Department of Jurisprudence

The Origins of *South African Law*

Only study guide for
FLS101V

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Preface

In the LLB programme there are two modules that deal with the history of South African law. Both these modules are offered at first-year level. *The Origins of South African Law* (FLS101V) deals with external legal history. It provides an overview of the sources and factors which have contributed directly or indirectly to the development of the South African legal system. The other ''history'' module, which goes hand-in hand with FLS101V, is *Foundations of South African Law* (FLS102W). That module covers the internal history of aspects of South African private law and explains the historical development of certain private-law rules and principles. Usually, students either enroll for the two modules simultaneously, or they take *The Origins of South African Law* in the first semester and *Foundations of South African Law* in the second semester.

Knowledge of the external history of South African law is essential to enable a law student to work with the historical sources of the law and to assess the significance and value of these sources. Law is an aspect of culture and a knowledge of the external history of the law is indispensable for a proper understanding of the law in the heterogeneous, or mixed, South African culture.

The fact that South African culture is not uniform means that South African law is not uniform either but is built on various legal systems. Because our law embodies features of different legal systems, it is described as a hybrid or mixed legal system. South African law is made up of three main components, namely an African, Western and universal — or human-rights component. These are known as the three pillars of the law. Broadly speaking, the African component comprises indigenous African law; the Western component consists of Roman-Dutch and English law; and the universal, or human-rights component comprises human-rights law. In *The Origins of South African Law*, we focus on the history of these three main components of South African law. We also briefly look at the external history of Islamic law, one of the religious legal systems, which is playing an increasingly important role in the lives of many South Africans. Even though the Constitution does not officially recognise Islamic law as a source of South African law, Islamic thought has influenced Western legal thinking Western law and there is draft legislation on the recognition of Islamic marriages.

This study guide contains a range of exercises for self-evaluation and comprehensive feedback which will enable you to assess your own progress and your understanding of the origins of the South African legal system. Further assessment will take place through assignments and an examination. Tutorial letters that contain important information regarding the study material, assignments and the examination will also guide you through the module.

Study unit 1

General introduction

Learning outcomes

After having studied this study unit, you should be able to

- describe the importance of legal history
- define the different concepts related to the study of legal history
- discuss the fact that our law consists of various components
- explain how these different components developed in our law
- explain how these different components became part of our law

1.1 BACKGROUND

As indicated in the Preface, in this module you will learn about the origins of the South African legal system, that is, how and where our law began. We therefore look at the historical sources of law in the different phases of the development of our legal system. To be able to work with these sources, it is necessary to understand that the South African legal system is hybrid in nature and is made up of three main components, namely an African, a Western and a universal or human-rights component.

A thorough knowledge of the history of our law is essential to enable you not only to work with the sources of our law, but also to assess their significance and value. Through this knowledge you will gain a proper perspective on the sources from which our law developed. In fact, it was once said that

> [a] lawyer who is ignorant of legal history, who is not trained to use the techniques of historical scholarship and who is unable to defend his client's case against fictitious history and unproved or unprovable historical assertions when those are used against it, is not simply unlearned, he is poorly equipped, and ineffective. He is in short, not truly a lawyer; he is only a member of the legal profession (Wiener *Uses and Abuses of Legal History: A Practitioner's View* (1961), in Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 3).

This remark applies to all jurists, but particularly to South African jurists. Knowledge of legal history prepares you to deal with the sources of the law and explains the present character of our law. It provides the background against which our law should be understood.

A proper understanding of the roots of one's legal system makes it possible to undertake meaningful law reform. You must remember that as a community develops, so also does its law develop, in order to satisfy the community's needs. Law is not an isolated social phenomenon. It is influenced by economic, religious and moral views and developments. You will find that unless you look at the context in which concepts which are part of daily legal practice were originally formed, you will not be able to understand them properly.

In South African law there are many new problems which require new solutions. There is a growing tendency among practitioners and courts to observe the methods followed by other legal systems in order to solve problems which are common to their own and other systems; in other words, they compare systems. This is known as the **comparative-law method**. Roman law is the common heritage of many legal systems including South African law. Almost all European and South American legal systems, as well as those of Japan and Turkey, have their origins in Roman law to a greater or lesser

degree. We therefore have ready access to these legal systems and can take note of the way they have solved legal problems. Likewise, in Africa, there are various countries that share a common legal heritage and that could provide solutions to problems of a different nature. These countries include South Africa, Namibia, Lesotho, Botswana, Swaziland and Zimbabwe, whose legal systems comprise indigenous African law as well as Roman-Dutch law, as influenced by English law. The South African Law Reform Commission too, makes use of the comparative-law method and regularly refers to legal developments in other countries.

You must keep in mind that this module deals only with the **external history** of the law — in other words, it deals with the people, events and institutions that played a role in the development of South African law through the ages.

1.2 INTERNAL AND EXTERNAL LEGAL HISTORY

What is the difference between the *external* and *internal* history of the law?

- The **external history of the law** traces the sources and factors which have contributed directly or indirectly to the development of a legal system. These relate to the political, constitutional, economic, sociological and religious factors that have influenced the development of the legal system.
- The **internal history of the law** covers the origins and development of the legal rules and principles themselves, under the influence of external historical events.

The importance of the external history of the law is mainly that it sheds light on the internal history of the law. For example, the influence of **canon law**, that is the law of the church (external history of the law), explains the development of certain legal rules and principles of the **law of contract** (internal history of the law).

ACTVITY 1.1

Answer the following short questions to see whether you have understood what you have read so far. Use the spaces provided for the purpose.

(1) The internal history of the law relates to the origins and development of ..... and .....

(2) The external history of the law relates to ....., ..., ... and ..... factors which have contributed directly or indirectly to the development of the legal system.

FEEDBACK 1.1

(1) The internal history of the law relates to the origins and development of **legal rules** and **principles**.

(2) The external history of the law relates to **political, constitutional, sociological, economic** and **religious** factors which have contributed directly or indirectly to the development of the legal system.

ACTVITY 1.2

Answer the following listing test, the aim of which is to illustrate the difference between internal and external legal history. Use your general knowledge to do this.

Arrange the following concepts in the appropriate column:

The French Revolution of 1789; the rule that no person may be dismissed unfairly; global warming; the implementation by the National Party of the policy of apartheid; recognition of political rights in the 18th century; the Group Areas Act; the rise and spread of feminism; the recognition of third-generation rights in our Constitution; the establishment of trade unions; the rule that a husband incurs criminal liability for raping his wife.

External legal history	Internal legal history
Political event:	
Constitutional event:	
Economic event:	
Sociological event:	
Environmental event:	

FEEDBACK 1.2

External legal history	Internal legal history
Political event: The National Party implements the policy of apartheid	The Group Areas Act
Constitutional event: The French Revolution of 1789	Recognition of political rights in the 18th century
Economic event: The establishment of trade unions	The rule that no person may be dismissed unfairly
Sociological event: The rise and spread of feminism	The rule that a husband incurs criminal liability for raping his wife
Environmental event: Global warming	The recognition of third generation rights in our Constitution

Remember!

The examples used in activity 1.2 were specifically chosen to illustrate the difference between

- political, constitutional, economic, sociological and environmental events which had an influence on the way people view their world and consequently on the development of their legal system (in other words the study of the **external** history of the law) and
- legal rules and principles which developed as a result of the events mentioned above (in other words the study of the **internal** history of the law)

Each event listed in the column entitled ''External legal history'' had an influence on development in a specific area of law, which eventually resulted in the recognition of a new legal rule.

The first example, namely the policy of apartheid as implemented by the National Party, is an example of a **political** event in the external history of our law. Political developments demanded the introduction of certain new legal rules to make it possible to implement the policy of apart-

heid. The promulgation of the Group Areas Act was one of the consequences of the policy of apartheid, and this Act introduced new legal rules. In other words, the Group Areas Act is an example of development within the internal history of our law.

Similarly, the second example, namely the French Revolution of 1789, was a **constitutional** event in the external history of our law. As a result of the French Revolution, political rights were officially recognised for the first time by a government (in this case, the French government). For the first time, people were granted political rights such as the right to freedom and the right to equality. In other words, the first recognition of political rights is an example of developments within the internal history of law.

The third example, namely the establishment of trade unions, is an event that had a huge influence on the development of labour law. It was only after the establishment of trade unions that the interests of employees and labourers came under the spotlight. In other words, the establishment of trade unions is an example of an **economic** event within the external history of our law. As a result of the activities of the trade unions in South Africa, the right of an employee not to be unfairly dismissed was recognised and is now entrenched as a human right in our Constitution — an example of the development of the internal history of our law.

The fourth example, namely the rise and spread of feminism, is another event that has had a huge impact on the way we see the world. Before the rise of feminism, women had no (or very few) rights. It is due to feminist thinkers that South African women have, among others, the right to equal treatment with South African men and the right to vote. In other words, the rise and spread of feminism is an example of a **sociological** event within the external history of our law. One of the products of feminist thinking in South Africa was the recognition of the right of a woman not be raped by her husband. In 1993, the South African legislature included this rule in the Prevention of Family Violence Act 133 of 1993. Section 5 of this Act provides that a husband may now be convicted of the rape of his wife. In other words, the recognition of this rule is an example of the development of the internal history of our law.

The last example, namely global warming, is an example of an **environmental** event within the external history of our law. Only after scientists had brought the issue of global warming to the attention of the general public did campaign groups start to pressure governments for, among others, the recognition of the need for a clean environment. Such rights are now recognised as third generation human rights and are entrenched in our Constitution. The recognition of third generation rights is therefore an example of the development of the internal history of our law.

1.3 THE SOURCES OF THE LAW

The main sources of origin, or places of origin, of our law are

- legislation
- court decisions
- common law
- customary law
- indigenous African law

But where do we find this law?

South African law is not codified. In other words, **there is no comprehensive, written version of our law that has the force of legislation.** Because there is no single authoritative record of the entire legal system, we must look to various sources to find the law. These ''various sources'' are sources such as **the decisions of the courts** and **legislation**. However, the solutions to legal problems are not always to be found in the law reports (which contain the court decisions) or the statutes (which contain the legislation). There are also other important sources of our law — **common law** and **indigenous African law**. These are the historical components of our law.

The common law is the centre around which the other sources that generate law revolve. This common law is a living law, which is still applied by our courts and which is capable of adapting to the changing values of our society.

Keep in mind!

In South Africa the term ''**common law''** refers to Roman-Dutch law as influenced by English law. This ''common law'' is a source or place of origin of South African law and must be distinguished from other sources such as court decisions, legislation and customary law.

In a broader sense ''common law'' also has another meaning, namely the common law of England. English common law influenced the legal systems of many countries (eg South Africa, the United States of America, and Australia). The legal systems of countries that have been influenced by English law are therefore referred to as ''**common-law systems''**. In contrast, the legal systems that have been influenced by Roman law are referred to as ''**civil-law systems**''.

Our society, and in particular our legal order, has experienced drastic changes in the 1990s. Not only did the new Constitution add indigenous African law to the sources of South African law, but it also introduced a new human-rights culture. The Constitution safeguards the fundamental rights which every person enjoys by virtue of the fact that he or she is a human being. The Constitution is our highest law and it establishes principles against which all other law should be tested. Remember that neither statute law, nor common law or indigenous African law may be in conflict with this, the supreme law of the land.

