



# LEGAL PLURALISM IN THE GREAT LIMPOPO TRANSFONTIER CONSERVATION AREA (GLTFCA)

**\*\* South Africa \*\***

**\*\* Mozambique \*\***

**\*\* Zimbabwe \*\***

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## What is Legal Pluralism?

*Legal pluralism refers to more than one legal order in a social field, eg. different laws in one country or the different laws of more than one country such as the 3 countries in the GLTFCA.*



## Classic Legal Pluralism

- Historically legal pluralism was used to explain the co-existence of transplanted colonial laws and indigenous laws in one legal order.
- Eg. Colonial powers in SA did not interfere with indigenous laws – indigenous people were governed by their own legal rules. The position remained in many post-colonial countries.
- Legal pluralism expanded to other areas as well, example between overlapping geographical areas & countries – global legal pluralism.



## Legal pluralism 'family tree':


- *Classic* legal pluralism: interaction between colonial and indigenous laws – early globalisation ('colonial pluralism').
- *Global* legal pluralism: interaction between laws in the transnational (global) sphere (includes classic legal pluralism). Eg. The interaction of laws of the various countries of the GLTFCA.



## LEGAL PLURALISM IN THE GLTFCA

**Macro-level: *Global legal pluralism* – as embodied in the agreement & the treaty between the 3 countries.**

**Micro-level: *Classic legal pluralism* – as embodied in the different national, provincial, local & customary laws in the 3 countries.**

