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FOUNDATIONS OF LAW

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1. COMMON LAW

Roman Law

- XII Tables
- Praetorian Edict
- Aedilitian Remedies
- Justinian's Codification
- Canon Law
- Glossators/Commentators
- Reception of Roman Law in the Netherlands

Roman Dutch Law

English Law

South African Common Law

2. CONSTITUTION

D Kleyn & F Viljoen *Beginner's Guide for Law Students* 4ed (2010), Juta: Cape Town 210 – 227 (chapter 13)

T Humby, (ed) *et al Introduction to Law and Legal Skills in South Africa* (2012), Oxford University Press: Cape Town 21 - 44

Meintjies – Van der Walt *et al Introduction to South African Law: Fresh Perspectives* 2nd edition, (2011) Heineman: Cape Town (chapter 3)

3. LEGISLATION

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T Humby, (ed) *et al Introduction to Law and Legal Skills in South Africa* (2012), Oxford University Press: Cape Town 169 – 184

4. JUDICIAL PRECEDENT

D Kleyn & F Viljoen *Beginner's Guide for Law Students* 4ed (2010), Juta: Cape Town 58 - 80

5. CUSTOM

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L. Du Plessis *An Introduction to Law* 3rd ed (1999), Juta: Cape Town 237 - 239

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6. INDIGENOUS LAW

D Kleyn & F Viljoen *Beginner's Guide for Law Students* 4ed (2010), Juta: Cape Town 89 - 90

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SOURCES OF LAW

As South African Law has many sources ie. Common law, legislation or statutes, judicial precedent (court decisions), indigenous law, custom and legal academic writings, it is of practical importance for lawyers to be aware of these different sources which provide the key to the content of the law. For it is in these sources that one finds the law and gets to know it.

Furthermore, it provides lawyers with **authority** for their arguments as they must be able to justify their assertions of a particular viewpoint. To do this, lawyers may rely on the provisions of a statute, a court decision, and opinion of one of the old authorities etc. Not all sources of law, however, have the same authority. Some have binding authority (eg Constitutional Court decisions) while others have merely **persuasive** authority (eg writings of modern authors or the decisions of foreign courts).

We will be commencing this course with Common Law as a source of our law and we will look at Roman Law, Roman Dutch Law, the influence of English Law and finally South African Common Law. In the second term we will look at the other sources i.e. legislation, the constitution, judicial precedent, custom and indigenous law.

TWELVE TABLES

- I Of summoning before the magistrate
- II Of judicial proceedings
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- VI Of ownership and possession
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TABLE I: Of summoning before the magistrate

If a person be summoned to appear before the magistrate, he must go: if he does not go the plaintiff may call witnesses and take him by force.

If the defendant evades the notice to appear, or takes to his heels, the plaintiff may detain him by force.

If the defendant is prevented from attending by reason of illness or old age, the plaintiff must find him a conveyance, although he is not obliged to provide a covered carriage.

The surety for a landowner (or taxpayer) must also be a landowner (or taxpayer): for anyone other than a landowner (or taxpayer) anyone who is willing may be his surety.

Where the parties come to terms, the judge shall announce the settlement. Where the parties do not come to terms, the plaintiff must state his case before noon in the Comitium, or in the forum, in the presence of the defendant.

After midday, if one of the parties has not appeared, judgment shall be given by default in favour of the party present.

If both parties are present, the proceedings terminate at sunset.

Both parties must enter into recognisances for reappearance.

TABLE II: Of judicial proceedings

In the sacramental action five hundred (or fifty, where the amount involved in the dispute is less than 1000) pound pieces of copper (*asses*) must be deposited in court as security for costs.

The case may be adjourned on account of the serious illness of the judge or arbitrator or one of the parties, or if one of the parties is an alien.

He who wants a person as a witness must go to his house and summon him in a loud voice to attend on the third market day following.

If a theft has been compromised the action is extinguished.

TABLE III: Of execution

Thirty days are allowed for the payment of debts admitted or adjudged due by pronouncement in court. After this period has elapsed, the defaulter may be seized by the creditor and brought before the magistrate.

If the judgment is not satisfied, and no one offers as surety on the debtor's behalf, the creditor may take this debtor and bind his hands or feet with fetters not exceeding fifteen pounds in weight, or less if the creditor so desires.

If he wishes the debtor may find his own sustenance; otherwise the creditor must give him one pound of bread a day, or more if he (the creditor) so desires.

In default of payment or satisfactory security, the debtor may be kept in bonds for sixty days, and during this time the debtor shall, on three successive market days, be brought before the praetor in the Comitium and the amount of the debt shall there be publicly declared.

After the third market day the debtor may be punished with death, or sold beyond the Tiber. If there is more than one creditor the debtor's body may be divided between them, and if the parts be greater or less than they should be, no liability is entailed.

TABLE IV: Of paternal power

Monstrous or deformed offspring may be immediately destroyed by the father. A father has absolute power over his legitimate children throughout their life: he may imprison, flog, chain or sell them, or even take their life, however exalted their position and however meritorious their public service.

Three consecutive sales of a son by his father releases the son from the father's power. A posthumous child born within ten months after the death of the mother's husband is deemed legitimate.

TABLE V: Of inheritance and tutelage

All females are in perpetual tutelage, except vestal virgins who are free from this tutelage and from paternal power.

Such property of a woman, under the tutelage of her agnates, as requires a formal conveyance for its transfer, cannot be acquired by use unless alienated by the woman herself with the authority of her tutor.

A father may dispose of his entire property as he pleases and may appoint such tutors as he thinks fit.

On intestacy the property of a father goes to the proper heirs and, in default of proper heirs, the nearest agnate takes the inheritance.

Failing an agnate, the inheritance goes to the *gens*.

In default of tutors appointed by testament the nearest agnate becomes the statutory tutor.

If a lunatic or spendthrift is not provided with a curator, the care of his person and property falls to the agnates or, in default, to the *gens*.

If a freed man dies intestate and without a proper heir his patron succeeds to his property.

Debts due to or from a deceased person are divided by operation of law between the heirs in proportion to their respective shares in the inheritance.

A division of the inheritance may be achieved by an action for its partition. A slave freed by testament, on condition of giving a certain sum to the heir, may, if alienated by the heir, obtain his freedom by paying such sum to the alienee.

TABLE VI: Of ownership and possession

The legal effect of every contract and of every conveyance made with bronze (copper) and scales is determined by the verbal declaration made at the time.

A person who denies that he used the words actually spoken is liable to a penalty of double the value of the subject-matter of the contract or conveyance.

A vendor may make good any faults which have been expressly mentioned, but for any faults which he has expressly denied he must pay a penalty of double damages.

Land may be acquired by use after two years' possession; in the case of other property one year is sufficient.

A husband acquires marital power over a woman by cohabitation for one year, but by absenting herself from her husband's house for three consecutive nights in each year a woman prevents her husband from acquiring marital power over her.

Title by possession, however long, to a Roman citizen's property can never be acquired by an alien.

After the preliminary inquiry as to the right to property, interim possession is given to the party who already possesses; but, if the suit concerns personal freedom, interim possession must be given in favour of the party asserting freedom.

Stolen timber built into a house, or forming supports for vines, cannot be removed, although the owner may bring an action to recover double the value of the timber. If the timber becomes separated it may then be claimed by its owner.

The property in a thing sold and delivered does not pass until the purchaser has paid or otherwise satisfied the vendor.

Conveyances by surrender in court and by bronze and scales are confirmed.

TABLE VII: Of the law concerning land

A space of two and a half feet must be left around every house.

Boundaries are regulated in accordance with the laws of Solon: thus a fence must be kept within the boundary line; a foot of space must be left outside a wall, two feet outside a house; a space must be left as broad as a ditch or trench is deep and, in the case of a well, six feet must be left. Olives and fig trees must be kept within nine feet, other trees within five feet, of the boundary.

Conditions relating to villas, farms and country cottages.

A space of five feet must be left between neighbouring fields for the purpose of access and the turning of the plough: this vacant land cannot be acquired by use.

If neighbours disagree on the subject of boundaries, three arbitrators are to be appointed by the magistrate to settle the dispute.

Roads must be at least eight feet broad where straight, and sixteen feet round bends.

Adjoining owners must keep the road free and, if the road becomes impassable, a person may cross their land where he pleases.

If rain-water threatens to cause damage, or the owner of property is prejudiced by the construction of an aqueduct, he may demand a guarantee against threatened damage and recover compensation for damage actually sustained.

