

THE RELEVANCE OF THE PAST IN PREPARING FOR THE FUTURE: A CASE FOR ROMAN LAW AND LEGAL HISTORY

Caroline Nicholson*

1 Introduction

A recurriculization of the South African LLB degree took place in 1997 for purposes of the introduction of the four-year LLB degree in 1998. This recurriculization was necessary to realise transformation within legal education and training¹ and was informed by three principles agreed to by the South African Law Deans (SALDA) in 1997, namely:

- (i) South African law exists in and applies to a diverse or pluralistic society;
- (ii) skills appropriate to the practice of law must be integrated into the degree; and
- (iii) faculties must strive to inculcate ethical values in students.²

Leslie Greenbaum notes a disquieting disjuncture between these guiding principles and the current realities of legal education. She notes: “The study suggests that reactive conservatism on the part of legal academics resulted in law curricula that replicate a cycle of disadvantage, and fail to achieve transformative learning which integrates knowledge, skills and ethical values”.³ As a consequence of this recurriculization, most faculties of law in South Africa have gradually reduced the amount of time students spend on legal history and Roman law.⁴ One of the primary reasons given for this has

1 See Nicholson “A new LLB for a new South Africa 1999” (40-1) *Codicillus* 27-35.

2 McQuoid-Mason “Developing the law curriculum to meet the needs of the 21st century legal practitioner: A South African perspective” 2004 *Obiter* 101; Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose* (PhD, University of KwaZulu-Natal, 2010) iv, available at <http://hdl.handle.net/10413/759> (27 Jun 2011).

3 Greenbaum (n 2) v.

4 Eg, the University of Pretoria did away with the courses legal history and Roman law and replaced them with a single course on historical foundations of South African private law. On the University of

* Professor, Department of Jurisprudence, University of Pretoria.

been the need to pare back the core curriculum to those courses perceived to be central to legal education and training.⁵ Many courses have been thus affected, by being stripped of their compulsory status and relegated to the ranks of elective courses.⁶ Furthermore, Greenbaum alleges that the determination of the core curriculum succumbed in some instances to vested interests of “senior staff members, who were able to apply pressure to secure the positioning of their particular areas of interest”.⁷ Here Greenbaum is referring to the process at the University of Kwa-Zulu Natal; however, it is the writer’s belief that this was the situation encountered at most, if not all institutions. Whether Roman law and legal history were sacrificed to vested interests cannot be stated with any confidence, however, they certainly suffered at the hands of the recurriculization.

There is also some resistance from students and academics to these courses which they regard as irrelevant to the South African jurist who, they believe, should be exposed to an “Africanised” curriculum designed to serve a post-apartheid South Africa – an Africa free from the “foreign” values reflected in the official legal system. Many South Africans, especially blacks, regard the official legal system with suspicion because of the negative impact it had on their lives: it denied them human rights and recourse to justice, and was manipulated to further the implementation and enforcement of apartheid in South Africa.⁸

The purpose of this article is to establish the role that Roman law and legal history play in the modern South African legal system, and to expand upon the value that their study adds to the education and training of the modern jurist.

That in the current legal context there are difficulties associated with teaching Roman law and legal history to students who are often underprepared is undeniable. However, to eliminate this component of the law degree would ill serve prospective jurists and deny them exposure to fundamental principles and concepts that underlie such crucial areas of the South African law as the law of things and the law of obligations.⁹ In this article

South Africa, see Nicholson (n 1) 32-33. On the place of Roman law in the curriculum, see Greenbaum “Foundations of South African law: Teaching legal history from a thematic perspective” 2003 *Fundamina* 95; Le Roux “The de-romanisation of legal history courses at South African universities” 2000 *Fundamina* 129; Ogunronbi “The challenges to legal studies in an era of transformation” 1998 *SALJ* 499; Olivier & Du Plessis “Recurriculization and legal history: Imperatives, needs and the new higher education context” in Spruit, Kamba & Hinz (eds) *Roman Law at the Crossroads* (2000) 105 esp 110ff.

5 See Boshoff “The four-year LLB – Part of a package” 1997 (Oct) *De Rebus* 663.

6 Eg, comparative law.

7 Greenbaum (n 2) 3-4.

8 See in this regard Moulder “Africanising our universities: Some ideas for debate” 1988 *Theoria* 1; Moulder “Universities and Africanisation” 1995 *SAJHE* 7; Greenbaum (n 2) 19-20; Church “Reflections upon reconstruction and legal education” 1996 *THRHR* 114-117; Moseneke’s contribution in Hosten, Van Wyk, Moseneke, Bleiden & Scott “Part 1: What does the legal profession require?” 1990 (31-1) *Codicillus* 8 at 15; Andrews “Legal education in a changing South Africa” 1990 (5-1) *African Law Review* 10 at 11-12; McQuoid-Mason (n 2) 101.

