THE ENDURANCE OF THE ROMAN TRADITION IN SOUTH AFRICAN LAW[1]

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Abstract: *The Roman tradition is visible in all spheres of the complex South African legal system. Although legal pluralism exists as a result of the prevailing cultural pluralism, Roman-Dutch law is regarded as the core of the South African common law. It is not unusual to find direct references to substantive Roman law in the South African Law Reports; or indirect references through the Roman-Dutch institutional writers. Importantly, the scientific framework of Roman-(Dutch) law still directs legal development in South Africa, even in the new Constitutional dispensation. Curiously, although they belong to wholly different families of laws and substantive Roman law was never received in African customary law, the Roman scientific framework and legal rules have commonly been used to explain that law and so to make it intelligible to the "Western" lawyer, thus contributing to the endurance of the Roman tradition in Africa. The Roman tradition has been preserved also in other Southern African countries, because of the prevailing Roman-Dutch tradition inherited from South Africa.*

Keywords: *Roman tradition; Roman law; Roman-Dutch law; African customary law; South African common law; science of Roman law; reception; Southern African countries; foundational principles; jural postulates; South African Constitution;*

1. Introduction

The survival of the Roman tradition in South Africa is detectable in all spheres of her complex legal system. South Africa has a heterogeneous society and legal pluralism exists as a result of the prevailing cultural pluralism. The officially recognised state laws are Roman-Dutch law as influenced by English law, and as adapted and developed through judicial decisions and legislation (this is the general law of the land), as well as African customary law as incorporated into legislation or pronounced in judicial decisions.

Historically, the civilian legal tradition was introduced into the Southern African region during the seventeenth century, when the Dutch imposed Roman-Dutch law on the existing African customary legal systems of the Cape of Good Hope. The indigenous African populations had no desire to receive the imposed

foreign law into their customary laws. Accordingly, there was never a true reception of Roman-Dutch law in South Africa, since "reception" entails a willing acceptance of a foreign legal system. Nevertheless, Roman-Dutch law, with its strong Roman-law component, was officially favoured and became the foundation of the South African common law. The introduction of English law in South Africa, from the late eighteenth century onwards, challenged the primary position of Roman-Dutch law, but could not depose that law. English law blended with the Roman-Dutch law to form a hybrid legal system of which, by and large, its formal law was based on English law and its material law was predominantly civilian.

During the twentieth century, a lively debate developed about what exactly constituted the common law of South Africa (Roman-Dutch or English law?) and about when and how Roman and Roman-Dutch law should be applied.[2] The emphasis gradually shifted to the continued relevance of Roman-(Dutch) law in a modern (post-1994) Constitutional dispensation, the compatibility of the Roman-Dutch common law with constitutional precepts and the balancing of African customary law and "Western (common) law" in a mixed jurisdiction.

2. The practical application of Roman and Roman-Dutch law

Although the South African common law has its roots in both the Roman (civilian) and English common-law traditions, Roman-Dutch law is the primary or dominant component and in the courts and in academic writing the term "common law" and "Roman-Dutch law" are used interchangeably.[3] Thus, in spite of the fact that there was never a willing reception of Roman-Dutch law in South Africa, it is not difficult to detect more than mere traces of the civilian tradition in South African law.

In legal practice and literature, then, the civilian branch of the law has been regard as the nucleus of the legal system. Roman-Dutch values, precepts and principles form the backdrop against which law reform has to take place, legal materials interpreted and new law generated.[4] Even after the introduction of the interim Constitution of the Republic of South Africa in 1994 as the supreme law of South Africa, the ethos of regarding Roman-Dutch common law as the foundation of the legal system persisted in the highest courts. The Supreme Court of Appeal[5] stated that "South African lawyers are required to keep our common law – the Roman-Dutch law – in mind as a background factor in interpreting our legislation" and more recently, the Constitutional Court confirmed the central position of the underlying principles of Roman-Dutch law in legal development.[6]

The Roman tradition found a footing in South Africa through the treatises on Roman-Dutch law and the European *ius commune.* Voet's *Commentarius ad Pandectas*, for example, was used by the *Raad van Justitie* already in the earliest days of the Batavian rule at the Cape in the seventeenth century. In 1793, the *Commentarius*, Grotius's *Inleidinge tot de Hollandsche Rechtsgeleertheyd*,[7] and a large number of the works of other institutional authors were listed in an inventory of the *Raad van Justitie*.[8] Even though Roman-Dutch law is an amalgam of Roman law and Dutch law, it is commonplace that for South Africa the Dutch institutional writers were the bearers of the Roman tradition. As such, they were largely responsible for its endurance in South Africa and indirect references to Roman law still abound in South African cases through Roman-Dutch authors such as Grotius[9] and, especially, renowned Dutch humanists such as Bijnkershoek and Voet.[10]

But the influence of the Roman tradition is not limited to Roman-Dutch law and to indirect references to Roman law. A superficial perusal of judicial pronouncements of South African courts and of academic writing evidences that in many areas of the law, ancient Roman law is still regarded as an original source of South African law and that it is not relied upon only to the extent that it has been adapted by Dutch legal practice and integrated into Roman-Dutch law. [11] It is not unusual to find that judges make direct reference to the works of the classical Roman jurists or Justinianic law.[12] Significantly, in 2001, the Supreme Court of Appeal remarked with relation to the *condictio ob turpem causam* that "[w]ithout losing sight of the fact that we live in the year 2001, [we] consider that D 12.5.6 gives us the authority that we need. Sabinus was quite right about the merits of the views of the early jurists. So was Celsus. So was Ulpian, in relying on his predecessors."[13]