Overhanging branches must be lopped fifteen feet from the ground. Action can be taken for the removal of a tree leaning over a neighbor's land.

Fruit which falls from a tree onto a neighbor's land may be collected by the owner of the tree.

TABLE VIII: Of wrongs

If anyone libels another by imputing criminal or immoral acts to him; he shall be scourged to death.

If a man breaks another's limb, and does not offer compensation to the injured party, he is liable to retaliation.

For a broken bone the penalty (if the injured party is a free man) is three hundred pound pieces of copper (*asses*) if the injured party is a slave the penalty is one hundred and fifty.

If a man otherwise injures another the penalty is twenty-five pound pieces of copper (*asses*).

In the case of damage accidentally caused compensation is recoverable for the damage sustained.

If a four-footed animal has caused damage compensation is recoverable from its owner or he must surrender the animal to the party aggrieved.

An action lies against anyone who pastures his animals on another's land.

Anyone who by magic arts destroys crops or removes them from one field to another is liable to be punished with death.

For cutting or pasturing on a neighbour's crops by stealth at night the penalty is death, but if the culprit is under the age of puberty he may, at the magistrate's discretion, be scourged, and made liable for double the value of the damage actually caused.

If a man wilfully sets fire to a house or a haystack near a house, if of sound mind, he is to be punished by scourging and burning alive. If the fire was the result of negligence, he must make compensation but, if he is too poor, he must be moderately chastised.

The penalty for unlawfully felling another's trees is twenty-five pound pieces of copper (*asses*) for every tree.

If a theft is committed at night, and the owner kills the thief, the killing is deemed lawful. If the theft is in the daytime the killing of the thief is not lawful unless he defended himself with a weapon.

A free man taken in the act of theft in the day time, and not having defended himself with a weapon, is to be scourged and delivered over to the person from whom he has stolen; if under the age of puberty he is, at the discretion of the magistrate, to be scourged and compelled to compensate for the theft. A slave is to be scourged and then hurled from the Tarpeian rock.

If stolen property is discovered in the thief's possession after a solemn search, wearing only a girdle and holding a plate, the penalty is the same as for a thief taken in the act; but for theft discovered without the prescribed formalities, or for the clandestine deposit of the stolen property on the premises of another, the penalty is three times the value of the thing stolen. For any other kind of theft the penalty is double the value of the thing stolen.

Stolen property cannot be acquired by use.

A person exacting more than the legal interest of eight and a half per cent per annum is liable to fourfold damages.

For fraudulent conduct on the part of a bailee the penalty is double the value of the deposit.

Any citizen may bring an action for the removal of a suspected tutor, and the latter incurs a penalty of double the value of the property which he has misappropriated.

A patron who defrauds his client shall be sacrificed to the gods.

A person who has acted as a witness or a scale-bearer, and who refuses to give his evidence, is to be branded infamous and declared incapable of being a witness and of calling upon others to be a witness for him.

False witnesses are to be hurled from the Tarpeian rock.

Anyone who practises magic arts or uses poisonous drugs incurs the penalty of death.

Seditious gatherings in the city by night are forbidden under penalty of death.

Members of corporate bodies may make their own rules provided such rules do not conflict with public law.

TABLE IX: Of public law

No law shall be passed affecting an individual only: all laws must be of general application.

Only the **comitia centuriata** has the right of legislating so as to inflict a punishment on a citizen involving his life, his liberty or his citizenship.

A judge or arbitrator appointed by a magistrate to decide a case is to be put to death if he receives a bribe.

There is a right of appeal to the people in cases where a death sentence is passed.

A person who has incited an enemy to make war against the Roman people, or who has delivered up a citizen to the enemy, is to be punished with death.

No one may be put to death except after a formal trial and sentence.

TABLE X: Of sacred law

Dead bodies must not be buried or burned within the city.

The wood of a funeral pyre must not be smoothed with the axe.

No more than three mourners wearing mourning robes, or more than one wearing a purple tunic, may attend a funeral, and not more than ten flute players may be hired.

Women must not disfigure their faces, tear their hair or indulge in excessive wailings.

The bones of a deceased person are not to be collected for the purpose of a second funeral unless he died on the field of battle or in a foreign country.

Slaves' bodies must not be embalmed and drinking bouts, costly besprinklings of the funeral pyre, long garlands and incense boxes are forbidden. However, the deceased is entitled to have placed on his body at the funeral a wreath won by himself or his slaves or horses, or his father may wear it.

No person shall have more than one crier.

Gold must not be buried with the dead, but if teeth are fastened with gold it is not unlawful to bury or burn it with the body.

A funeral pyre or sepulchre must not be placed within sixty feet of another man's house, except with his consent.

Neither a tomb nor its enclosure can be acquired by use.

TABLE XI: Supplementary laws

Marriage between a patrician and a plebeian is forbidden.

TABLE XII: Supplementary laws

A creditor may levy distress for the unpaid price of an animal bought for sacrifice, or for the hire of a beast of burden when the amount of the hire was to be spent on a sacrifice.

If a slave commits a theft, or does any other damage, his owner may, as an alternative to paying damages, surrender the slave to the party aggrieved.

If a person wrongfully acquires interim possession of a thing the subject of litigation, he is to be condemned in double the value of his temporary possession of the thing by the three arbitrators appointed to investigate the case.

A penalty of double its value is payable by a person who consecrates a thing the subject of litigation.

Subsequent legislation repeals previous laws inconsistent with it.

From the above it is clear that the **Lex XII Tabularum** dealt with every aspect of the law. Tabula VIII, dealing with delicts, is the longest. These delicts were not delicts in the modern sense of the word but also included acts which would be classified as crimes in modern law.

However inadequate the code may have been, it remained the only codification of the entire Roman law until the codification of **Justinianus** in 530 AD. It made knowledge of the law available to everyone and was a great achievement, giving the later jurists a firm base from which to continue the development of the law.

PRAETORIAN EDICT

The Praetor was the most important magistrate of all, especially during the Republican period. He was able to exercise enormous influence despite the fact that he had no legislative power and that he did not hold the position of judge.

The two main ways that the Praetor influenced the development of Roman Law were:

1. Organising the pre-trial proceedings
2. Issuing edicts

1. Organising the pre-trial proceedings

At the time of the formation of the position in 367 BC, the **Praetor urbanus** was in no way charged with the duty of reforming the law. His duties involved organizing pre-trial proceedings (*in iure*) (similar to the pleadings stage in SA Civil Procedure). The **Praetor urbanus** would define the issues of the case, appoint an official (*iudex*) to try the action and give this official a formula containing a definition of the question at hand in the case. The Praetor used a system known as the *legis actiones* whereby disputes had to be placed into limited avenues of action.

2. Issuing Edicts

These were documents which contained a number of directives and proposals concerning the duties and functions of the Praetor. The Praetor had the ability of submitting new defences/solutions for particular problems although usually most of the edicts or principles of the previous Praetor would be retained for his term of office.

Although the Praetors often lacked knowledge of the law, they usually consulted with those educated in the law, ensuring that the process of issuing edicts was an effective and logical way of developing the law.

Thus the organization of the pre-trial proceedings (*in iure*) and litigation (*apud iudicem*), together with the action of issuing edicts were the two ways in which the Praetors of Rome influenced the law. This can best be described in terms of the Latin words “*do, dico, addico*” which means “*I give the action, I promulgate the edict, I invest the judge with the right of judging.*”

At the beginning, the **praetor urbanus** was bound to allow actions by the **ius civile** ONLY, but in 149 BC it became acceptable for him to create new actions. This was greatly influenced by two factors:

- (a) the introduction of the **praetor peregrinus** in 242 BC to deal with foreigners who had settled in Rome as merchants etc.
- (b) the Roman Empire had expanded to such a large extent geographically that Roman Law had to be adapted to the needs of a highly intricate social and commercial system. The Praetor had to fulfill these needs. This took the jurisdiction away from the hands of the pontiffs which resulted in a secularization of legal matters.

AEDILITIAN REMEDIES

Aediles Curules

The *aediles curules* was a magistrate, like the Praetor and was also created at the same time as the praetor in 367 B.C. Their function was primarily municipal: to care for the safety of Rome, supervision of the public market, public buildings, streets and aqueducts. A secondary function was to arrange public games for the entertainment of the people of Rome as well as to control the State archives. The *Aediles Curules*, like the Praetor, could issue edicts which set out legal remedies that could be granted, to whom they could be granted and the circumstances in which they could be granted. Edicts were only valid for one year, i.e. the term of office of the incumbent, but in most instances, they were adopted by their successors.

