Cape Judge President John Hlope's

call to

Africanize law:

Commentary in support

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People attending a recent Progressive Professional Network symposium heard a landmark clarion call from Cape Judge President John Hlope when he said “We need to Africanize our law and make it relevant to the masses”, and further “I believe that people need law that embodies their own culture and values”. Apparently the only Johannesburg newspaper to cover and carry these comments was the Citizen of July 11, 2009, both in an article and in its editorial.

Cape Judge President John Hlope’s call is a very important call, one to be heard clearly, and not to be approached from the point of the messenger, but from the substance of his message. Further his call echo’s across Africa, a continent currently so divided by common and civil law constructs.

The context is that South Africa, like many other former dominions and territories, inherited a common law construct founded within a colonial mindset, and evolved by the apartheid state that does not have appropriate application today. Thus Hlope is correct to advise that the legal construct of common law in South Africa needs comprehensive review and change, which is precisely what Africanizing the law in South Africa will achieve.

Why should South Africa not do what other countries have done? That being for the nation to develop a legal framework that incorporates the best construct, from a global range of legal sources, whose aim and objective is a new and improved national legal framework. No where does this approach resonate more, than in the realm of culture, whose intellectual property rights are primarily protected by the copyright spectrum.

It can be said that copyright, in both civil and common law domains, has two defining features, those being (a) to perform and (b) to reproduce what has been created. The former was common to all humanity, and the latter was a distinct feature of the European led industrial revolution. The English language application of ‘mechanical’ to reproduction as a qualifier to the very existence, or subsistence of copyright has had the devastating effect of denying oral traditions, folklore and indigenous knowledge any right to have or hold copyright. This is at the very heart of the common law construct as it affects the copyright ‘balance sheet’ of a nation’s intellectual property assets. Simply put, if a creative work could not be copied (and sold), then it could not have copyright.

Evolving common law is often a painfully slow and insufferable process, which often finds itself, as a process, far from its original objectives. This is more prevalent when it is an inherited common law, and evolution cannot be said to be an applicable solution in South Africa. The issue of legal precedent with its attendant very high cost barriers to entry are primarily a common law construct and certainly not accessible to the masses.

Copyright law history in South Africa, with the paucity of precedent case law, demonstrates not the superiority of the common law construct, but the failure of common law to have much application in culture.

So on the basis that South Africa's indigenous and black intellectual property in the form of oral traditions, folklore and indigenous knowledge has existed since the dawn of time, and given that the common law construct for copyright is a completely inadequate and dysfunctional protector of such oral traditions, folklore and indigenous knowledge, there is a very urgent need to redress and Africanize the law so as to incorporate protection for these most valuable national treasures.

The impact of EU harmonization drive on the UK is one place to observe common law being forced to find harmony with another legal construct, the civil law construct. This has also occurred in Asia and in the Middle East, with a number of countries having a civil and common law mix, tempered by their own national cultural and tribal laws.

It is not just up to Hlope to elaborate on the call for Africanization of law, as some legal and political academics have clamoured. It is equally up to said academics to apply their minds, indulge in diligence, explore, interrogate, understand, unravel, unpack and act as academics do, when an exceptional point is made.

Wits academic Kevin Malunga is quoted in the Citizen as raising the points that Hlope should be "more specific" in "each "genre of law". Perhaps Malunga misses the point of Hlope's challenge, that

being that it is not about genres of law, but all about which law...common law, civil law, tribal law, a hybrid of some or all of the above, or none of the above.

It is understandable that within the narrow confines of common law, Malunga should be quoted as suggesting the 'safe' idea of legal evolution. In essence he appears to accept, as axiomatic, that South Africa has common law, is stuck with such, and nought will change this. This is highly debatable, and in the light of Hlope's call, highly probable that the common law construct in South Africa will be amended. Hlope's call is for the legal and political academics to think out of the box, to think laterally, not because such way of thinking is a 'nice to have' but more from the basis that such thinking is a necessity in our times.

Hlope also made an important point regarding the use of all South African languages, not just English, in the courts. This is a critical call, as it relates to accessibility of the law for the masses. It is vital to South African cultural future, that English never be regarded as superior or seen as a replacement for indigenous languages in South Africa, but rather as a cultural tool to be used to operate in the wider world, alongside indigenous languages.

The Citizen quote UJ political analyst Professor Stephen Friedman's question as saying that Hlope had to clarify exactly what he meant by "Africanizing" law.

Firstly, it is clear that Hlope meant that legal and political academics should apply their minds in an ongoing manner to reach consensus.