By merely looking at the sources of our law, it will be clear that there have been various causes and influences which have given our law the character and form it has today and which continue to direct legal change and reform. There are three major components of our law, all of which give our law a very specific character. These are

- the Western or European component
- the indigenous African component
- the universal component (human-rights law).

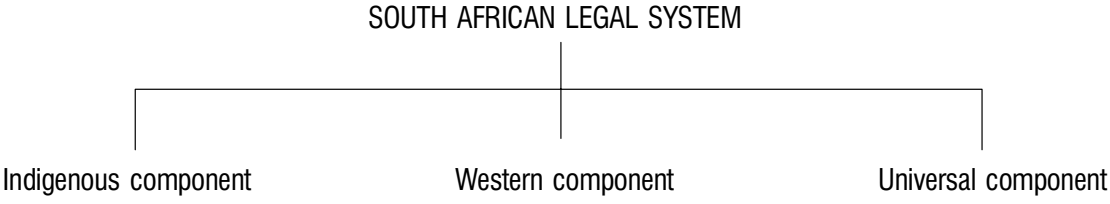
These three components will now be discussed in greater detail.

1.4 THE ORIGINS OF THE LAW

As mentioned above, ''our law'' consists of what may, broadly speaking, be referred to as

- **a Western component** (Roman-Dutch and English law)
- **an indigenous (African) component** (indigenous African law)
- **a universal component** (human-rights law)

The relationship between these components may be graphically represented as follows:



1.4.1 EXCURSION WHY A ''UNIVERSAL'' COMPONENT?

While it is obvious that the component which deals with African law is referred to as ''African''; and the component which deals with the law that originated in Western Europe and England is referred to as ''Western'', it may not be as obvious why we refer to the component that deals with human rights as a ''universal'' component.

Fundamental rights are those rights that are possessed by all human beings because they are human, irrespective of their creed, colour or gender. For this reason, and in the light of the movement towards the universal recognition of human rights, we refer to this component of our law as the universal component.

You may well ask why, if we are dealing here with a universal concept, most historical investigations into the subject are confined to the foundations of human rights in Western (European, English) law and culture. The reason for this is quite simple. In the light of the strong position of the group and group solidarity in African culture, it is accepted, erroneously, that the concept of the protection of individual human rights is unlikely to have existed in Africa.

What is more difficult to explain is why the contribution of Islamic thought and its influence on the development of Western legal thinking is not recognised. In the Western world, the early Middle Ages are generally called the ''Dark Ages'', because of the lack of intellectual and scientific development during this time. However, the civilisation that flourished in the Arab world from the 8th to the 12th centuries has been described as ''one of the cultural marvels of history''. Towards the end of this period, there was great intellectual activity in Islamic Spain. In study unit 9, section 9.4.1.1, we refer to the Islamic philosopher, Ibn Rushd, and in section 9.4.2 to the African philosophy of *ubuntu.*

1.4.2 WHERE AND WHEN DID THE DIFFERENT COMPONENTS FIRST DEVELOP?

To identify the **places** of origin of the different components of our law, we look at

- Africa
- Europe
- England

However, it is a somewhat more complex task to identify the **time** in history when these components originated.

With regard to the **African component** of our law, we have a very difficult task, because the earliest African history, and with it the history of African law, is essentially preliterate history, that is a history of societies without writing. Therefore the earliest origins of indigenous African law cannot be very specifically described. Indigenous African law started developing long before traditional indigenous African cultures first came into contact with other cultures. In fact African law dates so far back that we say that it has existed since time immemorial.

Before you can determine when the **Western component** of our law started developing, you must first establish what this component consists of. As indicated in section 1.4, the Western component of our law comprises Roman-Dutch and English law. It is clear what is meant by ''English law'', but do you know what is meant by ''Roman-Dutch law''? There is no simple answer to this question. The exact meaning of Roman-Dutch law and the way it is interpreted by the courts will be dealt with in study unit 7, section 7.2. What is important here is that Roman-Dutch law is made up of two important elements, namely Roman law and Dutch law. Roman law is the older of these two elements. Therefore we say that the history of the **Western component** of our law starts with the foundation of Rome 753 years before the birth of Christ (753 BC). In the 4th century AD (more specifically, 395 years after the birth of Christ) the Roman Empire split into an Eastern and a Western Roman Empire. Constantinople (present-day Istanbul in Turkey) became the capital of the Eastern Roman Empire and Rome (in present-day Italy) became the capital of the Western Roman Empire. The origins of our law can therefore, firstly, be traced back to the Western Empire.

We trace the history of our law in the **Eastern Roman Empire** only up to the death of Justinian (one of the prominent Roman emperors) in the 6th century AD. After that period we speak of the Eastern history of the law, which is not covered in this module.

In addition, we trace the earliest history or origins of **English law**, which also forms part of the Western component of our law, back to the 11th century AD.

The origin of the **universal component** of our law may be traced back to the rise of the natural-law theory as developed by both Greek and Roman thinkers even before the birth of Christ, and the early Christian church fathers from the 4th century AD onwards.

1.4.3 RELIGIOUS LEGAL SYSTEMS AND THE THREE COMPONENTS OF THE LAW

There is another important factor which, over the years, has shaped the development of all three components of our law, and which broadens, or universalises, our perception of the origins of our law, and that is **religion**.

In your study material you will find ample references to religion and religious legal systems. Generally, in any discussion of the history of the South African legal system, reference is made to the influence of **canon law** (ie the law of the Catholic Church), **Protestantism** and perhaps even **Judaism**. But that is not where we should draw the line.

Today, in **Africa**, there are many different religions and religious legal systems which govern the lives of South Africans. It is specifically in the field of private law, and, importantly, in marriage and succession, that these personal religious laws impact on the lives of people. Although these personal religious laws are not officially recognised as part of our law, the Constitution provides that legislation may be promulgated which could recognise marriages concluded under a religious legal system as well as a system of personal and family law adhered to by the followers of a particular religion. The South African Law Reform Commission has accordingly proposed a *Draft Bill for the Recognition of Islamic Marriages.*

In study unit 2 we will tell you more about the history of **Islamic law**. Islamic law regulates the lives of approximately a sixth of the world's entire population and adherence to Islam is growing all over the world. Although Islam is a minority religion in South Africa, it is the dominant religion on the African continent.

We discuss Islamic law not because it is more important than the other minority religious systems, but because there are specific examples of how Islamic thought has influenced Western legal thinking and Western law. Moreover, recently, the application of this system of law and the conflict between the values which form the foundation of Islamic law and of Western law have come under the spotlight through various cases tried in our High Court. Of course, these are not the first instances in which the High Court of South Africa has had to decide on the recognition and application of Islamic law.

ACTVITY 1.3

Answer the following fill-in questions to see whether you understand the discussion so far and whether you are achieving the outcomes set out at the beginning of this study unit.

(1) The common law is an important source of the ..... component of our law.

(2) There is no comprehensive .... of South African law which has the force of legislation. In other words South African law is not codified.

(3) There are three major components of our law, namely an ..... a ..... and a ..... component.

(4) The ..... is currently investigating Islamic ..... with a view to integrating it into the South African legal system.

(5) The history of the Western component of our law in Europe starts with the ..... .

(6) The origin of the universal component of our law may be traced back to the rise of the ..... as developed by Greek and Roman thinkers and by the early Christian church fathers from the 4th century AD onwards.

(7) Although historical investigation usually focuses on the ..... foundations of the universal concept of human rights, Islamic thought also impacted on this development.

(8) The earliest origins of indigenous African law are traced to a time ..... .

FEEDBACK 1.3

(1) The common law is an important source of the **Western** component of our law.

Remember!

In South Africa the term ''**common law''** refers to Roman-Dutch law as influenced by English law. This common law is a source or a place of origin of South African law and must be distinguished from other sources such as court decisions, legislation and customary law.

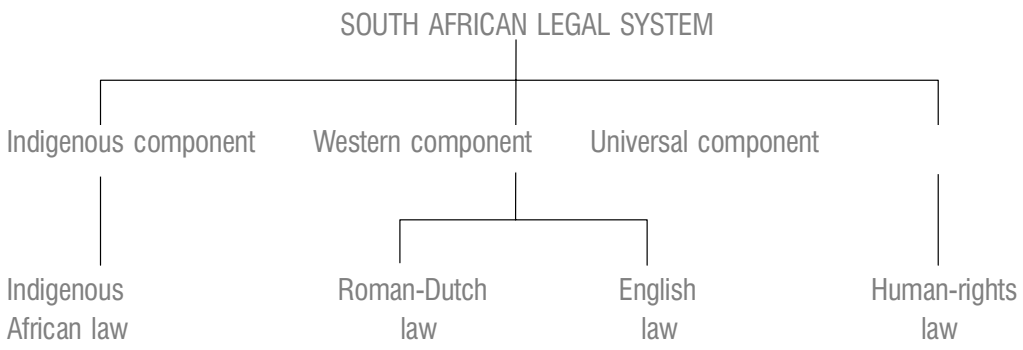
In a broader sense ''common law'' also has another meaning, namely the common law of England. English common law has influenced the legal systems of many countries (eg New Zealand, America, Australia). The legal systems of countries which have been influenced by English law are referred to as ''**common-law systems''**. In contrast, the legal systems which have been influenced by Roman law are referred to as ''**civil-law systems''**.

You must also remember that because our legal system has characteristics of Roman-Dutch law, English law and indigenous African law, it is referred to as a ''hybrid legal system''.

(2) There is no comprehensive **written version** of South African law which has the force of legislation. In other words South African law is not codified.

(3) There are three major components of our law, namely an **indigenous African**, a **Western** and a **universal** component.

Take a look



(4) The **South African Law Reform Commission** is currently investigating the Islamic **law of marriage** with a view to integrating it into the South African legal system.

(5) The history of the Western component of our law in Europe starts with the **foundation of Rome** (you could also have answered the 8th century BC, or 753 BC).

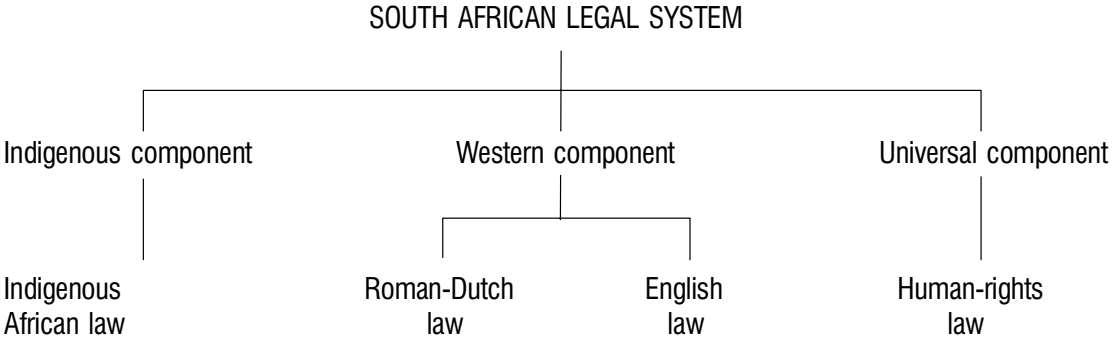
(6) The origin of the universal component of our law is traced to the rise of the **natural-law theory** as developed by Greek and Roman thinkers and by the early Christian church fathers from the 4th century AD onwards.