The most influential area that the *Aediles Curules* influenced the development of Roman Law was in Law of Purchase and Sale and this influence is still tangible in our Law of Sale today.

By way of historical background, during the Republic period, the sharp practices of slave and cattle dealers prompted the issuing of edicts by the *Aediles Curules* concerning the sale of slaves and beasts of burden. These edicts compelled the seller to disclose to the purchaser whether the slave or beast suffered from any illness or physical defects. In the case of slaves a number of “character” defects had to be disclosed eg whether the slave was subject to noxal surrender, whether he was a roamer, runaway, had tried to commit suicide. These illnesses and defects were displayed on noticeboards above the heads of the slaves or cattle in the market place.

If any illness or defect was revealed after the sale, the seller was held liable irrespective of his knowledge or ignorance of the defects. Furthermore, if the seller made any statements or promises eg if the seller made a statement or promise that the slave was a skilled carpenter or a trained cook or that a horse was a racehorse and it turned out not to be the case and a higher price was exacted from the purchaser, the seller was liable.

Two actions were available:

- 1) The purchaser could invoke the *actio redhibitoria* against the seller which had to be instituted within six months of the sale. This entitled the purchaser to rescind the contract and recover the full purchase price from the seller with interest, as well as all expenses incurred in connection with the sale. If a slave with an infectious disease was delivered to the purchaser and the slave infected a number of the purchaser’s other slaves, these damages could also be claimed.

Note: the *Actio Redhibitoria* was available only if serious defects were discovered ie. defects which undermined the usefulness of the thing.

- 2) The second action that could be brought was the *actio quanti minoris* (action for diminution) which allowed the purchaser to recover part of the purchase price ie. the difference between the slave’s actual value at the time of the sale and the price paid. This action had to be brought within a year of the sale.

These provisions were at first restricted to the sale of slaves and cattle in the market place and then later extended to slaves and cattle outside the market and finally to sales of anything, anywhere.

The actions could only be instituted if the illness/defect was firstly *latent* and secondly *not insignificant*.

- 1) This meant that the seller was only liable if the illness/defect was not patent i.e. so obvious that the purchaser should have been aware of it eg. if a slave had one eye or a horse was lame.
- 2) If the disease/defect was insignificant in the sense that it did not undermine the usefulness or purpose for which it was sold, then the purchaser would not be entitled to the aedilition remedies. eg. if a slave girl was sold as a cook and it was later discovered that she suffered from acne it would be too insignificant to undermine her function as a cook, but it would be otherwise if the slave girl was sold as a belly dancer.

Both the *actio redhibitoria* and the *actio quanti minoris* are still available in modern SA law and used in the Law of Sale.

The Decline and Fall of the Western Roman Empire in 476 AD

The German theory, popular in the nineteenth century, that the downfall of the Roman Empire in the west could be attributed to the “barbarian” invasions is not the complete story. A more plausible view is that no one reason, either internal or external, accounts for the decline of the Roman Empire. The following are some of the problems which the Roman authorities failed to resolve:

- economic difficulties
- political difficulties
- mode of production
- problems of succession
- the division of the empire into East and West.

JUSTINIAN'S CODIFICATION

Despite the collapse and fall of the Roman Empire in the West, the Empire continued in the East. At the time of Justinian, who was emperor of the Eastern Roman Empire in the sixth century AD, Roman Law had become a mass of literature which was impossible to handle despite the attempts made by Theodosius in 426 AD to bring order to the chaos.

Justinian was driven by a desire to restore the Roman Empire to its ancient glory and to reform the Roman Law. He wanted to provide one final and primary source of law in which all the answers to legal problems could be found. This codification of Justinian is known as the *Corpus Juris Civilis* which consists of 4 parts.

- 1) The *Institutes* which was an introductory textbook for use in the law schools.
- 2) The *Digest* which was a codification of the works of the Roman jurists. The *Digest* is the largest and most important part of the *Corpus Juris* and contains opinions of Roman jurists who wrote on all the sources of Roman Law.
- 3) The *Codex* which is a collection of imperial legislation.
- 4) The *Novellae* which was new legislation passed by Justinian which he promulgated after the *Codex*.

With his codification of the entire Roman Law, the second codification in the history of the Roman Law was complete. The German Romanist, Rudolph Sohm, says: "The *Corpus Juris* of Justinian, and it alone, has preserved, and rescued for all future ages, the great masterpiece of roman jurisprudence." (Sohm *Institutes of Roman Law* 3ed at 130).

CANON LAW

Canon Law was basically Roman Law modernized and adapted to meet the needs of the medieval church and its influence during the Middle Ages was enormous. It was the aim of the Catholic Church to make the *Corpus Juris Canonici* the universal code of all Christian countries. From the twelfth to the fourteenth century, it looked as if the ambition of the Church was going to be realised. The aim of the Church, however, was frustrated when the struggle for power between *imperium* and *sacerdotium* ended in victory for *imperium* and the idea of Christian theocracy was defeated. This came about when medieval society gave way at the time of the Renaissance and the reformation to a society of national states. In the Protestant countries, therefore, the Reformation put an end to the authority of the pope as a law giver in temporal affairs. The significance of this struggle was that it brought increased focus to be placed on the *Corpus Juris Civilis* of Justinian.

The influence of Canon Law on the development of Roman Law can be summed up as follows:

- 1) It profoundly affected certain branches of law such as Matrimonial law, the law of wills, legacies, the law of evidence and matters affecting conscience.
- 2) It largely influenced the courts of the southern provinces of the Netherlands and of Utrecht and Middleburg and so, indirectly the law of Holland.
- 3) It helped to spread the civil law and the interpretation of the glossators.
- 4) It had a great effect on the law of procedure, and helped to do away with the antiquated procedure of Justinian and to introduce the procedure of modern times.

An example of Canon Law which still forms part of South African Law is the *mandament van spolie* [see *Meyer v Glendinning* 1939].

GLOSSATORS AND COMMENTATORS: Their role in the revival of Roman Law

THE GLOSSATORS

The term “glossator” has been used to describe a group of scholars, initially centred at the law school of Bologna, but later present in all Italian seats of learning.

The professors in Bologna began the first scientific study of Justinian’s *Corpus Juris Civilis* which consisted of thousands of texts. The first task in this scientific study was to cast light on the texts and to explain their meaning. For this purpose the glossators applied the medieval glossing method, from which the name of the school was also derived. This meant the writing of notes (glosses) between the lines or in the margins of the text in the *Corpus Juris Civilis*. By means of these notes, the glossators explained the texts, and where the texts were contradictory, they gave a solution.

The glossators regarded Roman Law as embodied in the *Corpus Juris Civilis* as still existing law and not as the law of six centuries earlier. They used it to solve the problems of their time. In certain cases they also used the law in the *Corpus Juris* as building blocks to create new doctrines that suited their existing needs. The glossators confined themselves to the law in the *Corpus Juris* and did not pay much attention to the Germanic Law of their own time.

A few important glossators were *Irnerius*, regarded as “the father of the glossators”; *Vacarius* who spread the “glossatorial gospel” to England and helped found the law school at Oxford; *Accursius* who collected all the previous glosses, made a choice from them and where there were lacunae filled them.

An assessment of the Glossators

Without the timely intervention of the glossators, Roman Law might well have disappeared from the western world altogether. They carried out an efficient restoration of Roman Law as it had existed at the time of the 6th century and this one achievement alone ensured that Roman Law could be relearned in western Europe.

They also made a significant contribution in promoting law as a scientific discipline and ensuring that the administration of justice would ultimately come into the hands of trained jurists – the days of the layman lawyer were numbered. Moreover the glossators and their pupils spread far and wide over Europe and thus certainly made a contribution to the ultimate reception of Roman Law.

The work of the glossators was not without defects e.g. they failed to take into account the body of customary law which had developed in Italy since the fall of Rome. This militated against the needs of practice. It is clear that the conceptions and practices of classical Rome were not always capable of providing solutions for disputes arising out of the evolutionary changes that had taken place in the field of family relationships and court procedures.

Although the glossators did not deny the legal authority of custom, they took Justinian's views seriously i.e. that the legislative power had been delegated to the Emperor by the people and that no contradictions existed in the *Corpus Juris*. This led them into fictions and futile reconciliations. Also, it was subsequently found that *Accursius* had omitted important glosses completely or to have exercised a poor choice in his selection.