Nevertheless, the rules of Roman-Dutch and Roman law are not regarded as invariable elements of the legal system and, where the need arose, they have been subjected to adaptation to suit the needs of a developed society and to conform to present-day constitutional principles.[14] As a rule, the courts effect changes to the common law only after a thorough consideration of the internal legal history of the relevant rule, but within the context of the external legal history of South Africa.[15] The adaptation of the common law to bring it in line with the Constitution has thus far not threatened the continued existence of the Roman tradition, as the courts' primary objective appears to be the retention or restoration – in the sense of purging it from its apartheid contamination – of Roman-Dutch law and, importantly, as adaptation normally takes place in consonance with a narrow interpretation of the underlying principles of the civilian tradition.[16] This approach resulted in safeguarding the essence of the Roman tradition[17] "almost as if the Constitution never existed" – to the frustration of academics who root for fundamental reform of the legal system unfettered by tradition and within a coherent normative constitutional framework.[18]

The continuing academic discourse about the core position of Roman-Dutch law evidences the pivotal role that that system still plays in South African jurisprudence. The courts, generally, do not seem to dwell on academic theorisation in this regard. Roman-Dutch and Roman law are applied as a matter of course, on both a practical level (in the form of substantive norms or rules) and a scientific level (as far as structure, concepts, categories, principles, divisions are concerned). In fact, some modern-day decisions of the High Courts, and especially of the Supreme Court of Appeal, read like Roman-law text analyses.[19] Regular reference to the civilian component of South African law and direct references to Roman law – even if not always to primary sources – and occasionally without tracing any subsequent development in Roman-Dutch law, may also be found in decisions of the Constitutional Court.[20]

3. Impact of the scientific system of the Roman tradition

Historically, the scientific system of Roman law, including its divisions concepts, maxims and underlying principles, has proved to be more enduring than its actual rules and norms.[21] This has been evidenced by the continued existence, in varying degrees, of the science of Roman law in countries which never experienced any practical reception of Roman law[22] and in Continental legal systems which have been codified.[23] It is therefore not surprising that the science of Roman law has likewise proved to be a fundamental and tenacious aspect of the South African legal system.[24]

Like its substantive rules, the scientific system of Roman law was established in South Africa through the imposition of Roman-Dutch law. For example, both Grotius's *Inleidinge* and Voet's *Commentarius*,[25] mentioned above, were conduits of the scientific structure of Roman law. The *Inleidinge*, the first treatise on Roman-Dutch law as an independent system, was based on Justinian's *Institutes*, utilising the concepts, divisions and principles of Roman law; and, as Van der Linden wrote in the Preface to his Supplement to the *Commentarius*: "[C]ertainly among those who have in this way handed down the science of Roman Law … none has discharged that function better than the most distinguished man Johannes Voet."[26]

In fact, it would not be amiss to say that probably the most significant legacy of the old Roman-Dutch jurists was the underlying principles of Roman(-Dutch) law, which have been referred to as the "deeper sources South Africa shares with modern civil law systems"[27] and which still serve as framework for the development of the South African legal order.[28] Although Roman-Dutch law has been typified as a system of law that integrated "the wisdom of the Roman law

jurists with the idealism of the Dutch scholars",[29] it is clear that its fundamental postulates are predominantly rooted in Roman law, either pure, or as developed in Medieval law schools, by Dutch jurists or by scholars of the European *ius commune*.[30]

In judicial and administrative decisions as well as in the interpretation of legislation, South African courts intuitively respect these foundational principles and utilise them as starting point for legal reasoning and as framework for developing the law.[31] Nevertheless, the courts do not see these principles as self-standing rules, but as part of an integrated system of values or postulates of justice which are given expression through the existing rules of law.[32] In *Anglo Operations Ltd. v. Sandhurst Estates (Pty.) Ltd.*,[33] the court observed that while the different actions of Roman law were no longer identified by name in Roman-Dutch law, the "underlying principles for the application of each remedy" had endured.

Some familiar examples of Roman postulates of justice that today still guide South African courts in private law include:

- the principle that nobody should be compelled to perform or comply with that which is impossible (*lex non cogit ad impossibilia*), referred to by the South African Constitutional Court as being derived "from the principles of justice and equity which underlie the common law";[34] in the law of obligations this principle was originally expressed by Celsus in *D*. 50.17.185: *Impossibilium nulla obligatio est*;
- the principle that nobody should be enriched at the expense of another, founded on *D*. 12.6.14 (*Pomponius libro 21 ad Sabinum* : *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*) and *D*. 50.17.206 (*Pomponius libro nono ex variis lectionibus*: *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*);
- the principle that nobody should profit from his or her own bad faith or unlawful actions.[35] This principle underlies the law relating to contract, property, delict and representation and finds expression in Roman law maxims such as *ex turpi causa non oritur actio*[36] and *in pari delicto potior conditio defendentis*;[37] (In the seminal case of *Jajbhay v. Cassim*,[38] still relied on today, the court elucidated: "The moral principle which inspired the enunciation of those two maxims is obvious and has often been expounded. It is to discourage illegality and immorality and advance public policy. So much is trite and certain, and our pronouncement of law on the matter before us must be in conformity with that principle." This postulate restricts the all embracing importance of the subjective will of the parties in the law of contract. Its application, though, may be limited by the demands of public policy. Nevertheless, the courts do not strictly adhere to the principle that nobody should benefit from his own bad faith and exceptions are in fact made where

public policy "sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community"[39] demands it.)