(7) Although historical investigation usually focuses on the **Western** foundations of the universal concept of human rights, Islamic thought also impacted on this development.

(8) The earliest origins of indigenous African law are traced to a time before **traditional indigenous African cultures first came into contact with other cultures**.

1.5 THE RECEPTION PHENOMENON

As indicated earlier on in this study unit, our law consists of various components. The following graph gives you an overview and summary of these components and their relationship to each other:



How did the different legal systems become part of our law?

There are different ways in which a legal system may become applicable in a territory. These include **reception**, **transplantation** and **imposition**. In our legal history we have examples of all three.

But first, what exactly is meant by these terms and how do we distinguish between them?

- **Reception** refers to the absorption or adoption of the rules, principles and institutions of a legal system into an existing legal system — in other words, the adoption of a legal system by a community which already has an existing legal system. If the reception is very comprehensive (extensive), we speak of an *in complexu* reception, that is the reception of an entire legal system.
- **Transplantation** means the importation or introduction of a legal system into a territory which has no legal system.
- **Imposition** means imposing a legal system on a territory which already has an existing legal system — against the wishes of the local inhabitants.

Let us now take a look at examples in our legal history.

It has always been accepted that Roman-Dutch law was brought to South Africa at a time when no sophisticated legal system existed and that it was therefore transplanted at the Cape, while English law was received at a later stage in the development of South African law. However, although it is correct to say that there was a reception of English law, it is not correct to say that Roman-Dutch law was transplanted here. At the time when Van Riebeeck (the Dutch official who first established a Dutch trading post at the Cape) came to the Cape, indigenous legal systems which were applied by the indigenous population were already in existence. It would be incorrect to think that the indigenous people who lived in the southern parts of Africa at that time, namely the Khoi and San people, had no legal systems at all! Therefore, strictly speaking, one cannot speak of the transplantation of Roman-Dutch law.

Should we then say that there was a reception of Roman-Dutch law into the existing indigenous law?

Here the answer is also ''no'', because true reception implies the recipients' **desire to receive**. Perhaps it would be better to refer to the process as the **imposition** of Roman-Dutch law on indigenous law.

There are many examples of the process of reception in legal history in general. The oldest example would be the reception of Roman law. In the various countries in Western Europe this reception resulted in a kind of European common law *(ius commune)*, which was a shared law, consisting of Roman law, canon law and Germanic customary law. Latin was the international form of communication. (The European *ius commune* will be discussed in study unit 5.) One product of this process was Roman-Dutch law which, as you already know, was brought to South Africa in the 17th century.

The reception of Roman law in Western Europe can, in its broadest sense, be divided into the following four different phases:

(1) First there was the **pre-reception era** or a period of **infiltration** during which a few Roman-law rules were chosen and then randomly incorporated into Germanic customary law. This reception was sporadic and started in the 5th century when the Germanic tribes adopted the Roman idea of individual land ownership.

(2) The second phase was the **intellectual ''rediscovery''** of Justinian's Roman law by a group of jurists called the glossators. This took place in the 12th century at the law school of Bologna in Italy.

(3) In the third phase, or the **early reception phase**, there was an increase in the scientific study of Roman law. This took place during the 13th and 14th centuries.

(4) The last phase was characterised by the **reception proper** of Roman law. This was during the 15th and 16th centuries, when Roman law as a system was incorporated into the legal systems of some countries to form part of their common law.

The most recent example of reception was when human-rights law was received into our law. You may remember that the Constitution, with its Bill of Rights, was the outcome of a process negotiated by representatives of the South African community as a whole. In other words, the South African community willingly accepted human-rights law into the existing legal system.

The reception of Roman law has two meanings. It may refer either to the reception of the actual rules of Roman law, which is called the **practical reception**; or it may refer to the reception of the scientific system of Roman law (the concepts, the categories, the principles and the divisions of Roman law). This is known as the **scientific reception** of Roman law.

It should therefore be kept in mind that in this module, when we speak of the reception of Roman law, we are referring to both a practical and a scientific reception of law. However, there are countries, some of which are in eastern Europe, which experienced only a scientific reception of Roman law without ever having received any of its substantive rules.

The influence of Roman law was not confined to Europe. Directly or indirectly (via European-inspired codes) Roman law spread its influence throughout the world. Quebec, Louisiana (USA), Japan, Egypt and most of the South American countries are among the territories influenced by Roman law.

ACTVITY 1.4

Complete the following fill-in questions to see whether you have followed the previous discussion. If you do not know what answer to fill in, go back to the previous section and reread it with the specific question in mind. The feedback directly after the activity will also contribute to a better understanding of the material.

(1) Since South African law has been influenced by the ..... tradition and the ..... or ..... tradition, as well as the

..... or ..... tradition, we may say that our legal system is a mixed or hybrid one.

(2) ..... refers to the willing adoption of a legal system by a community which already has an existing legal system.

(3) ..... refers to the importation of a legal system into a territory which has no legal system.

(4) There are four phases in the reception of Roman law in Western Europe. The first, starting in the 5th century AD when a few Roman-law rules were randomly incorporated into Germanic customary law, is known as the ..... phase. The second, in the 12th century, was the phase of the ..... of Justinian's Roman law. Thirdly, the 13th and 14th centuries saw an increase in the scientific study of Roman law. This was known as the ..... phase. And, finally, during the 15th and 16th centuries when Roman law was incorporated into the legal systems of some European countries to form part of their common law, we speak of the ..... of Roman law.

(5) The reception of the actual rules of Roman law is called the ..... reception while the reception of concepts and principles within the system is called the ..... reception of Roman law.

(6) Explain the difference between reception, transplantation and imposition.

(7) Which of the following processes best describes the way indigenous African law became part of South African law?

(a) superimposition
(b) transplantation
(c) reception
(d) none of the above

FEEDBACK 1.4

(1) Since South African law has been influenced by the **Roman** or **civilian** tradition and the **English** or **common-law** tradition, as well as the **indigenous African** tradition, we may say that our legal system is a mixed or hybrid one.

Keep in mind!

The Western component of our law comprises both Roman-Dutch law (which has characteristics of the Roman or civilian law which prevailed in Europe until the 19th century) and English law (which has characteristics of the English common law which is in force in England). Moreover, our law has an African component which comprises indigenous African law. It is because there are features of all these legal systems in our law that our legal system may be described as a ''hybrid'' or ''mixed'' legal system.

(2) **Reception** refers to the willing adoption of a legal system by a community which already has an existing legal system.

(3) **Transplantation** refers to the importation of a legal system into a territory which has no legal system.

(4) There are four phases in the reception of Roman law in Western Europe. The first, starting in the 5th century AD when a few Roman-law rules were randomly incorporated into Germanic customary law, is known as the **infiltration** or **prereception** phase. The second, in the 12th century, was the phase of the **intellectual rediscovery** of Justinian's Roman law. Thirdly, the 13th and 14th centuries saw an increase in the scientific study of Roman law. This was known as the **early reception** phase. And, finally, during the 15th and 16th centuries when Roman law was

incorporated into the legal systems of some European countries to form part of their common law, we speak of the **reception proper** of Roman law.

(5) The reception of the actual rules of Roman law is called the **practical** reception while the reception of the framework, concepts and principles within the system is called the **scientific** reception of Roman law.

(6) (a) Reception is the willing absorption or adoption of the legal rules, principles and institutions of a legal system into an existing legal system. There is, in other words, an existing legal system and there is a willingness to receive the foreign legal system.

(b) Transplantation takes place where a legal system is transplanted to a territory where there is no existing legal system.

(c) Imposition takes place where a legal system is imposed upon a territory which already has a legal system, against the will of the inhabitants of the territory.

Remember!

These three concepts may be applied to other legal systems apart from Roman law, Roman-Dutch law, English law and indigenous African law. Throughout your studies you should ask yourself how each of the legal systems and institutions that we are dealing with came to be part of our law.

(7) This is an example of a multiple-choice question. You will encounter such questions both in your assignments and in the examination. When you answer multiple-choice questions, make sure that you read the question very carefully. Then look at the different possible answers. In question (7) you were asked how indigenous law became part of South African law. Without even looking at the different options, you should know that indigenous African law was the law that was originally applied in Southern Africa. This is explained in section 1.5. When you look at the different options, it becomes clear that the first three options are all incorrect. Indigenous law was not superimposed, transplanted or received in South Africa. So, the only remaining option is (d) and that is the correct option: This option states that not one of the processes mentioned in (a)–(c) is applicable to the reception of indigenous law. You will learn more about the earliest origins of indigenous African law in study unit 2.

However, if the question had related to English law, instead of indigenous law, what would the answer be? Yes, the correct option would be (c), since English law was **willingly** received into the **existing** legal system that applied in South Africa at the time.

1.6 CHRONOLOGICAL ORDER OF EVENTS

Experience has taught us that one of the biggest problems which students face when studying legal history is that they are not always able to see specific events and developments in their historical perspective. To help you overcome this hurdle, we have provided a very brief and simplistic overview of the events and developments in the field of legal history in their historical order.

Because **indigenous African law** was the first law that was applied by the inhabitants of southern Africa, we start with the events which influenced the development of indigenous African law.

In the section that deals in greater detail with this issue (study unit 2) we will look at the origins of indigenous law and also consider how the Dutch, and later the English, administration at the Cape influenced the application and development of indigenous law.

The first Western law that was applied at the Cape was **Roman-Dutch law**. However, since the law that was brought to Africa originated a long time before the Dutch settled on African soil, we also have to consider where that law originally came from. The origins and development of Roman-Dutch law are discussed in study units 3–7. So, where does that law come from? Just by looking at the name ''Roman-Dutch'' law, it should be clear that that law has characteristic features of **at least two legal**

systems, namely Roman law and Dutch law. Roman law, which is the older of the two, originated in the 8th century BC (ie approximately 800 years before the birth of Christ). Roman law was influenced in time by Germanic law and the law of the Church (also called canon law). Roman law, the law of the church and the law of the province of Holland (which was a Germanic legal system) came together to form Roman-Dutch law. The history of Roman-Dutch law in Europe continued until the beginning of the 19th century.

More than a century after the arrival of the Dutch, the British occupied the Cape. They brought English law with them. English law influenced the existing law at the Cape and became part of the Western component of South African law. Study unit 8 deals with the introduction of Roman-Dutch law and English law at the Cape and the development of the Western component of our law in South Africa.