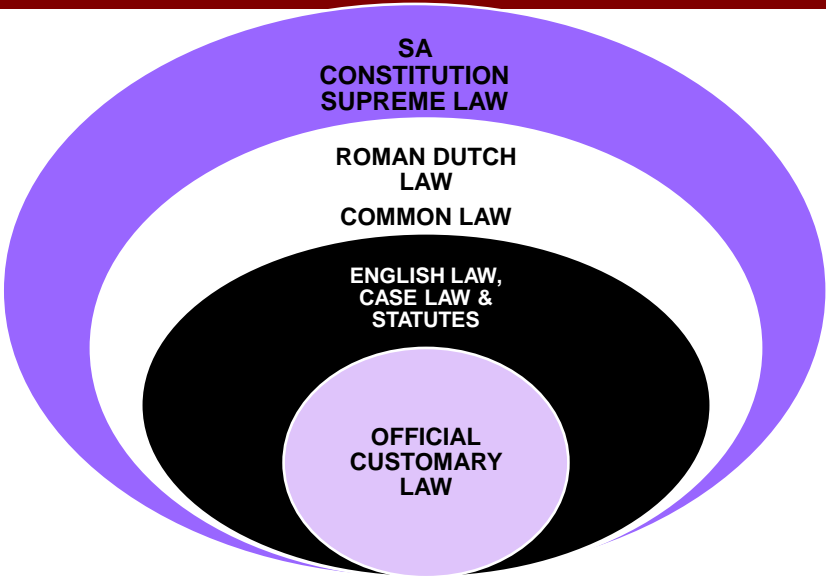


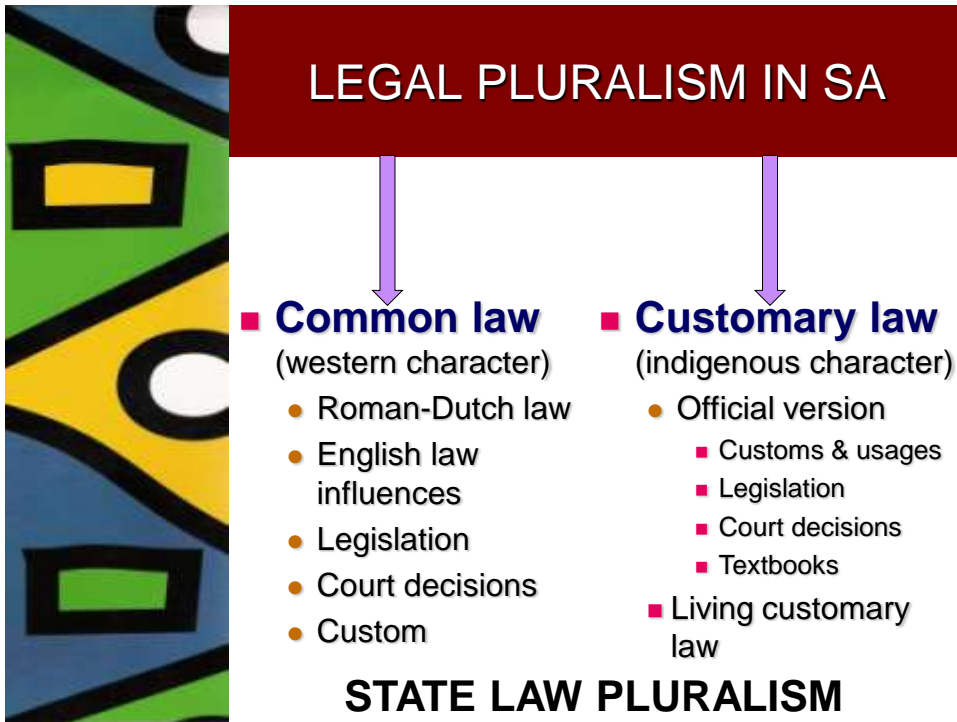
**FOCUS TODAY IS CLASSIC  
LEGAL PLURALISM: THUS  
LEGAL PLURALISM ON A  
MICRO LEVEL WITHIN THE 3  
GLTFCA COUNTRIES**



# LEGAL PLURALISM IN SOUTH AFRICA

**SA OFFICIAL STATE LAW IS MIXED**





## CUSTOMARY LAW IN SOUTH AFRICA

### S 211(3) of the 1996 Constitution

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”



## Constitutional Recognition of Customary Law – S 211(3)

- **Mandatory:** courts do not have discretion – must apply.
- **3 Qualifications:**
  - It must be **applicable** – when is it applicable? This is the conflicts of law question.
  - It must be **subject to** the Constitution. When is it subject to? When is it **compatible**, i.e. the human rights question.
  - It must be **subject to** any other legislation that specifically deals with customary law. Similar to the common law, customary law can also be adapted by means of legislation.



## Status of Customary Law

- ***Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC):** While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.
- ***Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC):** Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law.
- ***Gumede v The President of the RSA* 2009 3 SA 152 (CC):** Customary law lives side by side with the common law and legislation.





## What is Customary Law?

- Separate legal system consisting of various indigenous laws.
- Definitions of customary law:
  - Bennett: “customary law derives from social practices that the community accepts as obligatory”.
  - *Law of Evidence Amendment Act 1988*: “custom as applied by the Black tribes of South Africa”.
  - *Recognition of Customary Marriages Act 1998*: “customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the culture of those people”.



## Problem of definition

### “Customs and traditions traditionally observed”

- Traditionally observed implies a long existence without change.
- But customs and traditions are not static and ever changing.
- *Bhe v The Magistrate Khayelitsha 2005 (CC)*: “True customary law will be that which recognises and acknowledges the change which continually take place.”
- Difficulty in determining what the customs and traditions are – also the difference between the groups.
- The whole problem of living law.



## Problem of definition

### “Indigenous African peoples of South Africa”

- Indigenous refers to the original inhabitants of an area which has subsequently been occupied by migrants.
- Those peoples must be from South Africa – cannot be elsewhere from Africa.
- Usually include the people that speaks African languages from the Nguni, Tsonga, Sotho and Venda groups.
- Problem is that some indigenous peoples – eg. Khoisan – are excluded because their communities have splintered because of previous policies.



## Problem of definition

### “From part of the culture of those people”

- Culture is a contested concept and difficult to define.
- Broad definition of culture – in line with definitions of UNESCO: “a way of life”.
- Bennett: Culture has at least 2 meanings:
  - Intellectual and artistic endeavour.
  - A people’s store of knowledge, beliefs, arts, morals, laws & customs (everything that one acquire by being part of a society).
- A combination of factors (language, birth, identity, etc) will point towards a person’s culture in SA.





