (ii), which reads:

for at least seven years , whether continuously or not , he or she has been qualified to practice as a legal practitioner in a country in which the common law is Roman-Dutch or English and English is an officially recognized language;

The effects of the said requirements are that in all our civil and criminal law litigation, the foundations of Roman-Dutch or English common law is the basis of our law, and as such, our judges must be well versed with either of the two common laws. Since the High Court is the court of original jurisdiction, civil and criminal law is developed, applied and administered on a daily basis in the High Court. The High Court is a superior court and also a court of appeal, which implies that its decisions are binding on inferior court, and therefore it has far reaching impact on the application and development of common law.

There is also an important aspect in terms of the requirements for qualifications for appointment of High Court judges which is note worthy. This is applicable also to the Administrative Court and Labour Court. This refers to provisions of Section 179(1) (b) (iii), which provides that:

If he or she is a Zimbabwean citizen, in a country in which the common law is English and English is an officially recognized language

This position clearly demonstrates that Zimbabwe is not necessarily a Roman-Dutch Common law country and that at times purely English law knowledge or background may be sufficient to be given authority to administer and develop civil or criminal law in Zimbabwe. To those who still had a mistaken understanding on which common law is exactly applicable in Zimbabwe, this provision guides us to the logical answer that the common law applicable is not necessarily Roman-Dutch. So a Zimbabwean who is appointed to the position of a judge of the High Court, Administrative Court or Labour court is empowered to amply apply his experience and knowledge in English law without even putting a comparative approach alluded to in the *Book v Davidson* case.¹⁵

The Administrative law and Labour law applicable in Zimbabwe is also Roman-Dutch or English law as demonstrated by the requirements for appointment of Judges administering these courts in section 179 of the Constitution, which apply to the High Court. So there is a Roman-

¹⁵1988 (1) ZLR 365 (SC).

Dutch or English law texture in the Zimbabwean labour law and administrative law. The legal principles governing and guiding labour law and administrative law in Zimbabwe is statutory, but common law is also relevant and applicable, which is why the judges of these courts are also required to have a common law background. When applying labour law and administrative law, the courts are also guided by common law,

What is the effect of section 3 of the Criminal Law (Codification and Reform) Act (Chapter 9:23)?

The provisions of section 3(1) provide that:

The non-statutory Roman-Dutch criminal law in force at the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies, or repeals that law.

What this provision provides for is not the abolition of common law, because the Code is subsidiary to the Constitution, and therefore cannot amend, repeal, vary, modify or reform the Constitution. What this section provides for is reforming common law offences or crimes as applied by our court in criminal law and not constitutional law. This position is clearly demonstrated by the provisions of section 3(2) which reads:

Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of-

- (a) The criminal law referred to in subsection (1); or
- (b) The criminal law that is or was in force in any country other than Zimbabwe.

This explains that the legislature still accepts the existence of the order and authority of the invisible or unwritten law (*lex non scripta*). The correct legal position is that common law still applies in the criminal law of Zimbabwe and remains the reference point but must be read in line with the Code in order to address the reform so desired in terms of the essential requirement, and available defenses. In any event, the original and literal meaning of common law and its application has always been subject to legislative modification. In terms of the Zimbabwean

legal system, the Constitution is superior, and it's followed by legislative law and then common law and custom. What the court is supposed to do in administering and applying the law is first to check what the constitutional position is regarding to a particular legal principle and thereafter look for any relevant statute giving effect to the constitutional position, before arriving at a conclusion. When there is no relevant statute, the court is then empowered to get guidance and direction from the applicable common law relevant. There is therefore no need for any confusion in the reading of Section 3 of the Criminal Code.

Conclusion

Zimbabwe applies the common law that was applicable at the Colony of the Cape of Good Hope on the 10th of June 1891, as subsequently modified. This common law is neither purely Roman-Dutch, nor English law, but a mixture of the two. Any averment to the effect that Zimbabwe is a Roman-Dutch common law is half truth, in the sense that although the Zimbabwean common law is largely Roman-Dutch law, some significant and substantial fusion with English law created a new legal system, which is a hybrid law. Since the colonial era, until now the Zimbabwe common law has remained a hybrid, and the qualification for appointment of judges with either Roman-Dutch law or English law background is a clear indication of the dual common law application in Zimbabwe.

The resilience and strength of common law in Zimbabwe since 1891 validates the common law legal theory, to the effect that although there is written law in existence, there is still in existence a fictitious and powerful body of law known by judges. There is no substitute for common law, as it is derived from the society itself, and from the experiences and trainings of the judges themselves. Judges are politically empowered by the Constitution to apply and develop common law when they perform their duties of interpreting the law and making determinations on issues before them. The prepossession and presupposition of the existence of common law in Zimbabwe is very apparent in the legal system, and there is a continued reference to Roman-Dutch common law and English common law in the statutory laws, clearly demonstrating the acknowledgment of the binding nature of common law in civil law, criminal law, labour law as well as administrative law, common law is relevant and applicable in Zimbabwe and the courts are required to apply common law, and also to develop it to suit the constitutional order as well as do justice in situations and cases before the courts.

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