9 Kleyn “The role and function of Roman law in South African legal education” in Spruit, Kamba & Hinz (n 4) 73; Nicholson “The challenges of teaching legal history to a demographically diverse and educationally under-prepared student body” 2005 *Fundamina* 50; Greenbaum (n 4) 95-96; Le Roux (n 4) 129-130; Ogunronbi (n 4) 499-500. Nicholson notes (at 50) that the current South African student

a case will be made for the retention of Roman law and legal history as components of the LLB degree.

As will appear below, legal history and Roman law are essential to the modern jurist. Their relevance is enormous although, sadly, many students and even some legal academics are unaware of the vital role they play. It is the purpose of this article to highlight the relevance and importance of Roman law, legal history and the legal-historical argument in modern law and to ponder some preliminary thoughts on how they can be better integrated to ensure that knowledge of critical importance is not lost forever. This discussion is opportune now as the LLB curriculum is again under scrutiny and the discussion about the retention or rejection of Roman law comes up with, as du Plessis puts it, “nauseating regularity” at such times.¹⁰ Opinions are divided and premised upon arguments surrounding the purpose of legal education.¹¹

The Council for Higher Education recently issued a preliminary report (CHE Report) on its research into the effectiveness of the LLB degree in South Africa for its stated purpose.¹² The Report served before the South African Law Deans Association on 3 November 2010 and the National Legal Education Liaison Committee on 4 November 2010; was presented at a national stakeholder’s colloquium on 11 November 2010 and, finally, was presented to the Society of Law Teachers of Southern Africa on 18 January 2011. The Council for Higher Education LLB Curriculum Project was designed to investigate what law graduates have learned during their studies and the extent to which they are prepared for their different professional career paths. This study also provided an opportunity to assess the impact on graduate preparedness of changes made to the LLB curriculum since 1998, particularly the introduction of the four-year undergraduate LLB.

The Report contains a number of statements regarding the purpose of the LLB degree. In response to the Council for Higher Education’s request, the South African Law Deans Association indicated that it views the LLB programme as providing “basic learning in law, foundational to various law-related professions”. It enumerated the knowledge, skills and abilities that LLB graduates should have in the following terms:

An LLB graduate should have:

- knowledge of the key disciplines of South African law as a distinct field of learning, including the essentials of the history, sources and practical operation of the law;
- skills associated with the effective articulation and communication of legal solutions to problems governed by law. These include advanced language skills (oral and

body is characterised by diversity, both cultural and economic, which has the potential to alienate the students from, *inter alia*, their study material. This alienation may be exacerbated by educational disadvantage prevalent amongst large numbers of students.

10 Du Plessis “Legal history and methods” 2010 (16-1) *Fundamina (Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 64.

11 The debate on Roman law and its place in the South African legal curriculum predates the 1998 recurriculization. See Nicholson (n 9) 54.

12 Pickett *The LLB Curriculum Research Report* Council for Higher Education (Nov 2010) (CHE Report).

written), analytical skills and an understanding of the prevailing social and legal culture; and

- the ability to keep abreast of new developments in law, to research the sources of law effectively and to develop new and specialised expertise in one or more disciplines of the law independently.¹³

The Law Society of South Africa asserts that the Department of Justice shortened the LLB degree in 1998 from five years to four years to make it more accessible to previously disadvantaged students.¹⁴ It asserts further that some experts believe that a consequence of the four-year degree has been that students are focusing on the basic elements of law only. This, according to the Law Society, means that students do not have time to study subjects that could provide them with more insight into the society in which they will practise. Legal Education and Development (LEAD), an important body of the LSSA, therefore submits that the curriculum should be overhauled and, to this end, has submitted a core curriculum that would be acceptable to itself.¹⁵

What is regarded as essential to the curriculum differs depending upon whose opinion one is seeking. Legal practitioners, academics, business persons and students will all emphasise different elements of the curriculum. A thorough examination of the CHE Report discloses that, although it is not statistically representative,¹⁶ there is consensus amongst respondents that the degree is either too short or, if not too short, needs to be remodelled to adapt it to the available time.¹⁷ The Report should thus result in a re-evaluation of the LLB curriculum and its core components. It is to this end that I make a case for legal history and Roman law.