- the principle that a person "must be able to assume that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds". This principle, formulated as such by Roscoe Pound,[40] forms the basis of pauperian liability and its Roman foundation may be found in Justinian's *Digest D.* 9.1.1*pr*: *Ulpianus libro 18 ad edictum: Si quadrupes pauperiem fecisse dicetur, actio ex lege duodecim tabularum descendit*) and in *Institutes* 4.9*pr*.

Earlier this year, the Constitutional Court observed with regard to the now defunct remedy for injury to personality rights, the *amende honorable* (which in fact did not originate in Roman law), that it did not propose the reinstatement of the remedy but rather development of the law "in accordance with equitable principles also rooted in Roman Dutch law".[41] The Court further stated that Roman-Dutch law's concern with justice and fairness finds tangible expression in the equitable principles and remedies detectable in virtually all aspects of [Roman-Dutch] law.[42] The fact that in developing the law South African courts often tend to draw on the fundamental postulates of Roman-Dutch law, rather than on the precepts of the Constitution, has met with much criticism.[43]

Nevertheless, the reliance on the fundamental principles of Roman-Dutch law does not inevitably boil down to a negation of constitutional values. In fact, it appears that the courts nowadays rather use these postulates as "conceptual apparatus",[44] but then determine their content with reference to constitutional values. In *Bredenkamp v. Standard Bank of South Africa Ltd.*,[45] for example, the Court confirmed that the underlying postulate that contracts and transactions should not be against public policy is derived from the common law,[46] but pointed out that its content should be determined with reference to the constitution. And in *Barkhuizen v. Napier*,[47] the court held that "[d]etermining the content of public policy was once fraught with difficulties … [but] since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it".

4. The civilian tradition in other Southern African countries

The influence of the civilian tradition reaches even further than South Africa. Namibia, Botswana, Lesotho, Swaziland and Zimbabwe, all "inherited" from South Africa the Roman-Dutch law as their common law.[48]

In the late nineteenth century, when Botswana and Lesotho came under its control, Britain imposed on them the "law for the time being in force in the Colony of the Cape of Good Hope" and not English law.[49] In a similar way, Roman-Dutch law became applicable also in the other Southern African countries mentioned earlier. Lesotho, Botswana, Swaziland and Namibia[50] were administered as part of South Africa, thus confirming the dominant position of South African law and, with it, Roman-Dutch law. As a result, the Cape played a leading role in legal development in these countries, its position being comparable to that of the province of Holland in the Netherlands during the period of the actual reception of Roman law.

The regard for South African law has endured in these countries and today not only South African case law, but also other legal materials direct legal development in Southern Africa. Decisions of South African superior courts still play a highly persuasive role in spite of the fact that there is no official system of precedent operative amongst these territories.[51] Generally, a noticeable appreciation for the civilian roots of their legal tradition is apparent in legal decisions emanating from this group of countries.

5. African customary law

It is an interesting phenomenon that African customary law, too, is in a way responsible for the endurance of the civilian tradition in Africa, even if an artificial manner. Although Roman law played no role in its historical development, the Roman scientific structure as well as substantive Roman law was commonly utilised during the nineteenth and earlier parts of the twentieth century as a frame of reference to explain African customary law to the "European/Western" reader.[52] In that way the Roman structure came to be imposed on the African customary law, and, curiously, in spite of the fact that they belong to completely different families of law, that elements of substantive Roman law are visible in academic versions of African customary law.

Occasionally, nowadays, Southern African courts still utilise Roman legal concepts to elucidate African law, thus keeping knowledge of this ancient law alive in a very pure form.[53] For example, recently, in *Lebona and Another v Lebona and Others*,[54] the Lesotho Supreme Court of Appeal used Roman law to explain the religious significance of burial in the law of Lesotho.

Nevertheless, it is important to bear in mind that the impact of Roman-law rules on the living African customary law has been purely academic. Unlike the early Medieval Germanic customary law, there has not been a reception of Roman law, either indirectly through Roman-Dutch law, or through the Romanisation

of African laws.[55] Roman law has been utilised merely as a practical academic tool and has not impacted on the actual application of African law at grass-roots level. This is confirmed by the huge divide today, more so than in the past, between the living African customary law and the formal African customary law reduced to writing in codifications, legislation, court decisions and restatements in which African customary law has often been captured with reference to Roman-law concepts.

6 Conclusion

Recently a French professor of legal history, Jean-Louis Halpdrin, observed that "the the reign of Roman concepts is declining".[56] Sadly, this is true also in South Africa where there is an overt drive to oust Roman-law and legal-history modules from legal education. This move appears often to be politically motivated, even if shrouded in arguments based on the evolving needs of a truly African society and the streamlining of legal curricula.