COMMENTATORS (POST-GLOSSATORS)

The Commentators were the successors of the glossators and were responsible for the reception of Canon Law in the secular sphere and for the true reception of Roman Law in western Europe.

The Commentators were not satisfied with merely explaining the actual provisions of Roman Law. Their **method** was to interpret the glosses on the *Corpus Juris* and the text itself i.e. each individual Commentator gave his opinion on the text, at the same time referring to the views of other writers on the same subject. Then in order to distinguish himself he would make finer distinctions and very often raise entirely new questions. The Commentators' methods of interpreting the Roman Law, as glossed by the glossators, led to its adaptation to contemporary conditions.

In fact, over a period of time, the Commentators brought about a coalescence between Romanist and Germanic conceptions. The challenge to reconcile these contradictions was accepted by the Italian Commentators and as a result of their approach (*mos Italicus*) a legal system was evolved which utilized all the sources of law at the time.

Some well known commentators were *Cinus de Pistoia* (1270 – 1336), a professor at Perugia University; *Bartolus de Sassoferrato* who was a pupil of *Cinus* and is generally regarded as the greatest medieval jurist and lecturer. Later the teachings of *Bartolus* attracted a large following and it was said that “no one is a jurist unless he is a Bartolist.”

An assessment of the Commentators

In the four centuries following Irnerius a common law or *ius commune*, based on Roman Law with Canon Law and Customary Law as additional sources, had been built up in western Europe. In this development, the Commentators often erred in giving undue weight to majority opinion. In time, the role of the Commentators in the development of civil law in western Europe came under heavy fire from scholars who particularly attacked the Accursians and Bartolists who had in barbarous Latin, blindly followed the preceding generations of commentators even in their contradictions!

Their most important role was that they facilitated the incorporation of Roman Law into the practical administration of justice. The part they played is of particular significance to us in South Africa because the Roman Law which the Commentators commented upon and adapted (although they may have misconstrued it) was the Roman Law which was received into the Netherlands.

RECEPTION OF ROMAN LAW IN THE NETHERLANDS

The Pattern of the Reception

- (a) The pattern of the reception of Roman law in the Netherlands was much the same as that which took place into Germany and the Holy Roman Empire. The early Roman influence

disappeared with the invasion of the Saxons. During the Middle Ages it would seem that the law consisted of Germanic custom, feudal law and town laws. With the growth of trade, the towns increased in size and prestige. Often the local lord granted immunities to the towns, in the vicinity, in return for the payment of levies to the lord. In this way the town obtained immunities from control of the feudal lord and could thus legislate for their citizens. These town laws were collected into a **Stadboek**. About the twelfth century this was the only law that applied.

- (b) In so far as the administration of justice was concerned, the development was very similar to that which took place in Germany. The judges had no special training and communal justice was the norm until the development of feudal law. With the advent of feudalism two classes of courts emerged – (i) lower courts which consisted of a chairman and a number of assistants or **heemraden** and (ii) higher courts which consisted of the local lord and his advisors. The Dukes of Burgundy sought to consolidate their power by setting up a supreme court for all their Burgundian possessions. In 1429 the House of Burgundy established a court for Holland consisting of five nobles who had the power to summon lawyers as assessors if they needed help. Its seat was at the Hague. The assessors were jurists who were trained in civil law. In time the civil lawyers became permanent members of the court. By 1462 the lawyers were in the majority in the court and by 1510 the nobles were excluded altogether. The court was known as the **Raad en Hof van Holland, Zeeland and Friesland**. It operated both as a court of the first instance, in so far as important cases were concerned and as a court of appeal from the lower courts. The House of Burgundy, as we have also seen, established another court, the **Groote Raad**, in the south in 1446. In 1473 Charles the Bold reformed this court and made it the final court of appeal with its seat at Mechelen for all the Burgundian possessions and was known as the **Groote Raad van Mechelen**. As a result of the eighty years war it was not possible for appeals to this court to be made from the North and in 1582 the **Groote Raad van Holland, Zeeland and Friesland** was established which became the final court of appeal from these Northern territories.
- (c) There is dispute among the legal historians as to how the reception in the Netherlands actually took place. It is not clear whether it was sudden as it was in Germany or whether it occurred as a result of an increase of an already existent awareness of Roman law which had never really died out. Sir John Wessels in his **History of Roman-Dutch law** at 124 argues that from the time of the very brief Roman occupation it had been sporadically applied and thus the reception was a gradual, not a sudden, extension. As early as the thirteenth century Latin phraseology was used in charters and grants of privileges to towns for instance – **litis contestatio, donatio inter vivos** and **restitutio in integrum**. It seems, however, that the reception in the sense of a substitution of great parts of the common law by Roman law was a fairly late phenomenon and was not complete until the 16th century. See further Hahlo and Kahn 515 – 6 and John Gilissen (1955) 15 **THRHR** 97 at 138.
- (d) A number of reasons can be advanced which paved the way for the reception of Roman law in the Netherlands.
- (i) The House of Burgundy encouraged the spread of Roman law as part of the policy of unifying their possessions. Roman law constituted a solvent of the almost contradictory customs which had grown up throughout the provinces.

- (ii) The establishment of an appeal court, the **Groote Raad** at Mechelen and later the establishment of the **Hooge Raad van Holland, Zeeland & Friesland** at the Hague fostered the spread of Roman law in much the same way as did the **Reichskammergericht** in Germany. Civil lawyers were trained mainly in Italian universities. Judgments formed important precedents for the other courts, lower courts and Roman legal thinking was spread in this way down through the hierarchical structure of the courts. Further as we have seen from 1510 the Raad en Hof van Holland, Zeeland and Friesland was staffed only by trained lawyers.
- (iii) The rise of the universities. These came late in the Low Countries. Before their establishment students from these countries went to Italian universities. The first university to be established was that at Louvain in 1425, Leiden in the north in 1575 and Franeker in 1585.
- (iv) The rise in commerce and industry. The whole aspect of life changed from an agricultural to a commercially oriented economy which demanded a system of law far more complex than the native Germanic law.
- (e) By the sixteenth century the reception of Roman law was complete. The reception was, however, uneven. It was not received to the same extent in all the provinces of the Netherlands. The extent of the reception varied from territory to territory. In Friesland there was an almost wholesale reception to the extent that all the customary law was expelled. See for instance the case of *Arendse v The Master* 1973 (3) SA 333 (C). This case raised the question as to whether the Roman law rule that a will had to be executed *uno contextu* applied in South African law. The court found that this rule had been taken over in Friesland, but not in Holland and thus that it did not apply in South African law.

The effects of the reception

- (1) The Roman law that was received into the Netherlands was that of the **Corpus Iuris Civilis** as expounded upon by the Glossators and the Commentators. However, the Roman-Dutch writers also made considerable use of the writings of the Humanists, the Canon lawyers as well the writers of Germany, France and Spain.
- (2) With the exception of the Northern provinces, Roman law was not taken over in its entirety, but only in those spheres where the indigenous law was felt to be deficient. This was so mainly in the field of commercial law or mercantile law. Thus the Law of Contract is heavily Romanized, so too is the law of Delict, the **Actio Legis Aquilia** of the Roman law is the basis of the modern Law of Delict. Similarly, the Law of Property and Testamentary Succession is highly Romanized. On the other hand the Family Law and the Law of Intestate Succession was not much influenced by Roman law.
- (3) The field of application of Roman law, as in the case of Germany, applied in subsidium only. In other words if the local law was lacking then Roman law would be applied. Thus, for instance, Grotius in his *Inleiding tot de Rechtgeleerdheydt* 1.22.22 states:

“In the absence of any written law, charter, privilege or custom on any particular subject, the judges have been enjoined on oath to follow reason to the best of their knowledge and discretion: and the Roman laws especially in the form in which they were codified in the time of the Emperor Justinian are regarded by the learned as replete with wisdom and equity.”

Similarly, Van Leeuwen in his *Censura Forensis* states:

“In our practice a rule has been introduced that whenever indigenous customs or statutes are silent there shall be had immediate recourse to the Roman law.”

And Van der Keessel in his *Thesae Selectae* says:

“The question as to what extent the Roman law has been adopted in our courts may be fully determined by the following rules: firstly, in every province, town or district that law should before all others be resorted to which has been expressly promulgated for it by the legislator. Secondly, those special customs also which have been adopted in any place or city ought to be observed there. Thirdly, laws and local customs entirely failing we ought to recur to the Roman law and seek a decision there.”