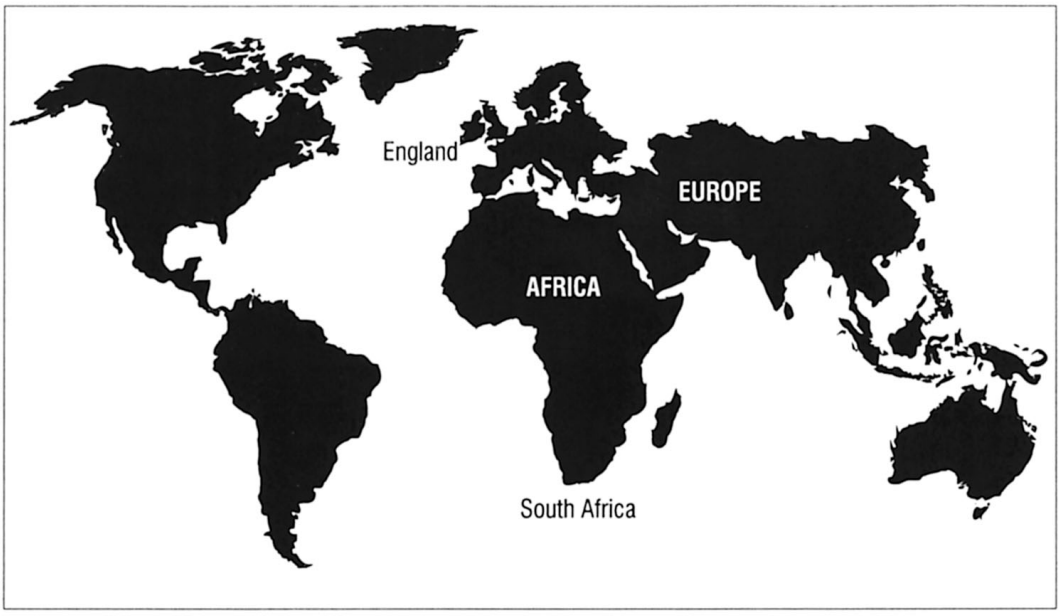
In study unit 9 we will look at certain events which influenced the development of the **universal component**, specifically with regard to the development of the natural-law theory, as well as events which took place in Africa, and in South Africa.

Very important

The information in sections 1.6.1, 1.6.2 and 1.6.3, and the time-lines provided, are a summary of the remaining study units.

The purpose of this summary is to give you a bird's-eye view of the study guide and to make it easier for you to understand the chronology or sequence of events. Although you do not have to study the time lines, or sections 1.6.1.2 up to and including 1.6.3, you have to understand the order in which certain events took place if you want to understand this module. This is because developments in legal history depend on events that have already taken place, and these past events always have an influence on current and future developments.

Furthermore, when you look at the time-lines you will notice that the three components of our law did not develop in isolation, nor did they follow one upon the other. Often, important developments took place in all three traditions at the same time. You must understand that what is indicated on the different time-lines should be read together with information provided on the other time-lines. For example, the events that took place during the 17th century and that are indicated on the time-line with reference to the **African component** should not be viewed in isolation but should be seen in conjunction with the events that took place in the same period and that are shown on the time-line with reference to the **Western component** and the **universal component**.



A basic map of the world

Excursion: method of dating events

When reading about events that took place long ago, you will often come across the terms ''BCE'', ''CE'', ''BC'' and ''AD''. These are all terms that are used to date events, in other words, to indicate in which year an event took place.

- ''BCE'' is an abbreviation for ''Before the Common Era''. The Common Era is the era that started in the year nil. ''BCE'' is used to refer to events which took place **before** the year nil (ie, more than 2000 years ago).
- ''CE'' is an abbreviation for ''Common Era''. ''CE'' is used to refer to events which took place in the Common Era, in other words, **after** the year nil.
- ''BC'' is an abbreviation for ''before Christ'' and is used to refer to events which took place **before** the birth of Christ.
- ''AD'' is an abbreviation for the Latin term *Anno Domini*, which means ''in the year of our Lord'', referring to our Lord Jesus Christ and is used to refer to events which took place **after** the birth of Christ.

So what is the difference between these terms?

Until the 19th century it was customary to use ''BC'' and ''AD'' to date events. In other words, 753 BC would be used to refer to a time 753 years before the birth of Christ, and AD 1996 would be used to refer to a time1996 years after the birth of Christ. However, because not everybody is a Christian, it makes no sense for people such as Jews, Muslims, Hindus, or atheists to refer to the date as being in the year of ''our Lord'' when they don't regard Christ as their Lord.

In the 19th century, some historians started using the terms ''BCE'' and ''CE'' instead. BCE is the abbreviation for Before the Common Era and CE the abbreviation for the Common Era. The Common Era starts in the year nil. Thus, 753 BCE is used to refer to a time 753 years before the Common Era, and 1996 CE is used to refer to the 1996th year of the Common Era. Using the terms ''BCE'' and ''CE'' is viewed as a better way of labelling dates:

- It is regarded to be *politically more correct* and more considerate not to date events according to periods before and after the birth of Christ, because not everybody subscribes to the Christian faith.
- Even for Christians, the BCE/CE system is more *accurate,* since today's historians will tell you that it is not an uncontested fact that Jesus of Nazareth was born in the year nil. Academics differ about the exact year of His birth. So it is probably not even correct to say that Jesus was born in the year nil.

Which method of dating will be used throughout this study guide?

Despite the above remarks, we have chosen to use the terms ''BC'' and ''AD'' throughout the study guide for the following reasons:

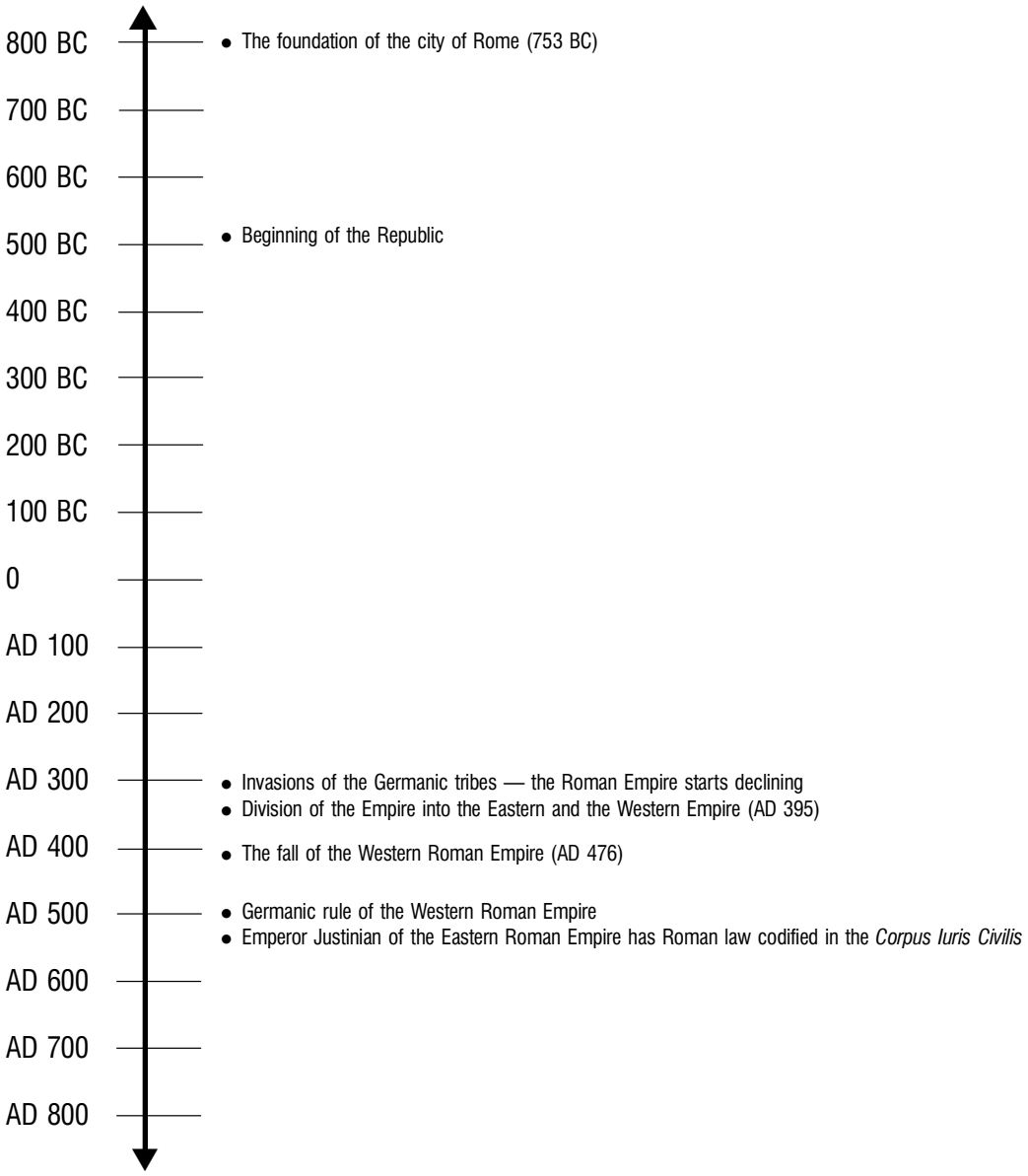
- Most of the legal historical sources that you will be using throughout your career use ''BC'' and ''AD'' as a method of dating.
- In spite of the concerns mentioned above, most historical sources throughout the world choose to use ''BC'' and ''AD'' as a method of dating.

Note that ''AD'' is placed before the year and ''BC'' after the year: ''AD 1996'', but ''753 BC''.

ACTVITY 1.5

Before you study the different time-lines provided, you should make sure that you understand how a time-line works and that you are able to interpret the information provided on such a time-line. For this purpose, it would be a good idea to do this activity to test your skills.

Study the following extract from the time-line of the Western component and answer the following questions:



Questions

(1) How many years or centuries are shown on this time-line?

(2) Which event depicted on this time-line happened the longest time ago, in other words, the furthest back in history?

(3) Which event occurred in the 5th century BC?

(4) How many centuries elapsed between the foundation of Rome and the fall of the Western Roman Empire?

(5) What factor indicated on the time-line contributed to the decline and ultimate fall of the Western Roman Empire?

FEEDBACK 1.5

(1) The time-line starts at 800 BC and ends at AD 800. This means that the time-line stretches from 800 years before the year nil, to 800 years after the year nil. In other words, this time-line stretches over a period of **1 600 years** (800 years plus 800 years).

(2) According to this time-line, the event that happened the farthest back in the past is the **foundation of the city of Rome in 753 BC**. This event took place more than 2 700 years ago.

(3) **The beginning of the Republic**

Keep in mind!

Think of the present time. Ask yourself which year this is. What century are we in? Although the first two digits of the year are 20-, this does not mean that this is the twentieth century! In fact, this is now the 21st century AD! Why? Look at the time-line provided in the activity. Find the period on the time-line that indicates the years between the year nil and the year AD 100. Suppose you were living during that century. If you had to describe to someone in which century you were living, what would you say? You would tell people that you were living in the 1st century AD. Do you find that strange? Think about it: If you were alive during the first hundred years after the year nil, it would be correct to say that you were living in the 1st century AD. In other words, even though the first two digits of that century would be 00-, you would be living in the 1st century AD. (Now apply this to another example: In which century would you be living if you were born in AD 315 and died in AD 372?)

Remember that the same principle applies when you are describing dates from before the year nil. For instance, if you were born in 82 BC and died in 4 BC, in which century would you have lived? In the 1st century BC of course! In a similar way, if something happened in 753 BC, we say that it happened in the 8th century BC. And if an event occurred in the 5th century BC, that event would have taken place in the period between 500 BC and 400 BC.

(4) **Twelve centuries** (If you are uncertain, count the centuries on the time-line.)

If you had been asked the number of years that elapsed between the foundation of Rome and the fall of the Western Roman Empire, you should have been able to calculate that number as well, since the specific years in which both events took place are indicated on the time-line. Can you do this calculation? Add the 753 years (from the period 753 BC to the year nil) to the 476 years (from the period of the year nil to AD 476). The answer is 1229 years. (Convert this number of years to centuries — how many full centuries are included in 1229 years? That's right, twelve centuries. Now check if this corresponds to the answer to the original question.)