The factors that have thus far sustained the civilian tradition in Southern Africa are a training in Roman law and legal history and, importantly, the precedent system. If training falls by the wayside, the precedent system may well keep the Roman tradition alive, but that would be a synthetic life. Without a sound knowledge of the civilian roots of the legal system, judges will not be able to use Roman or Roman-Dutch law to its full capacity, in spite of its inherent ability to transcend civilisations and historical developments. They will not be able to develop that law in accordance with its underlying principles and to adapt it to the needs of a modern society, and, importantly, to the demands of the Constitution. In short, future generations of lawyers will be deprived of the historical tools of our legal system which could, with little effort, be readily available.

While it is important not to cling unquestioningly to the civilian tradition, it is also important to bear in mind that "considerations of commercial and social certainty [often] render the common law ... as sound today as it was when first articulated over a century ago [and that] Constitutional considerations far from detracting from it [sometimes] appear to enhance it."[57]

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[1] This is an expanded version of a paper read at the Tercer Congreso International de Estudios Clásicos en México on "La Tradición Clásica en Occidente", held 29 Aug. to 2 Sep. 2011, Mexico City, Mexico.

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[2] See, e.g., the following articles and the copious literature cited by the authors: A.E.Van Blerk "The Irony of Labels" 1982 *South African L.J.* 365 and "The Genesis of the 'Modernist-Purist' Debate: A Historical Bird's-eye View" 1984 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/J. of Contemporary Roman-Dutch Law*. 127; E. Cameron "Legal Chauvinism, Executive-mindedness and Justice – LC Steyn's Impact on South African Law" 1982 *South African L.J.* 38; R. Zimmerman "Synthesis in South African Private Law: Civil Law, Common Law and *Usus Hodiernius Pandectarum*" 1986 *South African L.J.* 259; D.P. Visser "Daedalus in the Supreme Court – The Common Law Today" 1986 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/J. of Contemporary Roman-Dutch Law* 127; Visser "The Legal Historian as Subversive or: Killing the Capitoline Geese" 1986 *The J. of Legal History* 352; F. Du Bois & D.P. Visser "The Influence of Foreign Law in South Africa" in *Transnational Law & Contemporary Problems* 2003 (13-2) at 593-658.

[3] This is the position also in Lesotho: For example, in *Lehloenya Mokokoane v. Mokokoane* (CIV/APN/4/04) [2004] LS.H.C. 37 in par. [20] the Judge observed: "In this Kingdom the term 'common law' is very often used synonymously with Roman-Dutch law"; cf., also, the *dictum* in *Anglo Operations Ltd. v. Sandhurst Estates (Pty.) Ltd.* 2006 (1) S.A. 350 (T) at 365E-G; D. Van der Merwe "From Virtual Reality To Constitutional Resource" 1998 *Acta Juridica* 117 at 118.

[4] Cf. D. Davis "Judge Ackermann and the Jurisprudence of Mourning" 2008 *Acta Juridica* 219 at 221.

[5] See the judgement of Olivier, J.A. in *Thoroughbred Breeders' Association of South Africa v. Price Waterhouse* [2001] 4 All S.A. 161 (A.) par. [2].

[6] See *Le Roux v. Dey* (C.C.T 45/10) [2011] Z.A.C.C. available at http://www.saflii.org/ par. [199]. The centrality of the common law (rather than the Constitution) as the starting point for legal reasoning is, for example, evident in par. [154] where the Court observed: "Our common law recognises that people have different claims for injuries to their reputation (*fama*) and to their own sense of self-worth (*dignitas*) ... and although the Bill of Rights does not always draw sharp lines between the two, the distinction is important to our new constitutional order. It illuminates the tolerance and respect for other people's dignity expected of us by the Constitution in our public and private encounters with one another."

[7] These works were also well known during the nineteenth-century in the two Boer Republics, the Zuid-Afrikaansche Republiek and the Republic of the Orange Free State. They were, e.g., explicitly mentioned as subsidiary sources of law in the Constitution of the Zuid-Afrikaansce Republiek of 19 Sept. 1859.

[8] See G.G. Visagie *Regspleging en Reg aan die Kaap van 1652-1806* (Cape Town, 1969) Bylae III "Regsboeke in die Raad van Justisie se besit, soos dit weergegee word in die 1793-inventaris" at 120ff; cf., also, A.A. Roberts *A South African Legal Bibliography* (Pretoria, 1942) 142, 184, 320-321; D.H. van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1983) 350-351, 358-359; J. Cowley & J.E. Scholtens *A Catalogue of Early Law Books in the University of the Witwatersrand Law Library* (Johannesburg, 1987) 109; W. de Vos *Regsgeskiedenis* (Cape Town, 1992) 236ff; J.Th. de Smidt's *Old Law Books from the Libraries of the 'Raad van Justitie' (High Court) and JN van Dessin (South African Library)* (Leiden, 1998); I. Farlam "The Old Authorities in South African Practice" 2007 *Tijdschrift voor rechtsgeschiedenis* 399 at 402ff.