As it happened in practice, very few statutes overruled the common law; and the rule was also that customs had to be proved, and thus, as in Germany, Roman law was simultaneously a substratum and yet paradoxically, paramount.

Subsequent developments in the Netherlands

During the Napoleonic wars, the Republic of the United Netherlands was conquered by France in 1795 and Napoleon's brother was installed as King. In 1809 the Code Civil of France was introduced. After the defeat of Napoleon and the Congress of Vienna in 1815 the Kingdom of the Netherlands was established. It included all seventeen provinces, including present day Belgium. From the start there were constant differences between the north and the south. In the early nineteenth century it was decided to draft a new code for the Low Countries. Kemper drew up a draft code known as the **Ontwerp**. Belgium objected, however, as it wanted a code along the lines of the **Code Civil**. In 1830 the Belgians revolted and in 1839 it was recognized as a separate kingdom. In 1838 a new draft code was published which contained more French law this code is known as the *Burgelijk Wetboek* which is largely still in force. However, a process of re-codification of the Law of the Netherlands is going on and several chapters of the code have been changed by the *Ontwerp Burgelijk Wetboek*. Thus from 1809 the Roman-Dutch common law ceased to apply in the Netherlands. It continued to apply in the colonies however, for instance in Ceylon and South Africa. The Roman-Dutch law was replaced by a new code when Ceylon became the Republic of Shrilanka in the nineteen-seventies.

1.2 ROMAN DUTCH LAW

The four sources of Roman Dutch Law were:

- 1) Legislation
- 2) Judgments of the old Dutch courts
- 3) Writings of the old authorities
- 4) Writings on the *ius commune*

The most important of these sources in SA Law is the writings of the Roman Dutch jurists which serve as an authority in SA Law. Some of the most well known and respected jurists are Grotius, Voet, Damhouder, Huber and Van der Linden. We will look at the life and works of Grotius and Voet and their contribution to the development of Roman Dutch Law.

Hugo De Groot (Grotius) (1583-1645)

De Groot or Grotius as he is more well known was not only a jurist but also a theologian, a classicist, a historian and a poet. His greatest fame, however, is as a jurist. His two best-known works are the *Inleidinge tot de Hollandsche Rechtsgeleerdheid* and the *De Jure Belli ac Pacis, Libri Tres*. The *Introduction* was written by De Groot while he was a political prisoner in Louvenstein and had few books at his disposal. It was the first work of its kind in the Netherlands and was a treatise about Netherlands Law, and more particularly, the Law of Holland and it was written in Dutch (cf Voet). He was the first person to see the Law of Holland as an independent system and to describe it as such. It is because De Groot deliberately deals with the law of his fatherland, Holland, that his *Introduction* can justly be regarded as the first conscious description of Roman Law. The influence of the *Introduction* in the 17 and 18th centuries on the Laws of the Netherlands was immense and was followed by important additions by Groenewegen.

De Groot's work, *De Jure Belli ac Pacis*, appeared in Paris in 1625 and was the first comprehensive treatise on international law and even today, nearly four centuries later, is still regarded as the classical work in this field. It is not only a treatise on international law, but also a treatise on the Law of nature and Legal philosophy. This work has great significance for us because it provides a better understanding of the principles set out in the *Introduction*. [See "Hugo Grotius: Born 1583. The Lasting impact of a man of the Seventeenth Century" by DR Carey Miller in the 1982 *Acta Juridica* 66 and "Grotius, the jurist and international lawyer: Four hundred years on" 1983 *SALJ* 23 by John Dugard].

Johannes Voet (1647-1713)

Of all the old writers, Voet is cited the most by South African legal practitioners. He overshadows his father, Paulus, also a professor of law to such an extent that in current practice he is spoken of as Voet and it is not necessary to use his Christian name to distinguish him from his father.

Voet graduated from a French university and became a professor of Law at Utrecht University and later professor of civil law at Leiden University in 1680 where he lectured for 30 years.

His best-known works are the *Compendium Iuris* and *Commentarius ad Pandectas*.

The *Compendium* is a short textbook which follows the sequence of the Digest or Pandects in which he sets out the Roman Law and then briefly refers to the existing law. But this and his other works are entirely overshadowed by his *magnum opus*, the *Commentarius ad Pandectas* where he deals with the Roman law and adds the existing law of his time. It has been said that this work cannot simply be treated as a treatise on Roman and contemporary law taken together and interwoven, as Voet continually reminds us of how important it is for the consultant jurist to study carefully both the theory and practice of the law.

Voet also made use of a great variety of writers on the laws of the Netherlands and it is this aspect which makes Voet's *Commentary* an almost infallible guide to the legal literature of the Netherlands at that time. He is also a writer who is easy to understand, who states his propositions clearly and who is logical in his reasoning.

Like many of his fellow countrymen before him, Voet took what was good from the Humanists and fused it with the virtues of the Bartolists and he did this better than anyone before or after him. Voet's influence on the writers who followed him, and especially on South African practice, can hardly be overrated. His influence and fame were not restricted to his homeland but extended throughout Europe. His works were read everywhere and copies of his commentary were still being printed in Italy in the nineteenth century. Hahlo and Kahn have commented that were it not for the *Commentarius*, Roman Dutch Law might have disappeared from legal practice in South Africa.

Like many other jurists of his time Voet wrote in Latin and in the last century there was a need for a translated version of his work. In 1955, Mr Justice Gane published the "*Selective Voet*" which was an English translation with explanatory notes as well as citations of all the cases in which South African courts have referred to Voet. The reason the work was called "Selective" is due to the fact that those sections which were obsolete were omitted.

In South Africa his work, as mentioned above, has been highly regarded and, in particular, Lord Henry de Villiers, the first Chief Justice of the Union of South Africa had an especially great respect for him and quoted him regularly in his judgments.

Points of criticism which have been levelled at Voet's work, however, are the long sentences and weak paragraphing which has made translation difficult.

1.3 ENGLISH LAW

THE INFLUENCE OF ENGLISH LAW IN SOUTH AFRICA

From the eighteen-twenties onwards there was a steady increase in the influence of the English Law in all the provinces, but especially in the Cape and Natal. There were a number of reasons for this.

- (a) The backwardness of the local Roman-Dutch law. There were no law reports and the **Raad van Justitie** was not staffed by trained lawyers, until the late eighteenth century. Further, there were no universities in the Cape until the late nineteenth century. The law, therefore, was not very sophisticated.
- (b) Roman-Dutch law ceased to exist in the Netherlands as a living system of law, as it was replaced by the Code Civil in 1809. This meant that there were no books being written on Roman-Dutch law. There was no university at the Cape and therefore Roman-Dutch law was not being taught there.
- (c) The British occupation of the Cape became permanent after 1806 so that legal ties with the Netherlands were severed. Many Englishmen came to the Cape who were accustomed to the English law institutions and did not like some of the Roman-Dutch law procedures. For instance, the use of torture, trials behind closed doors, the rules of the law of evidence were backward in some crimes. For instance, there was no distinction recognized between murder and culpable homicide. The law was somewhat barbaric and severe. From 1813 all trials took place in court with open doors. Further, in terms of Ordinance 72 of 1830 it was provided that in all matters relating to the admissibility of evidence and the compellability of

witnesses, the Cape court had to conform to the practice of the “Courts of Record at Westminster”. They were in other words to apply the Law of Evidence of England.