(5) **The invasions of the Germanic tribes**. Not only is this fact explicitly stated on the time-line (during the 4th century AD), but it is also shown that after the fall of the Western Roman Empire, this Western Roman Empire was ruled by the Germanic peoples (during the 6th century AD).

1.6.1 THE AFRICAN COMPONENT

First let us take a look at the order in which events took place in Africa.

As mentioned above, it is rather difficult to trace the exact origins of the African component of our law. Broadly speaking, the important historical events or eras in the history of indigenous African law are discussed below.

1.6.1.1 The precolonial era

Strictly speaking, ''precolonial'' means the era before colonisation brought Africa into real and permanent contact with the West and the most serious inroads into traditional indigenous cultures were made. But, from the point of view of **legal** history in Southern Africa, the precolonial period would refer roughly to the period before the first English annexation of the Cape in 1795. The reason for this division is that the development of indigenous law was affected for the first time when the British administrators started regulating its application. Although earlier traders, missionaries and the Dutch colonists had brought some of the indigenous communities into contact with Christianity and a new type of economy, they had little interest in indigenous law.

For the purposes of this module, ''precolonial'' refers to the period preceding the first British annexation of the Cape.

As we explained in section 1.4.2, it is difficult to pinpoint the specific time in the precolonial era when indigenous African law began to develop. The Bantu speakers who occupy the greatest part of Africa south of the Sahara, established themselves south of the Limpopo river (in the northern parts of South Africa) at least 1500 years ago, that is around **AD 500**. However, this was not when indigenous laws first came into being. The indigenous legal systems are much older than that. In fact, it is often said that these systems have existed since time immemorial.

1.6.1.2 The colonial era

— First British Occupation of the Cape in 1795.
— The Cape under Batavian rule, 1803–1806.
— Second British Occupation, 1806.
— First official recognition of indigenous African law (Transkei).

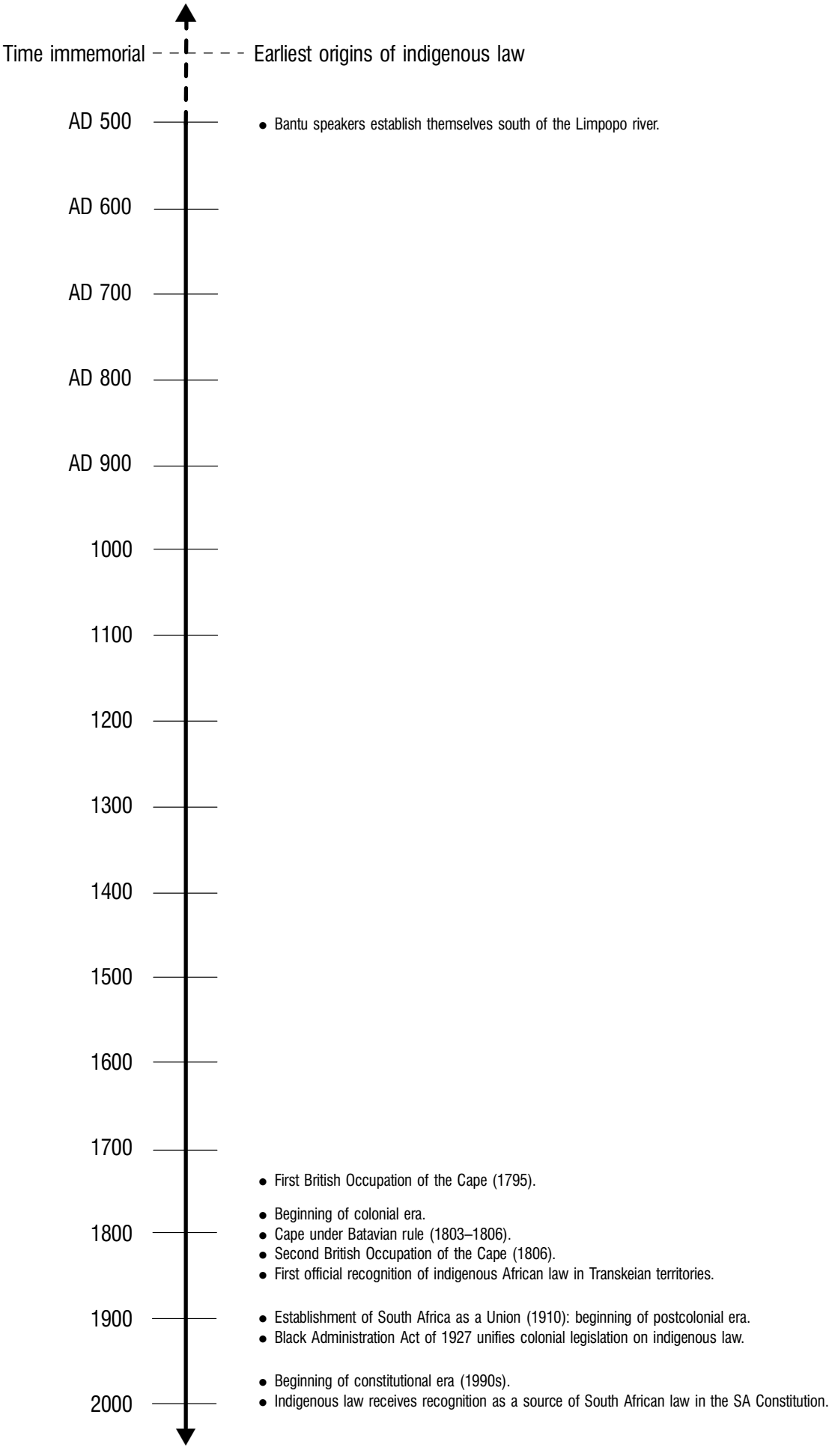
1.6.1.3 The postcolonial era

— Establishment of South Africa as a Union with legislative powers under the British crown in 1910.
— Black Administration Act of 1927 unifies colonial legislation on indigenous law.

1.6.1.4 The constitutional era (1990s)

— Recognition of indigenous law as a source of South African law in the Constitution of the Republic of South Africa, 1996.

The African Component



1.6.2 THE WESTERN COMPONENT

Let us now take a look at the order (chronology) of the events and developments in respect of the Western component of the law in **Europe**:

8th to 3rd centuries BC

— Foundation of the city of Rome in 753 BC.
— Period of the Kings.
— Beginning of the era of early Roman law (8th century BC).
— Beginning of the Republic (510 BC)

3rd to 1st centuries BC

— Beginning of the period of preclassical Roman law (3rd century BC).
— Development of the *ius gentium* and the *ius honorarium* by the *praetor* — legal systems characterised by fairness, flexibility and a lack of formalism.
— Beginning of the period of the Emperors (Principate and Dominate — 27 BC).
— Beginning of the period of classical Roman law (1st century BC).

1st and 2nd centuries AD

— Activities of the classical Roman jurists at the height of their development.

3rd century AD

— Beginning of the period of postclassical Roman law.

4th century AD

— Emperor Constantine grants religious freedom — Roman law first influenced by church law.
— Invasions of the Germanic tribes — the Roman Empire begins to decline.
— Roman law first influenced by Germanic law.
— Division of the Empire into an Eastern and a Western Empire (AD 395).

5th century AD

— Fall of the Western Roman Empire (AD 476).

6th century AD

— Germanic rule of the Western Roman Empire.
— Barbaric codifications of Roman law and Germanic law in the Western Roman Empire *(Lex Romana Visigothorum)*.
— Emperor Justinian of the Eastern Roman Empire has Roman law codified in the *Corpus Iuris Civilis.*

7th to 11th centuries AD

— The main sources of law are imperial legislation and customary law.
— Rise of feudalism.
— The Netherlands becomes a collection of feudal dependencies.
— Conflict between church and state.
— Early development of English common law (1066).

12th to 15th centuries AD

— Renewed interest in Roman law — the glossators, *ultramontani* and commentators study Roman law and canon law.

— The earliest beginnings of the reception of Roman law in Western Europe.
— The reception of canon law in Western Europe.
— Development of a European common law (European *ius commune*).

16th century AD

— Influence of canon law declines (Reformation).
— Influence of the humanists on legal development in Western Europe.

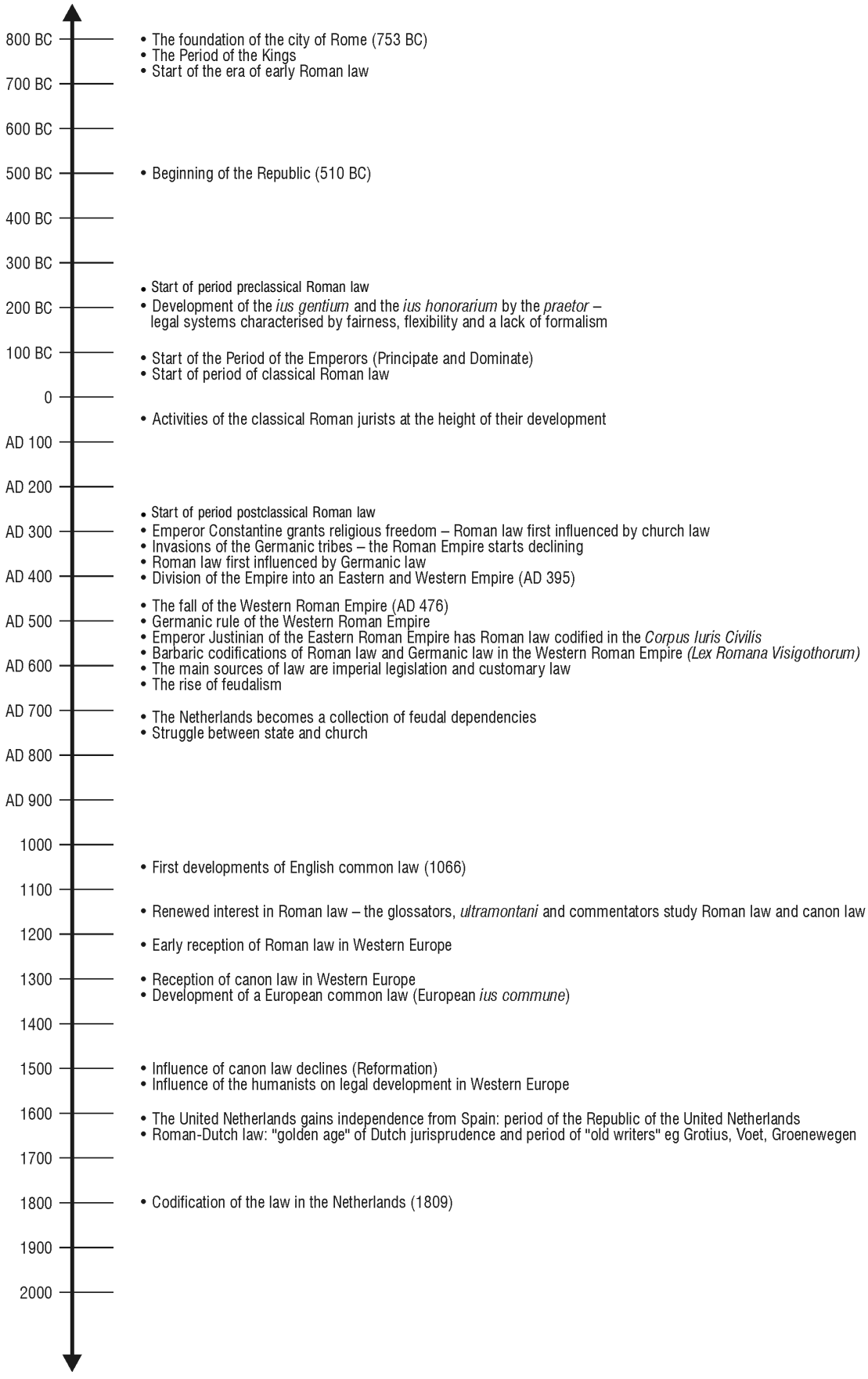
17th and 18th centuries AD

— The United Netherlands gains independence from Spain: period of the Republic of the United Netherlands.
— Roman-Dutch law: ''golden age'' of Dutch jurisprudence and period of ''old writers'', for example Grotius, Voet, Groenewegen.
— Holland the leading province in the Netherlands.