A brief overview of the current legal-history and Roman-law component of the curriculum at South African law faculties reveals that there is no consistency in their approach to the teaching of these subjects in the LLB degree. Certainly the amount of time and energy dedicated to these courses has declined over the last decade at the majority of institutions.¹⁸

13 *Idem* 141.

14 Naidoo (ed) "Nationwide review of LLB degree underway" www.polity.org.za/article/llb-degree-inder-review-2010-01-15 (3 Oct 2011).

15 The core curriculum suggested by the Law Society of South Africa is to be found in App 4.4.2 of the CHE Report. Some employers suggested that universities should concentrate on important subjects such as contract, corporate, tax, property, and constitutional law: CHE Report (n 12) 89.

16 *Idem* 21.

17 *Idem* 43-47.

18 As indicated, the Faculty of Law at the University of Pretoria currently offers legal history in combination with Roman law in the form of the Historical Foundations of South African Private Law. The University of South Africa has renamed legal history and Roman law as Origins and Foundations of South African Private Law. The University of the Witwatersrand offers Foundations of South African Law, a course which will be abolished at the end of 2011. The University of the Western Cape offers Introduction to Legal Studies which may include some elements of history and Roman law. The University of Cape Town offers Foundations of South African Law, Introduction to Legal History in South Africa being one of the seven elements of the course, and a course in Comparative Legal History. This course aims to give students a solid background to the development of private law. The first semester begins with an overview of the development of the law from the classical

In making the case for the retention of Roman law and legal history as foundation courses, I shall mention some aspects of modern law that still closely resemble their Roman precursors, and take a brief look at a selection of Constitutional Court cases in which reference was made to the common law. These cases will illustrate the value of a full understanding of Roman law to the modern African jurist as well as the importance of an ability to present a cogent legal-historical argument rooted in South African legal history, incorporating the Dutch and English influences.

2 The case for Roman law

In 1946, in the foreword to the fourth edition of his *Introduction to Roman-Dutch Law*,¹⁹ Lee acknowledged that with legal development comes a reshaping, and in some instances a disintegration, of the old law. At that time the author predicted that the following fifty years would see a decline in recourse to the old authorities and that Roman-Dutch law would be superseded as a source of South African law by the consolidation of South African law through case authority and legislation. Despite this anticipated process, the author stressed that certain Roman-Dutch institutions are “stubbornly persistent”. Lee was not blind to the fact that in certain areas Roman-Dutch law may be burdened by ancient traditions that are “out of harmony with the spirit of the age”. Despite this observation, there is no escaping the undeniable fact that Roman-Dutch law is still a major component of the South African common law of South Africa.

period of Roman law, through the Middle Ages to current law. Most of this semester is devoted to a consideration of Roman-law rules in identified areas. The University of KwaZulu-Natal offers Foundations of South African Law. This course incorporates an overview of the origins of South African law and its development. It includes Roman-Dutch law, indigenous law and English law. It pays particular attention to, *inter alia*, ownership, possession and contract but advances into access to justice, HIV/AIDS, legal writing, etc. The University of Stellenbosch has retained Roman law and Introduction to Law. In the former course both the external history, including Roman constitutional law and sources of law as well as Roman private law are taught. Rhodes University offers Foundations of Law in the first year. In the second semester certain themes, institutions and rules, of particular importance in modern South African law are identified and their development is traced from Roman law to modern law. Professor Visser, who is responsible for these courses, states that “the main focus in this part of the course is to demonstrate the temporal contingency of legal rules as well as the importance of understanding the background of a modern legal rule”. The University of the Free State offers a semester course in legal history, the objective of which is “to enable students to trace and critically evaluate the sources and historical development of the South African law”. In addition, this University offers a second semester course in legal history in the fourth year. Roman law is catered for by a semester course in the first year in which students are introduced to the Roman law of persons, succession, things, obligations and procedural law. Nelson Mandela Metropolitan University (NMMU) offers a semester course in legal history that covers, *inter alia*, the history and development of South African private law. The University of Zululand offers a semester course in Foundations and Sources of South African Law which entails discussions of the history of South African law including Roman-Dutch law, English law, and other sources such as indigenous law, common law, legal precedent and the Constitution. Unfortunately general information on course content for the Universities of Venda, North West, Limpopo and Fort Hare is not readily available on their websites.