Secondly, Hlope certainly has provided timely and welcome insight to the direction of legal thought in South Africa, and what legal horizon to look to.

Thirdly Hlope certainly indicates that South African legal thought should not confine or constrain itself in seeking a better legal framework to common law only

Fourthly Hlope confirms that we should not be satisfied with the law that we have (anybody who is familiar with the Copyright Act would loudly concur), and that Africanization would lead us to something that might be better 'for all'

If one was to summarize an answer to Friedman, as food for thought and fodder for debate, then one might say that to Africanize law, one would implement a legal construct that:

- Made the law accessible to common person, to the masses, to all. Law in South Africa is currently inaccessible to most, and exceptionally expensive to contemplate. Sure it costs nothing but time to lay a charge, however it is another story to open a case.

- Made law not just about crime and punishment, but also about prevention and cure.

- Protected oral traditions, folklore and indigenous knowledge, the very foundations of culture.

- Brought law closer to the community and simplified its overly academic application

- Was a confluence of applicable and relevant common law, civil law and tribal law

- Was not only accessible in, reliant on, and tied to, the English language (and to a certain extent Afrikaans).

- Dispels the wide income polarity that exists between those who make (through precedent) and debate law (advocates, lawyers etc) and those who implement the law (judiciary, police...). Simply put, a legal construct that deifies the income capacity of certain positions, whilst dumbing down and condemning others to vocational perpetual poverty, is a legal construct that needs overhaul, as it is well prepared soil for the crop of corruption.

Essentially there may be four separate responses to Hlope's call:

a. Nay-sayers (who work from the premise why it can't work)
b. Yay-sayers (who work from the premise why it can work)
c. No-sayers (non-committal)
d. None of above

There is an opinion that says if one lives in France...then one learns to speak French. The facts are that in South Africa, the vast majority of people, as in excess of 85% do not have English as a first language, so why do the few mono-linguistic English speakers think that South Africa is an 'English' culture? Friedman is quoted going in to say that the "Africanization of Law could be dangerous when people started imposing their own cultures on the country's legal system". Well, if English was one's first (and only) language, and one thought one was living in an English country, then it is perhaps understandable that one might take such a position. Of course if one were not a first language English speaker in South Africa, one might wonder why the language of law was that of another country and another culture, imposed upon one's own. Truth is, English culture is imposed on South Africa's legal system, and having a senior judge president calling for Africanizing the Law, is refreshing palatable, long overdue and very reasonable to the majority of South Africans, albeit it possibly being an abhorrent prospect to the few, especially the elite.

South African culture is a multi-lingual culture, not mono-lingual. Having more than just one language has long been a necessity to most South Africans and to South African cultural identity

There are many South African legal and political academics that would do well to consider deeply the implications of denial concerning multilingualism, which denial they might be part of or practicing. Indeed, every South African has had to learn English, regardless of their first or home language. Yes, English is a critically important and vital tool. But no..... English is not a replacement to a home or first language, and no... English is not the language of the majority, and no.....South African culture is not English culture. English speakers in South Africa, who have no other language but English, are unquestionably at a cultural disadvantage in South Africa, and certainly without access, especially when the idea that 'language is a window to culture' hits home.

Cultural 'bigots' is the opinion held by some about those people living in South Africa who refuse to speak any language other than English. Further it is not an uncommon truth that such English only speaking people know little about what is really going on about them. It must be re-iterated that the vast majority of South Africans do NOT have English as a first (read only) language. The minority that do should be mindful and respectful of this, as it is often the mindless amongst this minority who

have blocked and choked progress with their utter disinterest to step out of English and discover and understand indigenous languages and culture.

Commentators often use cliché's and in this instance, no more so than the Western vs African cliché, which has no application in respect of Hlope's comment. Hlope's comments speak directly to the need to change SA legal construct, and in a way that has application and relevance for most South Africans.

So...what does South Africa need to do to its legal construct.....some tinkering? No ways..... there rings an echo across the country....a head to toe overhaul is what is needed, as well as the application of many minds to see to it that an Africanized Law has vision far into the future, and is not just a quirk in the quilt of existing SA common law.

In conclusion, Hlope's call should herald new debate and discussion, and those who care should rigorously engage the topic at hand. For starters de-'Englishing' SA Law should be a priority. Judge President Hlope's words should not be seen in the fickle and flippant light that he has the ear of the President, but for the deep truth his comments standing alone represent. It's high time that SA legal and political academics rolled up their sleeves, and indulged the challenge that Africanizing Law in South Africa represents. There is necessity for a far more equitable SA Law. If some are not bothered to attain this for themselves, let them do such for their grandchildren.

End.

Acknowledgements

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