19th century AD

— Codification of the law in the Netherlands (1809).

The Western component: events that took place in Europe



Let us now take a look at the order of events (chronology) and developments in respect of the Western component of the law in **South Africa**.

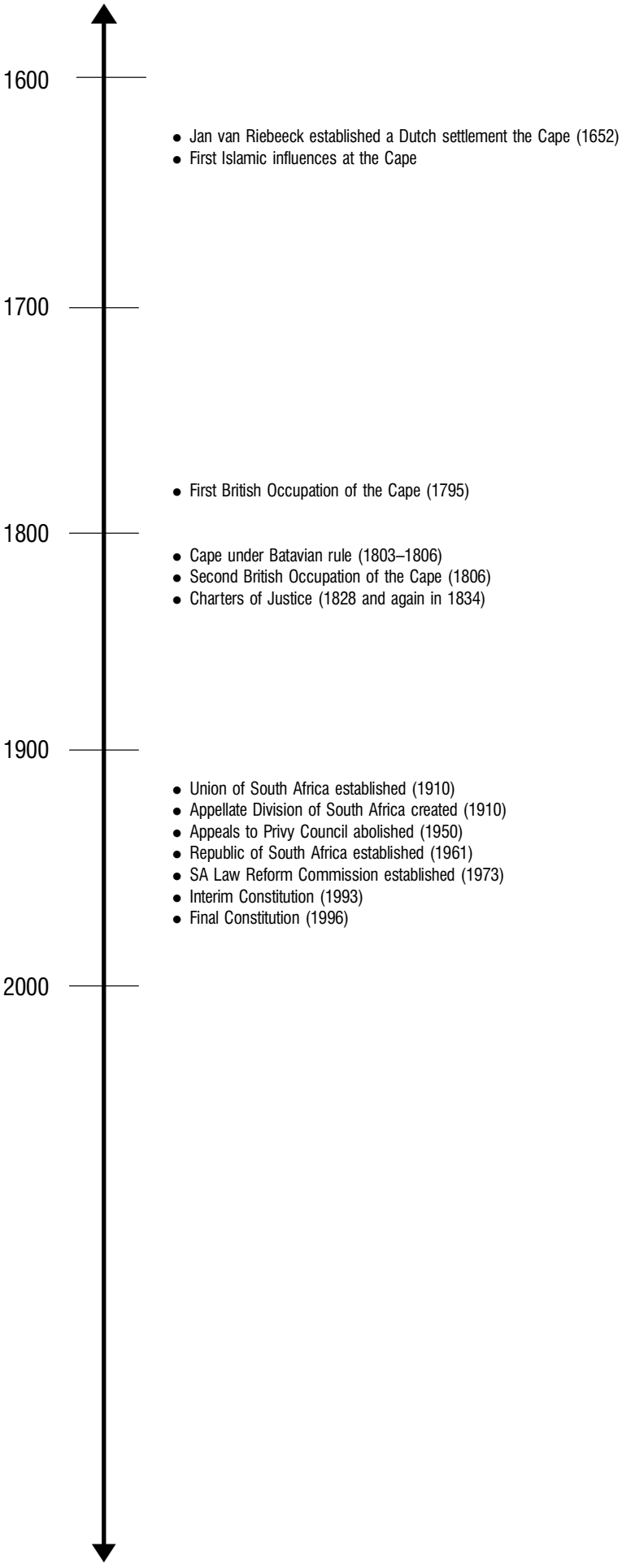
17th to 19th centuries AD

— Jan van Riebeeck establishes a Dutch settlement at the Cape (1652).
— First Islamic influences at the Cape.
— First British Occupation of the Cape (1795).
— Cape under Batavian rule (1803–1806).
— Second British Occupation of the Cape (1806).
— Charters of Justice (1828 and again in 1834).

20th century AD

— Union of South Africa established (1910).
— Appellate Division of South Africa created (1910).
— Appeals to Privy Council abolished (1950).
— Republic of South Africa established (1961).
— South African Law Reform Commission established (1973).
— Interim Constitution (1993).
— Final Constitution (1996).

The Western component: events that took place in South Africa



1.6.3 THE UNIVERSAL COMPONENT

Let us now take a look at the order (chronology) of the events and processes that influenced the development of the **universal component**.

5th century BC

— Natural-law theory first developed by philosophers in Athens.

4th century AD (in other words, 900 years later)

— Influence of early Christian church fathers on natural law theory.

12th and 13th centuries AD (in other words, another 800 years later)

— Influence of Islamic philosophers (eg Ibn Rushd) on natural-law theory.

17th century AD

— Beginning of the Age of Enlightenment/Age of Reason.
— Hugo de Groot: father of modern natural-law thinking.
— John Locke suggests that natural law consists of inalienable human rights to life, liberty and property.

18th century AD

— American Declaration of Independence acknowledges first-generation rights (1776).
— Constitutional grounding of first-generation rights also linked to the French Revolution (1789).

19th century AD

— Constitution of the Republic of the Orange Free State (1854).
— Constitution of the *Zuid-Afrikaansche Republiek* (1858).

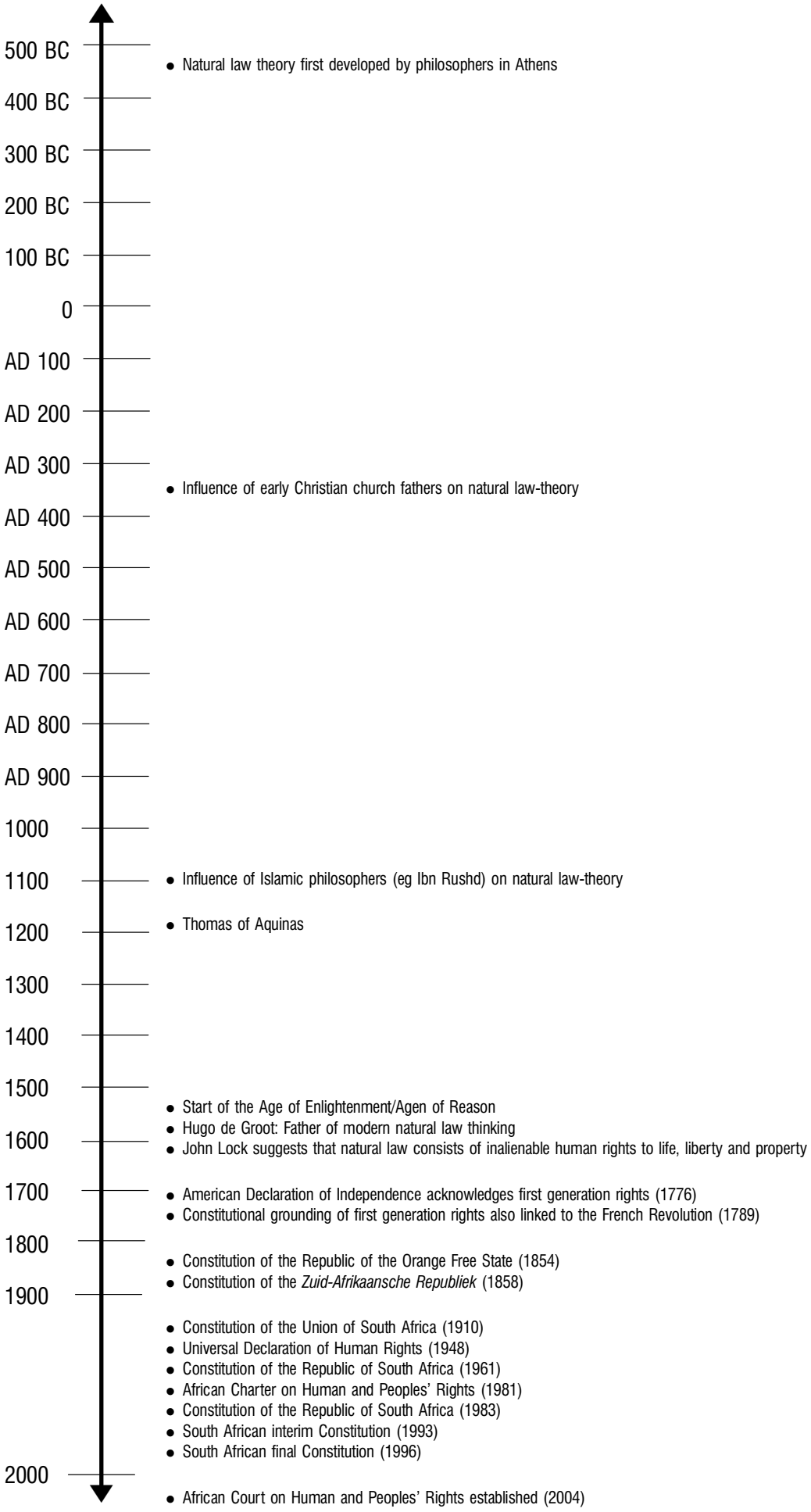
20th century AD

— Constitution of the Union of South Africa (1910).
— Universal Declaration of Human Rights (1948).
— Constitution of the Republic of South Africa (1961).
— African Charter of Human and Peoples' Rights (1981).
— South African Constitution (1983).
— South African interim Constitution (1993).
— South African final Constitution (1996).

21st century AD

— African Court on Human and Peoples' Rights established (2004).

The Universal Component



ACTVITY 1.6

Answer the following questions to see if you understand the discussion so far:

(1) Is Roman-Dutch law the only and most important law in South Africa?

(2) Is it necessary to study the history of Roman-Dutch law? Why is it necessary to study the history of indigenous African law in South Africa?

FEEDBACK 1.6

(1) No, our law is based on **three** pillars. There is an African component which comprises indigenous African law, a Western component which comprises Roman-Dutch and English law and there is a universal component which comprises human-rights law. In order to gain a proper understanding of our legal system and its roots, it is necessary to study all three of these components of South African law.

(2) No single one of the pillars upon which our legal system rests is more important than the others. All three are valuable and indispensable and have played an important role in the formation of our legal system, and will continue to play an important role in the reform and development of our law. Remember, our law is a living law which should keep up with the changing needs of society. It is not static. If law does not keep pace with the changing values of society, it will no longer be regarded as legitimate and will no longer be obeyed. In order to keep pace with the changing needs of society, the values which form the basis of the Western, indigenous African and universal traditions must be accommodated.