19 Lee *Introduction to Roman-Dutch Law* (1946).

Roman-Dutch law has roots in both Germanic customary law and Roman law. Roman law was relied upon because it was “logical, coherent, and complete”.²⁰ It was integrated into the curricula of European law schools because of its influence on subsequent legal development, especially in the Western world as in South Africa. The situation in Europe has, however, changed and some European law schools no longer offer Roman law, while some offer it only as an elective course and some have retained it as a core component but have created the potential for students to avoid studying it. It is clear from what was stated above that this disturbing European trend is sadly discernible in South Africa too.²¹

Roman law is a “unique legacy of the ancient western world”,²² viewed by the Romans as “the art of the good and the just”.²³ Its greatest and most lasting influence has been in the sphere of private law but it also spawned such fields of law as public international and private international law.²⁴

Most importantly, Roman law permitted jurists to create and develop legal principles by fusing existing legal principles, engendering in jurists an ability to depart from legal principles that although dictated by logic would engender injustice in individual cases. The application of Roman law was thus characterised by flexibility that facilitated its adaptation to accommodate changing social needs.²⁵ This adaptability and willingness to reinterpret astutely makes the Roman jurist a model for the modern jurist when called upon to uphold a legal rule but at the same time to modify its substance.²⁶ The ability to interpret creatively and innovatively is a fundamental skill essential in the development of any legal system that requires existing institutions to be utilised for new purposes.

Information on the first life of Roman law is largely sourced from the rather inaccurate *Digest* of Justinian’s *Corpus iuris civilis*, the study of which was enthusiastically pursued by European universities.²⁷ The study of the *Digest* became increasingly systematic and the treatises and commentaries on it subjected it to extensive interpretation and distinction with a view to adapting it to meet the legal needs of their time. Through this process Roman law evolved into the European *ius commune* of the latter 1400s and the 1500s²⁸ and is currently being used in the creation of a modern Western European *ius commune*.²⁹ Roman law had such a pervasive influence on Western legal development that it was regarded as relevant to the teaching of law in countries in which Roman law was never applied. One such country is Denmark.³⁰ The reason for the inclusion of

20 *Idem* at 4.

21 See n 18 *supra*.

22 Thomas *Textbook of Roman Law* (1976) 3-4.

23 *Idem* 4.

24 *Idem* 9-12.

25 *Idem* 5.

26 *Ibid*.

27 *Idem* 6-7.

28 *Idem* 9.

29 See text associated with n 57 *infra*.

30 Tamm “Why Roman law? Danish arguments for the study of Roman Law” 2010 (16-1) *Fundamina (Libellus ad Thomassium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 428.

Roman law in the Danish legal curricula was its influence on the development of Danish legal science, particularly regarding the alignment of the legal system with the principles of natural law, of which Roman law is regarded as the source.³¹ Roman law has in fact displayed an admirable depth and consistency. It exerted a lasting effect on European law.³² The Roman ability to harmonise law with the nature of things,³³ coupled with the perception of it as a model for the sensible “rule of law”, was regarded as having paved the way for subsequent codification. Today, in Denmark, Roman law is taught as an elective course to students studying modern law, especially contract and delict.³⁴

In South Africa, Roman law institutions are still of vital importance. The law of property has at its core Roman law.³⁵ Thus, despite modern adaptations and advances it still wears a mantle of Roman law that requires that Roman-law concepts and institutions be fully understood. Nor has the law of obligations shed its Roman-law character, and it cannot be properly appreciated by a jurist ignorant of the development of the modern laws from their ancient roots.³⁶ The concepts protection of possession, elasticity of ownership, *nemo plus iuris, dolus, culpa*, no liability without fault, the protection of reputation, dignity and personal integrity, liability for damage caused by animals (strict liability), the reasonable man and many more legal concepts and institutions are remnants of Roman law. These examples of the Roman-law heritage are obvious; although there are many more that are less obvious.

Cornie van der Merwe makes a strong case for the proposition that although Roman law adhered to the maxim *superficies solo cedit*, certain exceptions to this maxim were already recognised in Roman times.³⁷ He relies upon a selection of texts from the *Digest* that may be interpreted in such a way as to support his argument that some forms of individual ownership of sections of a building existed in classical Roman law³⁸ and emphasises that the phenomenon was definitely recognised in the post-classical period in the Roman provinces of Syria and Palestine.³⁹

Alfredo Rabello shows that the Unidroit Principles of International Commercial Contracts (Unidroit Principles) and the Principles of European Contract Law (PECL) may also trace their development back to the principles of impossibility found in Roman law of contract.⁴⁰ He asserts that a *rapprochement* between the civil- and common-

31 *Idem* 429.