- (d) By a proclamation of 5 July 1822 English became the official language of the colony. Moreover, English was made the official language of the lower and the superior courts. However, later in terms of the Dutch Language Use Act of 1884 the Lower Courts were compelled to allow Dutch to be used equally with English in the courts. An act of the same name of 1908 made a similar provision in relation to the Superior Courts.
- (e) The growth of trade which followed in the wake of the discovery of and opening of the diamond and gold mines in South Africa. The Roman-Dutch law pertaining to mercantile law was deficient and not sufficiently sophisticated to deal with the needs of the economy. In the result much English law was enacted as part of the law of the Cape. For instance, Act 8 of 1879 provided, inter alia, for the application of English law in all questions relating to maritime and shipping law, bills of lading and fire, life and marine insurance. English law was also taken over in the area of immaterial property rights, patents, trademarks and copyright. Further, the early Cape statutes on companies, negotiable instruments and insolvency, which have set the pattern for South African law up to the present day, were based on the corresponding English legislation. It followed as a matter of course that the judicial interpretations of these statutes, reinforced by the *stare decisis* rule led to a greater emphasis being placed on English law. The courts naturally turned to the English law reports in interpreting these statutory provisions and in this way a great deal of English law was taken over in South Africa.
- (f) A further reason for the inevitable spread of English law was that the officers who staffed the courts tended to have no knowledge of or interest in the Roman-Dutch law. The Cape Supreme Court was established with the First Charter of Justice of 1827. The existing members of the Court of Justice were pensioned off and after 1828 the courts were staffed entirely by judges brought out from England and Scotland. Only the Scottish judges had any real knowledge of Roman and Roman-Dutch law. Mr Justice Menzies, who ranks as one of the best known judges in South Africa during the nineteenth century, was the only judge, during the formative period of British rule, to cite Roman-Dutch authorities. In so far as the legal practitioners were concerned, those who had been in practice prior to 1828 were allowed to continue to practise law, but on the recommendation of Commissioner Briggé, from that date onwards, advocates were to be recruited from the members of the English, Scottish and Irish Inns of Court and from among graduates of the universities of Oxford, Cambridge and Dublin. Moreover, judges were to be appointed solely from the ranks of the practising advocates in South Africa.
- (g) The Privy Council in London was the final court of appeal in the South African legal system. In 1832 the Judicial Committee of the Privy Council was set up to hear appeals from the Colonies. This led to the introduction of a system of binding precedent into South African law which was foreign to the Dutch system. The attitude of the Roman-Dutch law to previous decisions was that they were of persuasive authority only. The decisions of the Privy Council were absolutely binding in South Africa, however, it was not until the late nineteenth century that provision was made for senior colonial judges to be sworn in as members of the Privy Council, for the purpose of hearing appeals from the Colonies. Not surprisingly, therefore, via appeals to the Privy Council, rules of English law came to be applied in South Africa. For instance, in the famous case of *Pearl Assurance Company v Union Government* 1934 AC 570 (PC); 1934 AD 560 (PC), the Privy Council held that

penalty stipulations were, as in England, not enforceable in South African law unless the particular stipulation could be construed as a liquidated damages provision. In this regard the Privy Council was clearly wrong. However, because the decisions of the Privy Council were absolutely binding in South Africa it was not until after 1950, when appeals to the Privy Council were abolished, that the matter was set aright in South African law by the Conventional Penalties Act No 15 of 1962 which in effect re-introduced the Roman-Dutch position in this regard. Penalty clauses are thus once again enforceable in South African law.

- (h) Important changes to the Criminal and Private Law were introduced by legislation. In 1829 the age of majority was reduced from 25 to 21 years of age. In 1845 the English underhand will was introduced and in 1874 the legitimate portion and other restrictions on the freedom of testation were abolished. The law of criminal defamation was codified by the Libel Act of 1882 see *S v F* 1967 (3) SA 407 (SWA).
- (i) In 1828 all restrictive laws pertaining to the San people were abolished and San people and Coloured persons were given full civil rights including the right to buy and own land on the same terms as the whites. Freedom of the press was introduced in 1829. In terms of the Slavery Abolition Act of the British Parliament in 1833, slavery was abolished with effect from December 1834 at the Cape. Municipal self-government along modern lines was introduced in 1836.
- (j) Equally important to the direct introduction of English law rules and principles through legislation were the changes which took place by a kind of osmosis. Reference to the English law rules became frequent after 1850. The training of so many of the judges and advocates in English law, the ease of reading English as opposed to Dutch or Latin, the detailed reports of English decisions, the ready access to and growing improvement of the textbooks on English law, the familiarity of the profession with the English legal structure, the reputations of the judges and the influence of the Privy Council as the final court of appeal all encouraged the use of English legal rules as persuasive material where the Roman-Dutch books were silent, vague or contradictory. There are areas of the law where the influence of the English law was minimal – the Law of Persons and Family Law, the Law of Property and portions of the law of obligations eg Purchase and Sale. In other areas on the, other hand, the influence of English law was fairly strong – Criminal Law, the Law of Agency, parts of the Law of Procedure, the Law of Contract and the Law of Delict. The influence of English law waxed and waned with the power and prestige of Great Britain. It was at its height from 1860 – 1910. As Hahlo and Kahn at 578 point out: “By a process of imperceptible accretion, not unlike *alluvio*, aided by legislation with an English bias, a layer of English rules and concepts became superimposed upon the law of Grotius and Voet. Roman-Dutch law was assuming an anglicized look.”

1.4 SOUTH AFRICAN COMMON LAW

THE EVOLUTION OF SOUTH AFRICAN LAW

Had the swing towards English law continued, the Roman Dutch law would probably have died out entirely and have disappeared as happened in British Guyana. That did not occur, however Roman-Dutch and English law have fused during the past hundred years to bring about South African law. Roman-Dutch law forms the basis of our law, but our common law is South African

law and not Roman-Dutch law (see for instance, the case of *R v Goseb* 1956 (2) SA 698; 1959 (1) SA 839.

Why was it that Roman-Dutch law did not disappear?

(a) The attitude of some of the judges.

Prior to the establishment of the Union of South Africa not all the judges were English law oriented. Judge Menzies was trained in Scottish law which was at the time not far removed from Roman-Dutch law. He, therefore, had a good knowledge of the Roman-Dutch writers. A colleague of his Mr Justice Burton had spent some months in the Netherlands in order to learn Nederlands and something of the Roman-Dutch law. He did much to preserve Roman-Dutch law and to ensure its preservation in South Africa. In 1829 he wrote a book, the first legal textbook on the South African law, entitled **Observations on the Insolvent Law of the Colony**. Much credit must also go to Sir Henry De Villiers in preserving the continuation of Roman-Dutch law in South Africa. He was the Chief Justice of the Cape Supreme Court from 1873 to 1910 and thereafter, as Baron of Wynberg, he was the first Chief Justice of the Supreme Court of South Africa which post he held until his death in 1914. Lord De Villiers was educated in the English law and thus was not a great Roman-Dutch scholar. He always tried to apply the Roman-Dutch law and made reference to the old authorities, but often made mistakes in trying to apply that law. Some legal academics, for instance, De Wet and Yeats have scathingly attacked his judgments. It has been said that his judgments were brief, and clearly wrong. He was responsible for one of the greatest controversies concerning the South African law of Contract. Professor Wouter De Vos, however, contends that he was one of the most important of the judges who contributed to a preservation of the Roman-Dutch basis of the South African law in that he was prepared to have recourse to the Roman-Dutch authorities even if he did often misinterpret them as a result of his English law background. The fact that he made use of the old authorities in his judgments set a precedent for other judges who followed him. Other important judges in this regard were Sir Henry Connor a judge in Natal from 1857 to 1865. After a period on the bench at the Cape, he became the Chief Justice of Natal for the period 1874 – 1890. He was an authority in the Roman-Dutch law and had a good personal library on Roman and Roman-Dutch law. Mention has also been made of Judge Kotze, Chief Justice of the South African Republic and later a judge of appeal after the establishment of the Union of South Africa in 1910. Other important judges of renown in the period just prior to and in the early period of the Union of South Africa were Sir James Rose-Innes and Sir John Wessels. Judge Wessels was so perturbed that the Roman-Dutch law would cease to exist that he ardently advocated that the law of the country should be codified.

(b) The emergence of Faculties of Law.

The South African College started at Cape Town followed by Victoria College at Stellenbosch where inter alia Roman-Dutch law was taught. One of the most important factors in the preservation of Roman-Dutch law was the establishment of two fully autonomous universities – the University of Cape Town and the University of Stellenbosch in 1916. The students who studied at these universities made a considerable contribution as practitioners, judges and professors and writers of a later generation. The commencement of the scientific study of Roman-Dutch law acted as a bulwark against and constituted a reversal of the trend towards English law. The appointment of Bodenstern and Malherbe to chairs of law at Stellenbosch in 1921 heralded the emergence of the first Afrikaans-speaking

Law Faculty in South Africa. These two professors together with their English-speaking counterparts at the University of Cape Town – Professors George Wille, J Kerr-Whyllie and Eric Emmett, inaugurated the trend towards the scientific study of law with a view to its practical application. They wrote critically on the practice of law in South Africa with the view to evolving a law based solidly on Roman-Dutch principles.