Test yourself

Answer the following self-assessment questions on the material that you studied in study unit 1. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions. Make sure that you answer these questions to the best of your ability.

- Identify three main sources of our law. (3)
- Describe what is meant by ''codification''. (1)
- Describe what is meant by ''common law''. (4)
- Explain why it is important to study the history of our law. (2)
- Identify the three major components of our law and explain what each component consists of. (6)
- Distinguish between external and internal history. (2)
- Identify a religious legal system. (1)
- Distinguish between reception, transplantation and imposition and give an example of each from South African legal history. (6)

Study unit 2

The African Component

Learning outcomes

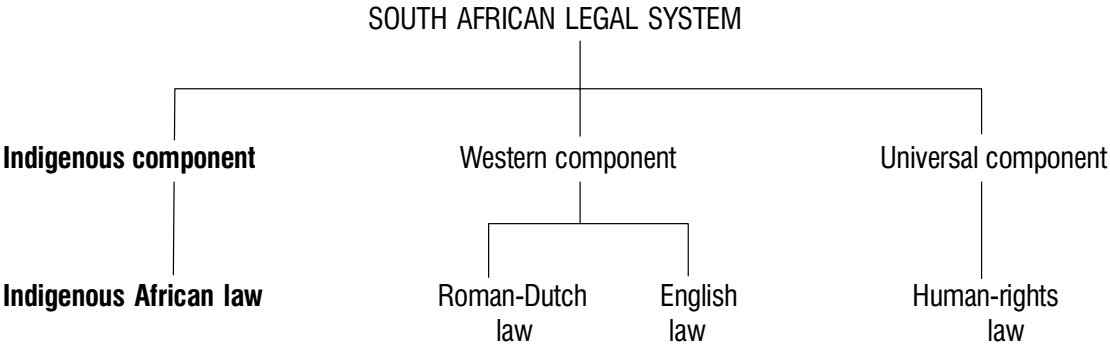
After having studied this study unit you should be able to

- explain the historical development of the recognition of indigenous law
- understand the importance of oral traditions in the study of preliterate history
- indicate the relevance of the repugnancy clause
- understand the impact of the Constitution on the application of indigenous law
- understand where Islamic law fits into the South African legal system
- explain the historical development of the recognition of Islamic law

2.1 INDIGENOUS AFRICAN LAW

As we said in study unit 1, the South African legal system consists of three main components, namely the indigenous component, the Western component and the universal component. The diagram below is a graphic representation of this structure.

In this study unit, we concentrate on the **indigenous component** of the South African legal system.



As you already know, South Africa has a multicultural society, which is a society consisting of various communities — such as the Hindu, Muslim, indigenous African and, broadly speaking, Western or European communities. Law is part of a community's culture and therefore various systems of law are applied in South Africa. But not all of these systems are officially recognised. Although legal effect is given to some of the institutions of some South African communities, it is only **indigenous African law** which, together with Western law, is officially recognised and constitutionally entrenched as a source of South African law.

This study unit deals with the political, economic, social and constitutional factors which have contributed to the recognition and development of indigenous law (in other words, the external history of indigenous law). Although Islamic law does not form part of the indigenous African component of our law, we also discuss the historical development of this law in study unit 2. The reason why it is discussed here is that it is only recently that the courts have started giving recognition to this legal system.

To return to indigenous law: As mentioned above, indigenous law developed a very long time ago. In fact, we can trace its origins back in history to a time before there was writing. It is therefore necessary for you to know how the **legal history** of preliterate people is passed on from one generation to the next and how such history is reconstructed by scholars.

2.1.1 THE PRECOLONIAL ERA

Important

Make sure that you know when the precolonial era occurred. If you do not remember, refer to the discussion of the chronological order of events in study unit 1, section 1.6.

2.1.1.1 What is meant by ''indigenous law''?

In this module, ''indigenous law'' refers to the law of the Bantu speakers, who presently occupy the greatest part of Africa south of the Sahara. Although the San (Bushmen) are regarded as the original inhabitants of the Southern African region, today they occupy only a small part of the south-western corner of Africa.

The Bantu speakers originated in North-East Nigeria and Cameroon, and from there they migrated southwards and eastwards. The collective name ''Bantu'' is derived from the original ancient language, ur-Bantu or proto-Bantu. It is uncertain exactly when their migration started, but it seems that their first contact with the San of Northern Botswana took place more than 2 300 years ago, in approximately 300 BC. The Bantu speakers came to South Africa about 1 500 years ago. They established themselves as iron-using farmers in the northern parts of South Africa (in the Limpopo region) in approximately AD 500 (not, as is sometimes believed, in the mid-17th century, at the same time as the Dutch arrived at the Cape).

Although there is great variety of the indigenous legal systems and although they cannot be traced back to a common ancestor, these systems of law share enough common features and fundamental similarities to be regarded as a single legal family. For this reason and because of their common history, reference to ''indigenous law'' in this module includes all the legal systems of the different groups of Bantu speakers.

2.1.1.2 Legal history and oral traditions in precolonial Africa

The Bantu speakers have a preliterate tradition, which is a tradition without writing. The preliterate tradition of these people resulted from the fact that they were geographically isolated from the Sudanese civilisations where the technique of writing became known during the 10th century.So, one may ask, how is it possible to reconstruct the legal history of a society without writing? The answer is: by making use of oral traditions. Oral traditions are oral narrations, or communications from the past. They are unwritten, verbal accounts of the past. (''Tradition'' in this sense refers to a communication which has been handed down from generation to generation.) Oral information is preserved through songs, legends and epic poems, which are memorised verbally and transmitted from one generation to the next, or handed down in more concrete ways such as by the burying of gold nuggets in clay pots to mark important events. Oral traditions, therefore, form the main source of information on a preliterate community's past.

By making use of oral traditions, which may be regarded as a living source of information on traditional indigenous cultures and their law, legal experts established that legal systems and forms of social control existed in precolonial African communities.

Although today indigenous law has to some extent been recorded through legislation, codification and restatement, it is still essentially oral law. It is preserved in the memories of people and handed down orally from one generation to the next. Remember, the oral traditions of indigenous communities are still

practised and have not yet been displaced by the written word, even though the oral traditions have been, and are being, written down. It can truly be said that each time an old man dies in Africa it is as though a library has burnt down.

The teaching of preliterate history is not without its problems. In fact, until the 1950s, precolonial history in Africa was a much neglected part of historical research since it was believed that history could be based on written documents only. There were various reasons why historians chose not to research the unwritten history of Africa.

These reasons included the following:

- Human memory alone was not regarded as entirely reliable.
- There was uncertainty about what method could be used to process oral information in order to reconstruct the history of preliterate communities.
- It is possible that historical facts could be distorted when recounted orally.

Objections to the study and teaching of preliterate African history were overcome

- by making use of an interdisciplinary approach, in other words, by using the source material of other disciplines such as ethnography and archaeology, and
- by the critical analysis and comparison of various oral (word-of-mouth) accounts. In this way information could be substantiated and the most likely version of the historical events related could be reconstructed, much in the same way as written records are used to obtain a true account of historical events.

Note the following

- **Ethnography** means the act of researching the cultural acts of a community by physically becoming part of that community and often even participating in their daily activities.
- **Archaeology** aims at reconstructing the past by digging up the cultural relics that previous generations left behind.

It is only fairly recently that scholars started recording indigenous laws in writing. Many of the scholars who engaged in the restatement of precolonial indigenous law were trained anthropologists as well as lawyers and often they were fluent in the language of the people being researched. These scholars included Myburgh, Schapera, Breutz, Lestrade and Van Warmelo.

2.1.1.3 The Cape 1652–1795

We have already mentioned that before Jan van Riebeeck came to the Cape in 1652, missionaries and traders had brought the indigenous people of Southern Africa into contact with Western cultures. The Dutch East India Company (*Vereenigde Oost-Indische Compagnie* (VOC)), which was a trading company established in the Netherlands and exploring new trading opportunities in Africa and the Far East, had only one interest in the Southern African interior, namely its strategic position.

The Cape of Good Hope was considered to be strategically located, since it was on the shipping route from Europe to India and the Far East. This made the position of the Cape indispensable not only for establishing a refreshment station for exhausted, ill and hungry sailors, but also for military purposes. As a result, the Company's judicial administration of the Cape during this period was not well ordered. The highest court, the *Raad van Justitie*, which was established in 1685, as well as all the lower courts, were initially staffed by laymen, and then until almost the end of Batavian (Dutch) rule, by inexperienced lawyers. It naturally follows that little attention was paid to the administration of justice in the interior, let alone the application of indigenous law.

When the Cape, established as a trading post and refreshment station by the VOC, could no longer

serve as a market for the colonists' produce, some settlers started moving out of the area to the eastern parts of the Cape and beyond. In their trek, they overpowered and dispersed the Khoi and San. By 1795 the Khoi were nearly all extinct and the San had of necessity been driven to the isolated and barren north-western parts of the country (today known as the Northern Cape Province).

The position of the Bantu speakers was quite different. Although they, too, came into conflict with the European settlers, because of their numbers they could not be destroyed like the Khoi and San.

For the purposes of the history of indigenous law, the precolonial era is regarded as having come to an end only in 1795 when the **British** took control of the Cape. That is because it was under British rule that the application of indigenous law was first regulated. Before that time indigenous laws and institutions continued to exist without interference from European settlers.

ACTVITY 2.1

Answer the following fill-in questions to see if you understand the discussion so far and determine whether you are achieving the outcomes set out at the beginning of this study unit.

(1) Although there many different indigenous African legal systems, their ..... and ..... cause them to be regarded as a single legal family.

(2) As a result of their geographical isolation, the Bantu speakers had a tradition without writing, that is a ..... tradition. One may then well ask: is it possible to reconstruct the history of such a people? The answer is ..... . How? Through ..... Oral traditions are ..... accounts of the past. How is oral information preserved?

(3) The reasons for the neglect of research into African history were that ..... was not regarded as entirely reliable; that there was uncertainty about what ..... to use to process oral information; and that it is possible that historical facts could be ..... when recounted orally.

(4) Indigenous African law is essentially ..... law and thus unwritten. This is so even though indigenous law has, to some extent, been recorded through legislation, codification and Western restatements.

FEEDBACK 2.1

(1) Although there are many different indigenous African legal systems, their **common features** and **fundamental similarities** cause them to be regarded as a single legal family.

(2) As a result of their geographical isolation, the Bantu speakers had a tradition without writing, which is a **preliterate** tradition. One may then well ask: is it possible to reconstruct the history of such a people? The answer is **yes**. How? Through **oral traditions**. Oral traditions are **unwritten, verbal** accounts of the past. How is oral information preserved? **Through songs, legends and epic poems, memorised and transmitted from generation to generation.**

(3) The reasons for the neglect of research into African history were that **human memory alone** was not regarded as entirely reliable; that there was uncertainty about what **method** to use to process oral information; and that it is possible that historical facts could be **distorted** when recounted orally.

(4) Indigenous African law is essentially **oral** law and thus unwritten. This is so even though indigenous law has, to some extent, been recorded through legislation, codification and Western restatements.

Keep in mind!