32 *Idem* 433.

33 *Ibid.*

34 *Idem* 434.

35 Thomas, Van der Merwe & Stoop *Historical Foundations of South African Private Law* (2000) 133.

36 *Idem* 213.

37 Van der Merwe “The doctrinal clog on the historical development of condominium by the maxim *superficies solo cedit*” 2010 (16-1) *Fundamina (Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 459 at 461ff.

38 *Idem* 463-465.

39 *Idem* 466.

40 Rabello “The ‘impossible contract’: From Roman law to the Unidroit Principles of Commercial Contracts and the Principles of European Contract Law” 2010 (16-1) *Fundamina (Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 346-358.

law traditions regarding impossibility has spawned international documents such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law.⁴¹ Rabello then indicates that although the modern approach that equates initial and supervening impossibility of performance would appear to be the antithesis of the Roman-law approach, the law as practised in Italy reflected that this modern approach was the one taken by the Italian judges.⁴²

Pascal Pichonnaz explores the development of the *interpellatio*.⁴³ He, too, refers to the move away from the Roman-law principles of default or *mora*, impossibility of performance, incomplete or faulty performance and non-performance, found in some of the continental codifications, to a conflation of these in the single concept of breach of contract found in the CISG, Unidroit Principles and PECL.⁴⁴ He surveys the punitive nature of default in Roman law, shifting the risk and founding damages claims for delay in appropriate cases,⁴⁵ and the need to make a demand or give notice (*interpellatio*) in certain circumstances.⁴⁶ Given the punitive nature of default, fault was required as was notice. The CISG and Unidroit Principles no longer require notice in order for a claim in damages for non-performance to arise. They do, however, require that the buyer or seller must give notice of an additional time limit before the contract can be avoided for non-performance.⁴⁷ Thus, a debtor was in default in Roman law only where performance was possible and the debtor knew or could reasonably be expected to have known of the specific time when his performance was due. Notice served the purpose of ensuring that the debtor was possessed of this knowledge.⁴⁸ So it is that Pichonnaz succeeds in showing that there is a “continuum from Roman times” in that Roman law required a notice warning the debtor that his failure to perform would lead to punitive consequences, and modern law requires a notice warning the debtor that failure to perform will result in the avoidance of the contract.

Jannie Otto⁴⁹ demonstrates that the modern invention, “consumer credit and consumer protection” is indeed not entirely modern and he takes an historical journey tracing its roots back to Roman protection of consumers, although the Romans did not have modern terminology.⁵⁰ The Romans recognised the warranty against latent defects

41 *Idem* 357.

42 *Idem* 358.

43 Pichonnaz “The evolving function of *interpellatio* in case of default” 2010 (16-1) *Fundamina (Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 274-287.

44 *Idem* 274-275.

45 *Idem* 275-277.

46 *Idem* 277-281.

47 *Idem* 286-287. See art 45.1 CISG read with art 61.1(b); arts 8:106 and 9:303 II PECL; art 7.1.5 Unidroit Principles.

48 *Idem* 278. See art 47.2 CISG read with art 63.2.

49 Otto “The history of consumer credit legislation in South Africa” 2010 (16-1) *Fundamina (Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History)* 257-273.

50 *Idem* 258.

and the *ultra duplum* principle limiting interest.⁵¹ The Romans thus paved the way for consumer protection. Very little in the field of consumer protection is entirely new. Usury legislation has precursors in Roman and Roman-Dutch law.⁵² Although this area of the law has become more sophisticated and complex, it remains fundamentally rooted in Roman law.

These are but a few examples of the unexpected persistence of Roman law in contemporary law in South Africa and Europe; they are not intended to constitute a *numerus clausus*.

3 The case for legal history and the historical argument in modern law

First, a study of history gives context and texture to contemporary law. The present law grows out of the past, and the future out of the present. Knowledge of legal history seems an indispensable guide both to the present law and to decision making on its future.

Secondly, an uncodified system does not break with history, so that ancient history remains part of the living law.⁵³

If sources of law are to be understood, their historical context is of vital importance. To this end “historical sensitivity”⁵⁴ is required. This statement is especially true in the South African system in which the past is still of practical value today.⁵⁵ Thus the past remains of vital importance to the present.