[9] See, e.g., *Pappalardo v. Hau* 2010 (2) S.A. 451 (S.C.A.), esp. par. [22]. In *Kidson v. Jimspeed Enterprises C.C.* 2009 (5) S.A. 246 (G.N.P.) par. [6], having dealt with various texts in the *Digest*, *Codex* and *Institutes* of Justinian regarding servitudes, the Court confirmed again the *dictum* in *Galant v. Mahonga* 1922 E.D.L. 69 that "[t]he Roman-Dutch authorities [in this case Grotius and Van der Linden] accepted [Roman] law ... and there never has, I think, been a doubt that it is so regarded in our law to-day". In *Dormell Properties 282 C.C. v. Renasa Insurance Company Ltd.* 2011 (1) S.A. 70 (S.C.A.) par. [57] the Supreme Court of Appeal stated that "[t]hese principles [Paul, *D.* 6 2.12.8 ; *Inst.* 7 3.15.2, relating to the calculation of time/periods] were received into the Roman-Dutch Law" and then referred to Grotius *Inleiding* 3.3.50, Voet *Commentarius* 45.1.19 and traced the legal development further through South African precedents to the present day.

[10] See, e.g., *Kahn v. Volschenk* [1986] 2 All S.A. 300 (A.); *Du Plessis v. Strauss* [1988] 4 All S.A. 115 (A.D.); *Rand Waterraad v. Bothma* 1997 (3) SA 120 (O).

[11] E.g., in *Bredenkamp v. Standard Bank of South Africa Ltd.* 2010 (4) S.A. 468 (S.C.A.) pars. [37]-[38], the Supreme Court of Appeal referred to several texts in Justinian's *Codex* (*C.* 2.3.6; *C.* 2.3 7; *C.* 2.3.29; *C.* 4.54.4; *C.* 4.54.8) and without further consideration of Roman-Dutch law concluded regarding contractual autonomy (*pacta sunt servanda*) and agreements which are against public policy: "This court in *Sasfin* consequently restated the obvious, namely that *our common law* [here, Roman law] does not recognise agreements that are contrary to public policy" (my emphasis). Again, in *eTV (Pty.) Ltd. v. Judicial Service Commission* 2010 (1) S.A. 537 (G.S.J.) at 545F-H, referring to *D.* 22.3.21 and *D.* 22.3.2, the High Court observed that "it is part of our inheritance from Roman law and appears in the *Corpus Juris Civilis* – that *semper necessitas probandi incumbit illi qui agit*: the need to prove always rests on the person who acts"; and in *Golden International Navigation S.A. v Zeba Maritime* 2008 (3) S.A. 10 (C.) at 16A-C, relating to the fundamental principles for a fair trial, the Court noted that it is "in the public interest that litigation be finalised without undue delay: interest *reipublicae ut sit finis litium*, as it was stated by the Romans many years ago … [i]ndeed, Emperor Justinian, in Codex 3.1.11, decreed that civil suits shall not, after *litis contestatio*, be deferred longer than three years". See, also, *Graf v. Buechel* [2003] 2 All S.A. 123 (S.C.A.) where the Supreme Court of Appeal traced Constantine's prohibition in the early fourth century, of a *pactum commissorium* (an agreement that if the pledgor defaults, the pledgee may keep the security as his own property) in the context of a pledge, through Justinian (*C.* 8.35(34).3) and then Roman-Dutch law. In par. [25], having also conducted a comparative survey the Judge stated: "In conclusion on the comparative survey of the law of some Western European countries, I can do no better than quote what Maasdorp JA said in … *Mapenduka v. Ashington*, [1919 A.D. 343] at 358: 'The reasons on which this law is grounded are as sound to-day as they were in the times of Constantine.'" The Court concluded: "That position remains." For other examples of the direct application of Roman law, see, e.g., *First National Bank of Southern Africa Ltd. v. Perry* 2001 (3) S.A. 960 (S.C.A.); *Van Der Merwe v. Taylor* 2008 (1) S.A. 1 (C.C.).

[12] See, e.g., *S. v. Mostert* 2010 (2) S.A. 586 (S.C.A.); *First National Bank of Southern Africa Ltd. v. Perry* (n. 11); *Linvestment C.C. v. Hammersley* 2008 (3) S.A. 283 (S.C.A.); *BC Plant Hire C.C. T/A BC Carriers v. Grenco (S.A.) (Pty.) Ltd.* 2004 (4) S.A. 550 (C.); *Kidson v. Jimspeed Enterprises C.C.* (n. 9); *Edouard v. Administrator, Natal* 1989 (2) S.A. 368 (D.).

[13] *First National Bank of Southern Africa Ltd. v. Perry* (n. 11) in par. [28].

[14] See, e.g., *Carmichele v. Minister of Safety and Security* 2001 (4) S.A. 938 (C.C.): there is an obligation on the courts to develop the law where the common law as it stands is deficient in promoting the constitutional objectives stated in s. 39(2) of the Constitution of the Republic of South Africa, 1996; see, also, *Anglo Operations Ltd. v. Sandhurst Estates (Pty.) Ltd.* (n. 3) at 397I-J; *Fourie v. Minister of Home Affairs* [2005] 1 All S.A. 273 (S.C.A.); *Barkhuizen v. Napier* 2007 (5) S.A. 323 (C.C.), esp. in par. [35]. See, also, the Namibian decision in *Frans v. Paschke* 2009 (1) S.A. 527 (Nm.), in which the Court declared the common-law rule that an illegitimate child may not inherit intestate from his or her father to be unconstitutional and invalid.