- (c) The establishment of the Supreme Court of South Africa and especially the Court of Appeal in 1909 by the South Africa Act. Many of the judges were men of eminence – De Villiers, Wessels, Rose-Innes, Kotze. Of crucial importance to the continuation of a Roman-Dutch basis of our law in South Africa was the attitude of the courts and in particular that of the Appellate Division. The Appellate Division saw as one of its tasks the need to forge a unified system of law, firmly based on Roman-Dutch principles, for the whole country. The court did not, however, see its task as that of applying pure Roman-Dutch law. Indeed, the court recognized that it could not turn back the clock as it were and ignore a hundred years of development during which period much English law had come to be grafted onto the local law. Gradually over a period of time the practice of looking to the English law for guidance diminished. Especially after the establishment of the Union of South Africa, the Roman-Dutch principles of law were embodied in the decisions of the courts and expounded upon in the writings of the jurists so that there was less need to refer to sources of English law.

In the nineteen-fifties a heated debate arose as to whether the influence of the English law in South Africa had been beneficial or not. There was a battle between the so-called ‘Antiquarians’ who advocated that pure Roman-Dutch Principles should be applied and that everything which could be said to be of English origin should be rooted out and rejected from our legal system. On the other hand, there were the so-called ‘Pollutionists’ or ‘pragmatists’ who contended that one could not simply ignore the fact that there had been considerable development of the law in South Africa. The argument being that one should not confuse the sources of the law with what the law actually is. Law is not static. It must develop so as to meet the changing needs of society. Indeed, in the early nineteen-sixties, there arose what may be described as a backlash against English law importations where the Appellate Division condemned the introduction of English legal principles and seemed determined to root out everything of an English law origin and to return to the pure Roman-Dutch law (see for instance, the cases of *Trust Bank v Eksteen* 1964 (3) SA 402 (A) at 410-11 and *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A)). In the end, however pragmatism won the day and the backlash against English law is something of the past. For, as Proculus writing in the (1950) 68 SALJ states:

‘[T]he erudite lawyer is not necessarily a good lawyer. Law is a social product and has a social function to perform. As long as a legal system satisfactorily meets the need of the community it serves, it should not be unnecessarily tampered with. It would be an ill day for South Africa if the views of the Antiquarians were to be accepted by the courts. Well-established doctrines would tumble and certainty and predictability would vanish. Instead of a practitioners law, a law of the courts, we should have a professors’ law (**‘Professorenrecht’**) the worst of all possible laws, because it is theoretical without considering practical consequences.’

- (d) A further factor which strengthened the position of Roman-Dutch law in South Africa was the emergence of various textbooks written on the subject. The first legal work to be published in South Africa was **Observations on the Insolvent Law of the Colony** by Judge W Burton. The first work of major significance was by Dr Van Zyl **The Theory of the**

Judicial Practice of South Africa published in 1893 followed by Melius De Villiers **The Roman and Roman-Dutch of Injuries** published in 1899. In 1903 Maasdorp published his **Institutes of Cape Law**, the latest edition of this work undertaken by Judge Hall, was published in 1978 and is entitled **Institutes of South African Law**. Nathan published a work entitled **The Common Law of South Africa** this appeared in four volumes the first two of which were published in 1904. Sir J W Wessels' **History of Roman-Dutch Law** appeared in 1908; G Wille's **Landlord and Tenant in South Africa** in 1910; R W Lee's **Introduction to Roman-Dutch Law** in 1915 and H G Mackeurtan published his work **The Law of Sale of Goods in South Africa** in 1921. There were also various doctoral theses on the Roman-Dutch law which appeared, some of which were undertaken at overseas universities such as the University of Leiden in the Netherlands, for instance, I Van Zijl Steyn's **Mora Debitoris volgens Heedendaegse Romeins-Hollandse Reg** (Stellenbosch 1929); J C De Wet 'Estoppel by representation' in die Suid-Afrikaanse Reg (Leiden 1939). Other important early works on the South African law were Sir J W Wessels' **The Law of Contract in South Africa** published in 1937 under the editorship of his son-in-law AA Roberts, it remained for a quarter of a century a leading work on the Law of Contract in South Africa and G Wille **Principles of South African Law**, first published in 1937.

Law journals were also published which contained articles on various branches of the law and promoted a knowledge of the Roman-Dutch Law. The oldest of these is the **South African Law Journal**. It came into existence in 1894 as the **Cape Law Journal** and contained many learned articles on Roman-Dutch law, for instance, a series of articles on the Roman-Dutch Law of Sale by Professor Bodenstern. In the nineteen-fifties Professor T Price of the University of Cape Town published a number of articles in the **South African Law Journal** in which he made a valiant attempt to rid the South African law of Delict of some of the undesirable influence of English legal principles. In 1937 the **Tydskrif vir Hedendaegse Romeins-Hollandse Reg** was first published which made a considerable contribution to promoting a knowledge of the Roman-Dutch law in South Africa.

The scientific study of law in South Africa has now come to its full fruition with the extensive legal literature as witness to the Roman-Dutch-based South African law.

2. CONSTITUTION

Prior to the new Constitution, the principle of parliamentary sovereignty applied, meaning that Parliament was the supreme law-making authority, and once a law had been correctly passed, according to the prescribed procedure, it could not be challenged in any court or tested against any norm of justice, ethics or morality. This has now changed under the Constitution of the Republic of South Africa, 1996, which is the supreme law of the land.

The Constitution forms the most important part of the written sources of South African law. Historically, the South African Constitution was treated as a source of law similar to any other statute, but since the transition to democracy (1994) the Constitution has assumed far greater significance as a legal source. Not only does it determine how the state structures are to exist and operate, but it now contains a Bill of Rights, guaranteeing basic human rights such as freedom, equality and human dignity of all individuals. All laws, statutes, common law and customary law may be tested for validity against the norms laid down in the Bill of Rights.

Section 2 states that the Constitution is the supreme law of the Republic and therefore any law or conduct, which is inconsistent with it, is invalid. In s 39(2) it is stated that in interpreting any legislation, or in the development of the common law and customary law, the courts must promote the spirit, purport and objectives of the Bill of Rights.

The Constitution endows the courts with a testing right, as discussed above. This means that the Constitutional Court has the right of judicial review with respect to legislation measured against the principles of justness, fairness and equality. Therefore, the Constitution elevates itself and the bill of rights in particular to a general standard (norm or *Grundnorm*) against which all legislation can be tested or measured. This means that the Constitution is the supreme law and that any act which is in conflict with it is invalid.

The Constitution also provides for the establishment of a Constitutional Court, which is the highest court with respect to the testing of legislation and so decides only constitutional matters and makes the final decision on the question whether a matter is a constitutional matter. The Constitutional Court has eleven judges and sits in Johannesburg and the President is Mogoeng Mogoeng.

2. LEGISLATION AS A SOURCE OF LAW

Legislation is written, formally enacted law, in the form of a statute (Act of Parliament), or a provincial act, or a municipal by-law or ordinance. It is created by an authorized organ of government, under powers created by the Constitution. The Constitution is the supreme law and therefore any law, which is in conflict with it, is invalid. Before the interim Constitution came into force the South African parliament was a product of the apartheid system and not a democratic process but now the Constitution provides for a fully democratic parliament where the whole of society can participate in the legislative process.

The South African Constitution is fundamental law and is superior to other Acts of Parliament. It enjoys an exalted status and can only be amended according to provisions entrenched in the Constitution itself. It binds all legislative, executive and judicial organs of state at all levels of government. As the Constitution is the supreme law of the Republic of South Africa, any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. This means that Parliament and Provincial legislatures cannot pass any law that is inconsistent with the provisions of the Constitution. This represents a landmark development in the history of our Constitutional development. Prior to its implementation, Parliament in South Africa was sovereign and the courts of law had no power to test the validity of an Act of Parliament. Now the Constitutional Court may decide on the constitutionality of any parliamentary or provincial enactment but may do so only in the circumstances anticipated in sections 79 or 121.

Also contained in the Constitution is the Bill of Rights (section 7(1)), which is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Thus all laws, statutes, common law and customary law may be tested for validity against the norms laid down in the Bill of Rights.

In terms of section 40(1) of the Constitution of the Republic of South Africa, 1996 the government of the Republic of South Africa is based on the concept of co-operative governance. In the Republic, government is constituted as national, provincial and local spheres of

government, which are distinctive, interdependent and interrelated (sec 40(1)). However, there are matters that fall within the functional areas of concurrent national and provincial legislative competence. This means that such matters can either be legislated at national level or provincial level. In Schedule 5 there is a list of matters that fall within the exclusive provincial legislative competence, which means that the provinces are the only legislative powers that can legislate on these matters.