Clearly, law constitutes both a product and an instrument of social engineering. Without a grasp of the historical factors that influenced its development there can be no insight into where South African law is today and how it might develop in the future. That “law is politics” may be seen clearly when tracing the development of Roman, Roman-Dutch and English law and their influences on South African law. Indeed the need to Africanise the LLB curriculum is as much about politics as it is about law.⁵⁶ Many of the shortcomings of the modern South African legal system are a direct result of political considerations that shaped South African law in the past. For this reason law and history are as closely entwined as law and politics. In applying and developing modern law, the modern jurist must be able to construct a well-reasoned legal-historical argument and therefore both Roman law and legal history are worthy of an important place in the LLB curriculum.

51 *Ibid.*

52 *Idem* 260-262.

53 Reid & Zimmermann (eds) *A History of Private Law in Scotland: Vol 1: Introduction and Property* (2000) 11.

54 *Ibid.*

55 Zimmermann “‘Double cross’: Comparing Scots and South African law” in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 4.

56 Read, eg, Woolfrey “Curriculum development in legal education – Some reflections” 1995 *SALJ* 151.

Furthermore, with the increasing emphasis on legal comparison, a thorough knowledge of the history and development of the local and foreign law is essential. In order to contextualise legal development, the comparativist must understand the history, politics, economics and social context within which a legal system operates.

In Europe, the fate of Roman law has been tied to the concept of the harmonisation of European law and the development of a new European *ius commune*. This idea that the importance of Roman law lies in its role in the harmonisation process has been used by those opposed to its continuing grasp on the curriculum, to illustrate the fact that Roman law is only important insofar as it relates to European private law and has no independent claim to respect and study.⁵⁷ Arguments that Roman law has an important role to play in the harmonisation process have been deliberately misinterpreted by many, including critical legal theorists, in order to undermine the relevance of Roman law in Europe today.⁵⁸ These critics emphasise the present and the future, at the expense of the past.⁵⁹

Tying Roman law to European private law is but one approach that may be taken. This view overlooks the intrinsic value of Roman law, which teaches students how to think like lawyers. Patterns of legal thought that have emerged over a period of time will provide reasons why the law has developed in a particular manner and how the law has accommodated diversity. Jurists cannot properly appreciate the legal rules that are the tools of their trade without respecting the foundations upon which they are built. In the words of Glenn,⁶⁰ “it is true that human life without recall of the past is scarcely imaginable”. He pertinently stresses that the past may be difficult to retain and may disappear. Those who regard history as a “load of ancient lumber” associated with corruption or past injustice and the perpetuation of inequality, may oppose its teaching⁶¹. Nevertheless, the past remains an invaluable tool in “revolving the law” and in acting as a catalyst for change.⁶² South Africa has a legal system in which cases, legislation and texts of the past retain practical significance, so that the past and the present remain inextricably intertwined.⁶³

The following sample of Constitutional Court cases illustrates clearly the importance of a thorough understanding of Roman law and legal history. Roman law has much to offer in and of itself but it is most important to the South African jurist in so far as it was received into the Roman-Dutch common law. Similarly, important concepts adopted into the common law from English law remain important. Thus, as may be seen from the following discussion, the historical cannot be discounted when considering modern legal development. That is not to say that Roman, Roman-Dutch or indeed English legal principles are being directly applied in the cases below, simply that legal-historical

57 Du Plessis (n 10) 65. On Zimmerman’s views, see “Roman law and comparative law: The European perspective” 1995 *J of Legal History* 21-33 and Du Plessis (no 10) 67-70.

58 Du Plessis (n 10) 66.

59 *Ibid.*

60 Glenn *Legal Traditions of the World* (2004) 7.

61 *Idem* 17.

62 *Idem* 18, 23.

63 Reid & Zimmermann (n 53) 4.

arguments based upon South African common law, influenced both by Roman-Dutch and English law, continue to be offered.

In *Crown Restaurant CC v Gold Reef City Theme Park (Pty) (Ltd)*,⁶⁴ the Constitutional Court was approached for leave to appeal a High Court judgment. The applicant sought a reintroduction of the Roman-law equitable remedy, the *exceptio doli generalis*. The *exceptio* was “buried” by the Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*.⁶⁵ The Constitutional Court did not deal with the issues raised by the applicant since they had not been raised in the High Court.⁶⁶ Leave to appeal was thus denied. It is unfortunate that the matter was not raised in the High Court as this could have opened the door to an interesting and innovative argument in the Constitutional Court. Instead, all the case actually illustrates is that the potential exists for such an argument to take place in future.