[15] "Even from this brief, and necessarily superficial, survey it is apparent that widespread civilised practice favours a flexible approach to the relocation of servitudes. If that flexibility is soundly based I think we would be wrong to adhere blindly to an inference drawn from the views of Voet expressed at the end of the 17th century I am persuaded that the interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when

the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible": *Linvestment C.C. v. Hammersley* (n. 8) in pars. [30]-[31].

[16] In *Carmichele v. Minister of Safety and Security* (n. 14) par. [36] the Court explicitly stated that development of the common law in terms of s. 36 of the Constitution "must also be done in a way most appropriate for the development of the common law *within its own paradigm.*" (my emphasis)

[17] See e.g. *S. v. Zuma* 1995 (2) S.A. 642 (C.C.) par. [12], *Du Plessis v. De Klerk* 1996 (3) S.A. 850 (C.C.) par. [110]; *Carmichele v. Minister of Safety and Security* (n. 14) par. [36]; and cf. the analysis of Davis (n. 4) at 223, 226-232, 236-237.

[18] Davis (n. 4) at 228, 232, 237-238; cf., also, A.J. van der Walt "Un-doing Things with Words: The Colonisation of the Public Sphere by Private Property Discourse" 1998 *Acta Juridica* 270 at 278, where he wrote: "If we really want to reform or transform our legal system we have to consciously fight for meaning; we cannot be comfortable with what we inherit" and "we cannot give up the struggle for justice simply because we are inexorably caught up in the insidious linguistic web of tradition"; and see also 280-281. In "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1995) 100 *S.A.J.H.R.* at 171, Van der Walt observed that the "abolition of the civil law tradition was never a serious possibility, but complacency about its supposed virtues can pose a serious danger of the 'bad old authoritarian ways' slipping back into the new legal order" and that even "a superficial glance at the Constitution shows that the principles contained in it should guide the development of the new legal order".

[19] See, e.g., *BC Plant Hire C.C. T/A BC Carriers v. Grenco (S.A.) (Pty.) Ltd.* (n. 12); *Lever v. Purdy* 1993 (3) S.A. 17 (A.D.).

[20] See, e.g., *Minister for Safety and Security v. Van Der Merwe* 2011 (7) B.C.L.R. 651 (C.C.). In par. [103], however, Judge O'Regan noted: "In summary, I would emphasise that it is undesirable for this Court to decide important and complex issues of the common law as a court of first and final instance, and especially in circumstances where the issues have not been properly ventilated on the pleadings or in argument." See, further, *Van Der Merwe v. Taylor* (n. 11); *NM v. Smith* 2007 (7) B.C.L.R 751 (C.C.); *Barkhuizen* (n. 15); *Khumalo v. Holomisa* 2002 (8) B.C.L.R. 771 (CC).

[21] See, generally, I. Zajtay "The Permanence of Roman Law Concepts in the Continental Legal Systems" with an addendum by WJ. Hosten on "The Permanence of Roman Law Concepts in South African Law" 1969 *Comparative and International L.J. of Southern Africa* 181; see, also, R. Pound *Social Control through Law* (Hamden, Conn. 1968) 112-118 on the fundamental postulates which underscore private law in Western legal systems; cf., further, 133-134. See, also, D. Van der Merwe "*Es läßt sich nicht lesen* – Reflections on the Status and Continued Relevance of the South African Common Law" 1994 *J. of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 660 at 678-680.

[22] E.g., Hungary (see Zajtay & Hosten (n. 21) 183-186) and Denmark (see D. Tamm "Why Roman Law? Danish Arguments for the Study of Roman Law" 2010 (16-1) *Fundamina. A Journal of Legal History* 428-434; D. Tamm "Convergence of Legal Systems? - The Legal Historian in a Changing World" 1999 (5) *Fundamina* 1-7); for further interesting examples see G. Hamza *Wege der Entwicklung des Privatrechts in Europa. Römischrechtliche Grundlagen der Privatrechtwicklung in den Deutschsprachigen Ländern und ihre Austrahlung auf Mittel – und Osteuropa* (Passau, 2007).

[23] See, e.g., Zajtay & Hosten (n. 21) 182-183.

[24] Zajtay & Hosten (n. 21) at 192; E. Kahn "Hugo Grotius 10 April 1583 - 29 August 1645 – A Sketch of His Life and His Writings on Roman-Dutch Law" 1983 *South African L.J.* 192 at 203; cf., generally, Van der Merwe (n. 21) 660.

[25] In the Cape, this work was more popular than his *Compendium Iuris* which was a more concise work and which had gained widespread recognition in Europe: see Roberts (n. 8) 320-321.

[26] See Roberts (n. 8) 317 and, also, 322-323.

[27] See Du Bois & Visser (n. 2) 610.

[28] J. Dugard "Grotius, The Jurist and International Lawyer: Four Hundred Years On" 1983 *South African L.J.* 213 at 216-217 stated that "[t]he true heirs of Grotius are not those who cling to antiquity and abstention, but those who seek to shape the contemporary South African legal order in accordance with the values and principles of Roman-Dutch law expounded by Grotius and his successors".