Legislation is a very powerful source of law and in principle it binds the whole of society. It can also be a quick and effective way to amend old laws and create new ones where there are gaps in the law, where the law no longer corresponds to the needs of modern society or where there are defects or loopholes in existing legislation. In a very short space of time a new statute can change current law whether it is statute law, a court decision, a rule of common law, custom or an opinion of a modern author.

HOW IS A LAW MADE? (See Kleyn & Viljoen)

Currently, national legislation is drafted by the relevant government department and sent to the Cabinet and then approved by the State's legal advisors. The Bill is then tabled in Parliament, at a "first reading". This is then published in the *Government Gazette* and comments are invited. The Bill goes back to a portfolio committee for changes, and then a second reading of the Bill occurs before Parliament. The debates are recorded in *Hansard*, the record of proceedings in Parliament, before the Portfolio Committee reconsiders the issue for the last time. The National Assembly will then vote on the committee's second report and proposals. The Bill then goes for approval to the National Council of Provinces and finally for signature by the President whereupon it becomes an Act of Parliament.

Note: the fact that an Act has been passed does not mean that it is in force. It will usually come into force on the date of publication of the *Government Gazette* but the Act itself may stipulate that it will come into force only at a later date.

TECHNIQUES FOR READING A STATUTE

As the language of a statute is very formal and complex, there are certain techniques, which assist the reading of a statute:

1. INTERNAL AIDS construing meaning e.g. Long Title, marginal notes, section headings, definition section containing key words which explain what they mean.
2. EXTERNAL AIDS like decided cases, which have interpreted the statute. A particular word can have many interpretations so it is important to know whether there are any cases on the statute – see *Butterworths Index of Statutes*, volume 1. Also look at surrounding circumstances like what defect or problem the legislature was hoping to address.
3. PRESUMPTIONS – a presumption is a ruling of common sense applied so consistently that it has obtained the status of presumed truth e.g. legislation does not aim at changing existing law unduly; legislation does not contain futile or meaningless provisions; legislation has prospective and not retrospective application.

INTERPRETATION OF STATUTES

When disputes arise about the meaning of statutes, courts are asked to interpret the statute according to certain rules in order to resolve uncertainty or ambiguity. The following rules of interpretation of statutes should be followed:

1. First rule or “Golden Rule” of interpretation is that the intention of the legislature must be ascertained.
2. Literal Theory: analyzing the words of the statute can do this. An ordinary, everyday word must be given an ordinary, everyday meaning i.e. the words must be understood in their literal sense unless a) it does not reflect the intention of the legislature or b) it leads to absurd consequences.

Statutes are applied in concrete situations e.g. court cases. Any difference of opinion is resolved by the judge’s finding (i.e. his interpretation). Eventually it is the judges who decide by exercising their discretion as to what exactly the intention of Parliament was. So although judges are bound to the words of statutes, the process of interpretation still leaves scope for their own input.

D Kleyn & F Viljoen *Beginner’s Guide for Law Students* 4ed (2010) 55
“The judge cannot change the material, but he can iron out the creases.”

4. JUDICIAL PRECEDENT

The idea of precedent suggests the resolution of questions today in the same manner as they were decided yesterday. Adherence to precedent is characteristic of all developed legal systems in that courts usually seek guidance from the experience of the past before coming to a decision. It is natural for judges to follow the pattern of conduct laid down and approved by their predecessors and to use material found in the judgments of the past. In addition to judges, practitioners must know what the law is. To ascertain the law, practitioners rely heavily on the previous decisions of the courts.

In the 17th and 18th centuries, the courts of Holland regarded past decisions merely as an aid in deciding cases brought before them (i.e. of persuasive value only). With the establishment of the Supreme Court at the Cape in 1828 the English rule of *stare decisis* was adopted.

Stare decisis introduced a new attitude to the doctrine of precedent in that the idea of treating past decisions as persuasive gave way to the idea that the legal rules embedded in a past judgment should be regarded as authoritative. This attitude towards precedent is expressed as *stare decisis et non quieta movere* (i.e. stand by decisions and do not disturb settled law).

Hahlo and Kahn have summarized the basic rules as follows:

1. A court is absolutely bound by the *ratio* of a decision of a higher court or of a larger court on its own level in the hierarchy, in that order, unless the decision was rendered *per incuriam* (i.e. a statute or a judgment by a higher court was overlooked) or there was subsequent overriding legislation.

2. A court will follow its own past decisions unless it is satisfied it is wrong when it will refuse to abide by it and so in effect overrule it.

If future courts are to be bound by previous decisions, it is clear that two factors must exist:

- (a) There must be a hierarchy of courts (i.e. a system of grading)
- (b) There must be a method of determining the legal rule contained in the higher court's judgment. This is achieved by an efficient system of case reporting.

Four specific questions arise regarding the *stare decisis* rule.

1. **The first question that one needs to examine is what is binding in the judgment of a court?** In a judgment a court normally makes findings on two kinds of issues:

- (a) factual issues
- (b) legal issues

In the context of a judgment legal issues and factual issues can never really be separated from each other. The question of fact must first be answered before the court can know which legal question(s) must be dealt with.

But factual and legal issues can be distinguished: facts are events and they are unique and not exactly the same from case to case whereas legal norms on the other hand are, by nature, general in their operation – they apply to more than one situation regardless of time, place or persons and are focused on what the similarities are in different situations (i.e. they work to level out differences).

The singularity of facts means that a court's finding on a question fact in a particular case is not binding in other cases. On the other hand, a court's finding as to the applicable legal norms affects more cases. A finding i.r.o a question of law in one specific case can thus be authoritative for other situations.

Note: Not everything a court decides with respect to the question of law is binding. Only the *ratio decidendi* (the reason for the decision) is binding. *Obiter dicta* (remarks in passing, judge's view) are not binding but can be persuasive.

2. **What are the various forms or degrees of being bound?** There are three degrees under this heading

- (i) No binding force
- (ii) Absolute binding force
- (iii) Persuasive force

3. **What is the scheme according to which one court is bound by another court's decision?** This question is answered by looking at the hierarchy of the courts.

4. **What happens in the case of conflicting decisions?** Conflicting decisions can be problematic where court A is bound to follow the decision of court B. In cases such as these, court A is obliged to follow the most *recent* of the conflicting decisions. If, however,

court A and B are courts of equal status, then court A does not have to follow either of B's decisions and is free to adopt *one* of these conflicting decisions and choose its own course.

5. CUSTOM

Custom derives from the legal convictions of a community and is generally unwritten law. Custom is fixed practices with which people live because they regard it as the law. Behaviour or acts following a fixed pattern over a long period of time may become law if they meet certain requirements and the law which emerges in this way is known as custom. Closely related to custom is trade usage and in fact RD writers drew no distinction between the two. Trade usage can be described as a practice in a particular trade or market or locality which is so well known and consistently followed that it is imported into every community unless the contrary is agreed. Examples of trade usage include a baker's dozen (13); during the times of the China trade a gross consisted of 13 dozen to allow for breakages during the voyage from China to other parts of the world. An example from the commercial world is that of interest in an overdrawn bank account. Even though there may be no agreement between the bank and the client, it is custom in the banking world to charge interest on an overdrawn banking account.

New law can be created or existing law can be amended by custom but existing statute law cannot be amended or abolished by custom or abrogated by disuse only later legislation can do that. Custom may furthermore be valid law over an entire country or only in a particular region.

In modern law, custom plays a limited role because it is seldom that a new legal principle which does not already exist in legislation or common law will be established as a custom.

The leading case on custom is *van Breda v Jacobs* 1921 AD 330 in which the court had to decide on the legality of a local custom. The plaintiffs who were fishermen were required to prove the existence of a local custom which provided that between Cape Point and Fish Hoek, once fishermen had thrown their nets to catch a shoal of fish travelling parallel to the shore, then other fishermen had to refrain from throwing their nets in front of other fishermen who had been first in locating the shoal of fish. ("First come, first pull" at 335).

The AD held that there were FOUR requirements that had to be proved for a custom to be recognized:

1. The custom must be reasonable
2. The custom must have existed for a long time
3. The custom must be generally recognized and observed by the community
4. The context of the custom must be clear and certain

The court, in this case, was satisfied that this was a reasonable custom. Its object was to prevent disputes and quarrels and it was eminently fair to all parties and caused no injustice to anyone. The defendants had to pay the value (i.e. £32 4s) of the fish intercepted by them in violation of custom.

Note: After a custom has been affirmed by a court, the relevant judgment can be referred to as authority for its existence.