In *Dikoko v Mokhatla*,⁶⁷ a defamation case, the court, in assessing the quantum of damages, referred to the *actio iniuriarum* as a Roman remedy available to a person whose personality rights were infringed by the actions of another. In determining whether a wrongdoer could be ordered to retract a statement and to apologise, the court referred to the Roman-Dutch legal remedy of *amende honorable*.⁶⁸ In her judgment, Mokgoro J notes that, although the remedy has fallen into disuse, Willis J in the High Court expressed the view that it still forms part of South African law.⁶⁹ Certainly apology is a potentially important part of the solution to legal disputes in modern South African law.⁷⁰

In *Fose v Minister of Safety and Security*⁷¹ the Constitutional Court addressed the issue of punitive damages. In so doing it examined the damages that could be awarded in terms of the Aquilian action and for *iniuria*.⁷² In *K v Minister of Safety and Security*⁷³ relating to the vicarious liability of an employer for the delictual acts of an employee,⁷⁴ the Constitutional Court set aside the Supreme Court of Appeal findings.⁷⁵ The Supreme Court of Appeal had refused to develop the South African common-law rules on vicarious liability in order to render it “consistent with the spirit, purport and objects of the Bill of Rights” and found the respondent vicariously liable.⁷⁶ The decision of the Constitutional Court to develop the common law on vicarious liability rested upon considerations relating to the purport and spirit of the Constitution and the fact that the

64 [2007] 5 BCLR 453 (CC).

65 1988 (3) SA 580 (A).

66 Pars [3] and [6].

67 [2007] 1 BCLR 1 (CC).

68 Par [63].

69 Par [64].

70 Par [105].

71 [1997] 7 BCLR 851 (CC).

72 *Idem* pars [62] and [63].

73 [2005] 9 BCLR 835 (CC).

74 The case involved rape committed by three uniformed police officers on duty.

75 *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).

76 *Idem* par [14].

officers in question had committed an omission and a commission.⁷⁷ The Constitutional Court examined the common-law rules on vicarious liability in cases of an employee's deviation from the normal performance of his or her duties in circumstances where the deviation is intentional and results in a wrong.⁷⁸ In *Khumalo and Others v Holomisa*⁷⁹ the Constitutional Court examined the common-law principles relating to the onus of proof in defamation cases, as developed. The common-law principles of defamation were considered⁸⁰ and then measured against the Constitution.⁸¹ In *Masiya v Director of Public Prosecutions (Pretoria) and Others*⁸² the Constitutional Court examined its role in developing the common law, particularly the criminal law regarding the offence of rape. To this end the Court had to examine the common-law definition of rape and to assess it within the context of constitutional imperatives.

There are any number of cases in which reference is made to the common law. The above serve merely as an illustration.⁸³ What they clearly demonstrate, however, is that if one wishes to formulate cogent legal arguments an understanding of historical influences on legal development continues to be of importance.

4 Conclusion

The Council for Higher Education Report has revealed that the top ten priorities identified by academia and practice coincide to a significant degree.⁸⁴ Of these, many are so-called "skills-based" in nature. An investigation reveals that institutions are delivering knowledge more readily than skills. Thus jurisprudence and legal-historical subjects, viewed as knowledge-based rather than skills-based, are being taught well but are not valued.⁸⁵ Other teaching that appears to be successful but not valued is that on constitutional principles and non-legal or social-context based courses. This demand for increased teaching of clinical law and skills is neither new, nor limited to the South African context. In 1993, an entire issue of the *Oregon Law Review*⁸⁶ was dedicated to articles presented at an international symposium on legal education in law schools in a variety of countries in which this issue also arose.⁸⁷

In 1988, JC van der Walt examined the need to evaluate legal education and indicated that consensus had been reached in 1983 that universities were responsible for the academic

77 Per O'Regan J, pars [7] and [46]ff.

78 *Idem* pars [21]-[33].

79 [2002] 8 BCLR 771 (CC).

80 *Idem* pars [17]-[20].

81 *Idem* pars [35]-[45].

82 [2007] 8 BCLR 827 (CC).

83 See further Farlam & Zimmermann "The Republic of South Africa" in Palmer (ed) *Mixed Jurisdictions Worldwide. The Third Legal Family* (2001) 104.

84 CHE Report (n 12) 92-99.

85 *Idem*.