[29] The Constitutional Court in *Le Roux v. Dey* (n. 5) par. [198].

[30] It is a well-known fact that Dutch jurists often "without any significant discussion or original contribution of their own, adopted the principles of Roman law": see the *dictum* in *Lever v. Purdy* (n. 19) par. [19] with regard to the culpability of a person in control of an owner's domesticated animal which had injured another; see, also, *Dormell Properties 282 C.C. v. Renasa Insurance Company Ltd.* (n. 9) par. [57].

[31] Cf. L.M. Du Plessis *Die Juridiese Relevansie van Christelike Geregtigheid* unpublished LLD Thesis, University of Potchefstroom (1978) 797 821-822.

[32] See *Barkhuizen* (n. 15) par. [82] in which the Constitutional Court observed that "[a]s the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law"; see, also, *Brisley v. Drotsky* 2002 (4) S.A. 1 (S.C.A.) pars. [22]-[24].

[33] (n. 3) at 369E-G.

[34] *Barkhuizen* (n. 15) in par. [75]: "For instance, common law does not require people to do that which is impossible. This principle is expressed in the maxim *lex non cogit ad impossibilia*: This maxim derives from the principles of justice and equity which underlie the common law." See, also, *Maphango (Mgidlana) v. Aengus Lifestyle Properties (Pty.) Ltd.* (611/2010) [2011] S.C.A. available at http://www.saflii.org/ par. [24]; *Thermaine Investments (Pty.) Ltd. t/a Improvair v. Pareto Ltd.* (5449/2011) [2011] W.C.H.C. available at http://www.saflii.org/ par. [11]; *Bredenkamp* (n. 11) in par. [46].

[35] See, also, S. van der Merwe, L.F. van Huyssteen, M.F.B. Reinecke & G.F. Lubbe *Contract. General Principles* (Lansdowne 2007) 191ff; Zimmermann *The Law of Obligations* (Cape Town 1990) 697-715.

[36] Cf., also, Grotius *Inleiding* 3.1.19 and 3.30.17.

[37] For a brief synopsis of the South African courts' approach to this rule, see Zimmermann (n. 35) 865-866.

[38] 1939 AD 537 at 542.

[39] *Southern Sun Hotel Interests (Pty.) Ltd. I.R.O. Southern Sun Waterfront Hotel v. C.C.M.A.* (C255/09; C362/09) [2011] available at http://www.saflii.org/ par. [28], quoting the Labour Appeal Court in *Kylie v C.C.M.A*. 2010 (4) SA 838 (L.A.C.) par. [56]. In the latter case it was further observed that "a tribunal or court is engaged with the weighing of principles; on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy...". See, also, R. Zimmermann (n. 35) at 865-866.

[40] Pound (n. 21) 115. See, also, *Lever v. Purdy* (n. 19) par. [13] in which the Court noted that the principle underlying a rule "may be a useful guide to determine the limits of a particular rule".

[41] *Le Roux v. Dey* (n. 5) par. [199]. Cf., too, Van der Merwe (n. 21) 661-662.

[42] *Le Roux v. Dey* (n. 5) par. [198].

[43] According to Davis (n. 4) at 237 the Constitutional Court has failed to write a new South African story of our law by adhering to devotedly to the common law. At 237 he observes: "But the jurisprudence offered by the [Constitutional] Court ... appeared to work with a timeless quality of existing common law. There was little examination of the extent to which the Constitution demanded an engagement between the old and new in order to construct a new body. He shows (at 223) how the Constitutional Court in *S. v. Zuma* (n. 17) reverted to and confirmed common-law principles, unadulterated by apartheid legislation. In that case the Court observed: "The concepts embodied in these provisions are by no means an entirely new departure in South African criminal procedure. The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision. The resulting body of common law and statute law forms part of the background to s 25 [of the Constitution]" (*S v. Zuma* (n. 17) par. [12]). The Court further commented in par. [110]: "The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate." See further D. Davis & K. Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 *South African J. of Human Rights* 403 at 414: "[T]he courts have made little effort to theorise the Constitution's impact on the common law, to sketch the content of the constitutional vision of a free and equal society, or to develop methods of common law reasoning suitable to the new dispensation". On the reconciliation of the common law and the Constitution see, also, J.V. van der Westhuizen "A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy" 2008 *African Human Rights L.J.* 251 at 267.

[44] A term coined by Davis J in an *obiter dictum* in *Mort v. Henry Shields-Chiat* 2001 (1) S.A. 464 (C.); at 474J-475F he stated: "Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community ... This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity."

[45] (n. 12) par. [43].