## Conflict between common & customary law

- How does one determine which law is applicable?
- Conflict of laws, or interpersonal conflict of laws – guidelines to determine which legal system is applicable:
  - Agreement between parties, eg. that customary law will apply.
  - Behaviour of the parties, eg. form of marriage.
  - Nature of the cause of action, eg. claim for *lobolo* (payment to the family of the wife).
  - Surrounding circumstances of a transaction, eg. parties way of living and overall cultural orientation. Problematic when two parties have different lifestyles. Then the court have to look at additional factors.
  - Some legislation have conflict rules, eg. Code of Zulu Law for Africans living in KwaZulu-Natal – i.e. a codification of Zulu law.



## Conflict between Customary Laws

- What happens if there is conflict between more than one customary law system?
- SA does not have a single, uniform system of customary law.
  - In case of potential conflict between customary law systems, s 1(3) of the *Law of Evidence Act* provides:
    - Court applies law agreed upon by parties.
    - If no agreement, courts have to look at the parties prior conduct, nature of the transaction or the parties' cultural orientation.
    - If none of the above is possible, the law of the place where the defendant resides, carries on business or is employed, must be applied.



## SAMPLE OF CUSTOMARY LAWS RELEVANT IN THE GLTFCA

### ■ Property laws

- Customary property rights – allotment of land by traditional authority.
- Variety of other laws deal with quitrent land, deeds of grant, permission to occupy & permits – not all repealed.
- *Communal Land Rights Act* 11 of 2004 – declared unconstitutional in *Tongoane v The Minister of Agriculture and Land Affairs* 2010 (CC) – procedural flaws.

### ■ Traditional Leadership

- S 211 Constitution – specifically refers to traditional leadership.
- Traditional Leadership & Governance Framework Act 41 of 2003 – provides legal framework.
- Provinces must develop legislation in line with this framework.

## LEGAL PLURALISM IN MOZAMBIQUE



## Constitutional Recognition of Legal Pluralism in Mozambique

### CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE

(in operation since 2004)

- **A 4: Legal Pluralism**  
The State recognises the **different** normative and dispute resolution systems that co-exist in Mozambican society, insofar as they **are not contrary** to the fundamental principles and values of the Constitution.
- **A 118: Traditional authority**  
1. The State shall recognise and esteem traditional authority that is legitimate according to the people and to **customary law**.



## Sample of Mozambican laws relevant to GLTFCA

- 2004 Constitution of Mozambique.
- Land Laws that gives land rights to communities & women.
- Customary law – but seems inferior to state laws.
- Anyone having an interest in the GLTFCA have to know the laws relevant in the area.

## LEGAL PLURALISM IN ZIMBABWE



### Constitutional Recognition of Legal Pluralism in Zimbabwe

- **S 89 of the Constitution:** 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 ... in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.
- **“African customary law”** means the tribal law and custom of Africans of a particular tribe.



## Meaning of law in Zimbabwe

**“law”** means—

- (a) any provision of this Constitution or of an Act of Parliament;
- (b) any provision of a statutory instrument; and
- (c) any unwritten law in force in Zimbabwe, including African customary law;



## S 111 Chiefs in Zimbabwe

(1) There shall be Chiefs to preside over the tribespeople in Zimbabwe who shall, subject to the provisions of subsection (2), be appointed by the President in accordance with an Act of Parliament.

(2) An Act of Parliament shall provide that in appointing a Chief the President shall give due consideration to the customary principles of succession of the tribespeople over which the Chief will preside and may provide for the appointment of deputy Chiefs and acting Chiefs.

(3) There shall be a Council of Chiefs which shall consist of such number of Chiefs elected by the Chiefs from each of the various areas of Communal Land in such manner as is prescribed by or under an Act of Parliament ....



## A few last words ...

- The phenomenon *legal pluralism* is more than a simple juristic peculiarity; it is a reality that is closely interwoven with daily lives.
- One cannot ignore the fact that there are people living under customary laws and in dealing with GLTFCA issues it is imperative that one takes these pluralistic issues into account.
- One needs take culture and indigenous laws into consideration during deliberations, in decision-making and implementation of legal rules & regulations.



## Any questions?

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