86 Vol 72.

87 England, Wales, Canada, Germany, Hungary, Russia, Australia, South Africa and Japan.

and theoretical training of the law students and that their professional training was the responsibility of the profession.⁸⁸ This allocation of roles was supported in 1997 by the Law Society and Nic Swart, Director of LEAD, is on record as saying “if one wanted to provide adequate academic tuition it would be impossible to include practical training programmes” in the four-year LLB.⁸⁹ Nicholson⁹⁰ stresses that practical training was envisaged to remain within the purview of practice in the 1998/1999 re-curriculization of the LLB degree and, it is submitted, the reasons for this, offered at that time, remain valid today. It should be borne in mind, however, that legal skills and practical training are two different things and that reading, writing and thinking skills essential to any jurist must be developed throughout the curriculum. No longer should “[l]ecturers pretend to teach the analytical process necessary to discover the law, namely reasoning like a jurist”.⁹¹ They should in fact assist students to identify correct juridical solutions as influenced by socio-economic and political factors, prevailing ideology and other factors relevant to current social reality.

It is always good to examine what is being done and determine whether it is being done efficiently. Because law graduates must be equipped to deal with the realities of modern South African legal practice, a re-examination of the role and purpose of the LLB degree is to be welcomed. That the syllabus must be relevant and go beyond mere rote learning is beyond question.⁹² Graduates must develop their ability to apply acquired knowledge in an appropriate manner. To this end, calls for the integration of skills into the classroom have been heard for decades.⁹³ Sadly, however, Swart’s statement alluded to above on the impossibility of including practical training in the four-year LLB if adequate academic knowledge is to be transferred to the student, remains valid. Nevertheless students must learn how to identify appropriate law applicable to a given situation and understand how that law will be interpreted. They must be taught how to analyse the law and reason effectively. It is submitted that Roman law and legal history have much to offer in teaching these juristic skills. For this reason to simply replace a course on Roman law by a section on the legal development of the relevant modern South African law in each substantive law module will not suffice.⁹⁴ Certainly the origins of the rules of private law and concepts of public law can and should be taught in the relevant substantive law courses, but the process of positivisation of natural law and equity and the logical, reasoned approach to legal development will not be adequately addressed in this manner. Nor will the importance to modern South African law of South African legal historical development and the legal-historical argument be adequately addressed in this manner.

88 “Professionele opleiding en toegang tot die professie” 1988 *TSAR* 38 at 39.

89 Anonymous “Four-year LLB to be implemented in 1998” 1997 (Jan) *De Rebus* 14.

90 (n 1) 34.

91 Thomas “Dare to bare: Get a vision and reveal it” 1997 *De Jure* 364 at 365.

92 See Motala “Legal education in South Africa: Moving beyond the couch-potato model towards a lawyering-skills approach” 1996 *SALJ* 695.

93 *Idem* 695ff.

94 Nicholson (n 9) 54.

It should also be noted that the syllabi of law modules are extremely crowded so that there is little or no time within courses to dedicate to the historical antecedents of modern law. It is thus to be feared that any attempt to incorporate a substantial historical component into such courses would meet with some resistance and that this aspect of the work might then receive little more than a cursory mention.

I therefore suggest that innovative methods such as enquiry-based processes⁹⁵ be used to integrate the historical development of relevant legal rules, principles and concepts into substantive private-law and even public-law courses but that separate courses on Roman legal development and the history of South African law be retained. In this way the inherent value of these subjects to aspirant jurists will be preserved.

The University of Pretoria is currently reviewing all its LLB courses and considering the implementation of an enquiry-based approach to teaching that will enhance students' research, reading and writing skills whilst allowing a more integrated approach to the subject matter being taught. This should make the relevance of the various courses and their relationship to each other more evident to students. To this end, an integrated assignment will be offered in the second semester of the first year, in which students will be required to integrate their legal skills and the knowledge they have acquired in courses on Roman law, legal history and introduction to law. Furthermore, a colloquium on legal history and Roman law is planned for late 2011 or early 2012 at which lecturers in these courses will be able to exchange views on approaches to be taken to in the future.

While practice seems to be seeking legal mechanics rather than jurists, it is the writer's opinion that for lawyers to be socially conscious and ethical they must be exposed to courses such as legal history, Roman law and jurisprudence. These will be formative in their development into thinking, humane lawyers who will contextualise legal problems and avoid the simple, mechanical enforcement of rules and regulations.

Abstract

This article explores the role of Roman law and legal history in the training of the modern jurist. A case is made for the retention of Roman law and legal history as vital components of the LLB degree. In making this case, the writer explores the reasons for reconsidering the role of these courses at this time and the inherent value that both offer the aspirant jurist. The article concludes with some preliminary suggestions on how these courses may be better integrated into the curriculum.

95 Research assignments and assignments could be used to force students to self-study and, at the same time, to acquire valuable research and writing skills.