[46] In *Robinson v. Randfontein Estates* 1925 A.D. 173 Innes C.J. traced the civilian roots of this principle: "The principle that the Courts will not enforce contracts which are contrary to good morals or against public policy has its roots in the Civil Law. *Ulpian,* dealing with pacts *(Dig. 2, 14:* 7, sec. 7) quotes the edict of the praetor: '*Pacta conventa quae neque dolo malo, neque adversus leges, plebiscita senates consulta, edicta principum, neque quo fraus cui eorum fiat, facta erunt servabo.*' The words are wide, but Gothofredus in his note makes a significant comment by adding after '*leges,*' the words '*vel bonas mores*'. The correctness of his view is endorsed by a pronouncement of *Paul (Dig.* 2: 14:27, sec. 4): '*Pacta quae turpem, causam continent non sent observanda; veluti si paciscar ne furti agam vel injuriarum si feceris; expedit enim timere furti vel injuriarum paenam, sed post admissa haec pacisci possumus*'." This Roman and Roman-Dutch foundation of the principle was confirmed by Cameron J.A. in *Brisley v. Drotsky* (n. 32) par. [4]. See, also, the seminal decisions in *Sasfin (Pty.) Ltd. v. Beukus* [1989] 1 All S.A. 347 (A.) and *Magna Alloys and Research S.A. (Pty.) Ltd. v. Ellis* 1984(4) S.A. 874 (A.) at 891 G).

[47] (n. 12) par. [28]. See, also, *African Dawn Property Finance 2 (Pty.) Ltd. v. Dreams Travel and Tours C.C.* 2011 (3) S.A. 511 (S.C.A.) par. [22].

[48] See, generally, the following works on the early legal history of these countries: J.R. Crawford "The History and Nature of the Judicial System of Botswana, Lesotho and Swaziland – Introduction and the Superior Courts" in 1969 *South African L.J.* 476 and in 1970 *South African L.J.* 76; J.H. Pain "The Reception of English Law and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland" 1978 *Comp. and Int. L.J. of Southern Africa* 143; A.J.G.M. Sanders "Legal Dualism in Lesotho, Botswana, Swaziland. A General Survey" 1985 *Lesotho L.J.* 47; T.W. Bennett *Application of Customary Law in Southern Africa* (Cape Town 1985) 39ff. esp. 49-62; A. Molokomme "The Reception and Development of Roman-Dutch Law in Botswana" 1985 *Lesotho L.J.* 121; O. Tshosa *National Law and International Human Rights Law: Cases of Botswana Namibia and Zimbabwe* (Aldershot 2001) 30ff. See, too, G.J. van Niekerk "The Harmonisation of Indigenous Laws in Southern Africa" 2008 (14-2) *Fundamina. A J.of Legal History* 155ff.

[49] Section 6 of the General Law Proclamation 2b of 1884 (Lesotho); s. 2 General Law Proclamation 10 Jun. 1891(Botswana).

[50] In 1915, South Africa took control of Namibia, a former German protectorate and at the time officially a United Nations Trust Territory, and administered it as one of its provinces. Accordingly, until its inpendence in 1990, Namibian external legal history was identical to that of South Africa. In 1990, s. 66 of the Namibian Constitution confirmed the position of Roman-Dutch law as the common law of that country: See K Shillington *History of Africa* (Oxford 2004) 327-329, 340-342, 460; H.R. Hahlo & E. Kahn *The Union of South Africa. The Development of its Laws and Constitution* (London 1960) 6-8, 129.

[51] In Botswana, surprisingly, South African judicial precedents are consulted also in criminal law and procedure despite the fact that Botswana criminal law has been codified in a Penal Code based on English law and that its Criminal Procedure and Evidence Act, too, is founded on English law: see C.M. Fombad "Mixed Systems in Southern Africa: Divergences and Convergences" 2010 *Tulane European and Civil Law Forum* 1 at 13. S. 252(2) of With regard to the other countries, see, generally, S. Scott "Some Thoughts on the Law of Property in Swaziland" 2006 *Comp. and Int. L.J. of Southern Africa* 152 at 153-154; 160-162; A.J.G.M. Sanders "Law Reporting in Swaziland" 1985 (29-1) *J. of African Law* 94-102; C. Rautenbach "Comments on the Constitutional Protection of Religion in Swaziland" 2008 *African Human Rights L.J.* 432 at 437-438; B. A. Dube "The Law and Legal Research in Lesotho" available at http://www.nyulawglobal.org/Globalex/Lesotho1.htm# Common law (accessed 25 Jul. 2011).

[52] See, e.g., GJ van Niekerk "The superior courts and legal pluralism in the last decade of the nineteenth century" 2010 (16-1) *Fundamina* 472-485.

[53] See, e.g., the unreported South African case of *Maduna v. Herschel Taxi Association* (T.H.C.) (case 1135/1997 unreported) and the case discussion by D. Koyana "Land Tenure: Conflict between Common Law and Customary Law: *Maduna v Herschel Taxi Association and Others*" 2002 (4) *De Rebus* 53; cf., also, S. Scott (n. 51) at 158 who, as in the *Maduna* decision above, points out the interesting similarity between the right to land of a person who has been allocated land in terms of Swazi customary law and *emphyteusis* in Roman law.

[54] (CIV/APN/27/2000) L.S.C.A. available at http://www.saflii.org.

[55] Cf. *contra* J-L. Halpdrin "The Concept of Law: A Western Transplant?" 2009 *Theoretical Inquiries in Law* 333 at 343-346.

[56] *Idem* at 354.

[57] *African Dawn Property Finance 2 (Pty.) Ltd. v. Dreams Travel and Tours C.C.* (n. 47) par. [27].