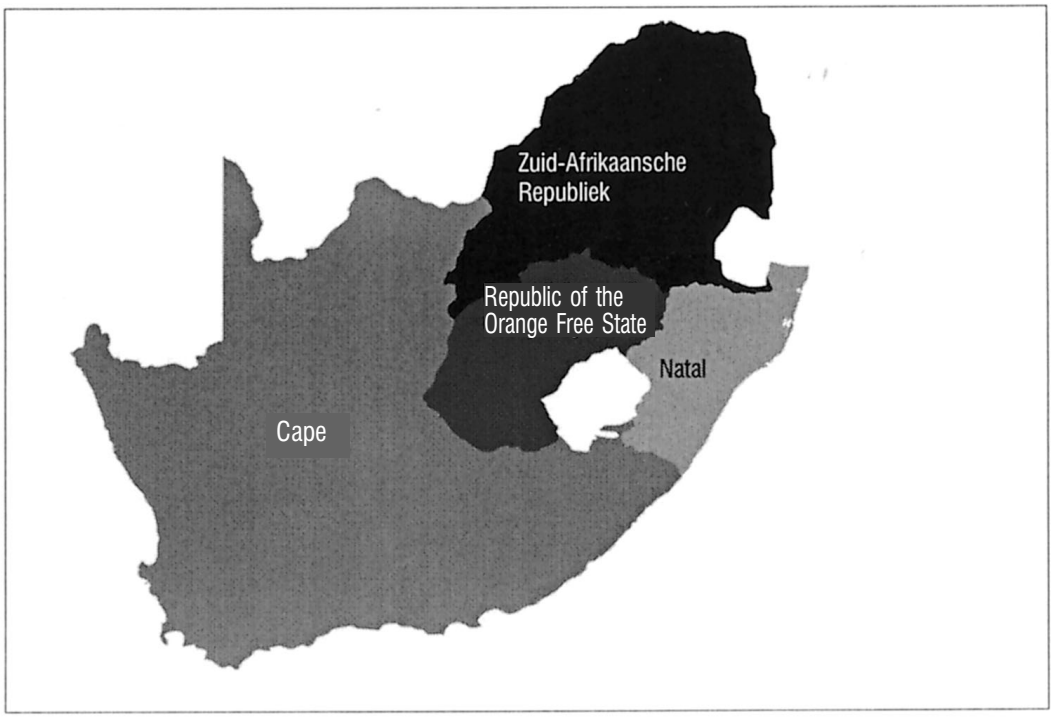
The transcription (writing down) of indigenous law was mainly done by Westerners. These

transcriptions are mostly in European languages such as English or French (or Afrikaans) and not in African languages. The fact that it was reduced to writing at some point does not mean that the natural development of indigenous law has ceased. The law still develops within the indigenous communities and is still being orally transmitted from generation to generation. That is why field research still has to be done in indigenous communities to establish the extent to which the law has changed. For example, the Centre for Indigenous Law at Unisa conducted research in Atteridgeville and Mamelodi to determine whether bridewealth (*lobolo*) still plays a role in modern marriages.

2.1.2 THE COLONIAL PERIOD

Important

Make sure that you are able to distinguish between the colonial and postcolonial eras in the history of indigenous law. If you do not remember when these eras occurred, refer to the discussion of the chronological order of events in study unit 1, section 1.6.



South Africa during the colonial era

During the colonial period, administrators of the interior settlements and later the different British colonies to a greater or lesser extent all desired to ''civilise'' the indigenous population and to do away with their ''barbarous'' laws and customs. Where indigenous law was recognised, it was subject to the strict application of a repugnancy clause. The repugnancy clause determined that indigenous law would only apply in as far as it was not contrary to the Western notion of public policy and natural justice. The application of indigenous law subject to a repugnancy clause in one form or another was widespread throughout colonial Africa.

By the middle of the 19th century, South Africa had been divided into various autonomous areas. There were two British colonies (Natal and the Cape), numerous indigenous kingdoms (the Zulu and Basotho kingdoms being the largest) and two Voortrekker republics (the *Zuid-Afrikaansche Republiek* and the Republic of the Orange Free State). The total population at that stage consisted of about 300 000 Europeans and 2 to 3 million indigenous African people.

Let us now take a look at these various areas.

2.1.2.1 The Cape

For the purposes of the administration of justice, the Cape Colony may be divided into two regions: **the Colony proper** (an area extending from what is now Cape Town) in which Roman-Dutch law as influenced by English law and as modified by legislation applied, and the **Transkei**, where indigenous law was applicable in addition to the law of the Colony of the Cape of Good Hope.

a The Colony proper

In 1795, when the Cape came under British control, **Roman-Dutch law** was retained as the law of the Colony of the Cape of Good Hope, to the exclusion of any other legal system. The general policy of the British administration was to **refuse to allow the application of indigenous law**. Although indigenous law was expressly disregarded as a system of law, it was nevertheless enforced when it was not contrary to any law or opposed to the Western notions of morality, public policy or equity.

b The Transkeian territories

The position in the Transkeian territories (an area in the present-day Eastern Cape Province), which were annexed by the British in stages, was quite different. This region, which was predominantly populated by the indigenous population, was far enough from the so-called ''white'' areas not to be considered a threat. Moreover, the indigenous community in the Transkeian territories was well structured and soundly organised. A reconsidered and more progressive policy was consequently adopted by the British administration and **for the first time in South African legal history, indigenous law was recognised as a system of law**. Although the application of indigenous law was not recognised unconditionally, at least it was no longer disregarded. Certain indigenous institutions were prohibited and the application of indigenous law in suits where both parties were blacks was made subject to the well-known repugnancy proviso that it should be ''compatible with the general principles of humanity observed throughout the civilised world''. In 1883 a criminal code for the Transkeian territories was adopted.

2.1.2.2 Natal

After annexation in 1843, the authorities in Natal decided to pursue the Cape policy of **non-recognition of indigenous law**. Sir Theophilus Shepstone, Secretary for Native Affairs in Natal, attempted to restore tribal leadership and recognised indigenous law, subject of course to the proviso that it was ''not repugnant to the general principles of humanity observed throughout the civilised world''. The chiefs were under the control of white magistrates or ''administrators of native affairs''.

In 1878 a codification of Zulu law was adopted in Natal. This Code was not a true reflection of the indigenous law of the territory and was disregarded by the indigenous community. It has since been revised several times. The current version was promulgated in 1987.

2.1.2.3 The Voortrekker republics

a The Republic of the Orange Free State

A policy of **non-recognition of indigenous law** was also followed in this independent republic. Headmen were given only a very limited jurisdiction in the small Witzieshoek area (near the present-day border with Lesotho) and in the Thaba 'Nchu Reserve specific recognition was given to customary marriages. It was only in 1899 that customary unions were formally recognised in the rest of the territory.

b The Zuid-Afrikaansche Republiek (Transvaal)

Here, too, a **policy of non-recognition** was followed at first. However, in 1885 the application of indigenous law was recognised in civil disputes where all parties were black, subject to the proviso that

the relevant indigenous law had to be in accordance with the general principles of civilisation acknowledged throughout the civilised world. In some areas commissioners' courts and chiefs' courts were instituted. From 1907 onwards appeals from commissioners' and chiefs' courts could be directed to the Supreme Court.

2.1.2.4 General

The administrators of the various territories all had different attitudes towards the administration of the local population, but the Inter-colonial Native Affairs Commission of 1903–1905 saw the ultimate goal for the administration of justice as being the improvement of indigenous law and its eventual assimilation into colonial law.

The indigenous communities were not in favour of the colonial law that was being imposed on them. They either ignored it and unofficially maintained their indigenous laws and institutions or, in some instances, obeyed the colonial laws out of fear of punishment by colonial officials.

Colonial policies laid the foundation for the official policy towards indigenous law and the judicial administration of the indigenous population in South Africa in later years. Major political transitions, such as when South Africa became a **Union** (1910) and then a **Republic** (1961) brought about little real change for the indigenous African people. In essence, newly formulated Union and Republican policies which seemed outwardly different in fact varied little from those that went before. Likewise, the indigenous population's attitude towards these policies did not change over the years. Official law was largely ignored and unofficial law and institutions grew in importance.

2.1.3 THE POSTCOLONIAL ERA

Important

Make sure that you know what period the postcolonial era covered. If you do not remember, refer to the time-line and discussion of the chronological order of events in study unit 1.

Remember!

It is important to remind yourself that we are discussing external legal history, in other words, the political, constitutional, economic and sociological factors, among others, which directed the development of our legal system. The history of the development of indigenous law in the postcolonial era provides us with a very clear example of how external factors can influence the development of a legal system.

Although the apartheid era officially commenced in 1948 when the National Party won an ''all white election'', a policy of separating the different races had been developing steadily from the turn of the of the 20th century. As early as 1905, the Inter-colonial Native Affairs Commission recommended that territorial segregation was necessary to safeguard white interests. Segregation guaranteed white political and economic control and was a shield against black majority rule. Policies of political, social and economic segregation led to the promulgation of many Acts which were aimed at keeping blacks in a position of subordination and which also impacted on the development of indigenous law. The most important of these Acts for indigenous law was the *Black Administration Act* of 1927.

2.1.3.1 The *Black Administration Act* 38 of 1927

The **practical reason** for the promulgation of this Act was that a uniform approach to the recognition and application of indigenous law was needed. By the time South Africa became a Union in 1910,

indigenous law was recognised to some extent in all the areas which were to make up the provinces of the Union of South Africa. However, the legislation of the different areas did not uniformly regulate the application of indigenous law. It was only natural that this diversity in the colonial legislation should lead to injustices in the administration of justice. The Act **consolidated the colonial legislation**. It provided for the limited recognition of indigenous law throughout the Union of South Africa subject to a repugnancy clause. Section 11(1) of the *Black Administration Act* determined that indigenous law would be applicable only in as far as it was not against the principles of public policy or natural justice.

From a **political** point of view, the *Black Administration Act* was promulgated to create a comprehensive system of black administration.

- Chiefs and other officials appointed in terms of the Act exercised their judicial and administrative functions under **state control**, thus implementing a national system of indirect rule.
- In line with the prevailing social and economic segregation of the time, a **separate court system** was created for blacks. Commissioners' courts and courts of chiefs and headmen were established as special courts of first instance where both parties were black. When a commissioner's court was instituted in an area, blacks were no longer allowed to approach the magistrate's court of the area.

2.1.3.2 The *Black Authorities Act* 68 of 1951

The *Black Authorities Act* was another piece of legislation which influenced the development of indigenous law. This Act made provision for the establishment of self-government at local, regional and territorial level and thus paved the way for the eventual creation of homelands. The homelands consisted of independent national states (Ciskei, Transkei, Boputhatswana and Venda) as well as self-governing territories (QwaQwa, Kwazulu, KwaNdebele Lebowa, Gazunkulu and KaNgwane). The independent states had legislative authority over their territories and the self-governing territories had limited legislative authority with regard to certain aspects of judicial administration within the territories. During their existence legislation was promulgated relating to court structures and the recognition and application of indigenous law. The homelands were all reincorporated into the Republic of South Africa on 27 April 1994 and Schedule 6 to the Constitution provided for the incorporation of the legislation of these homelands into South African law.

2.1.3.3 *Special Courts for Blacks Abolition Act* 34 of 1986

In 1983 the Hoexter Commission found that it was unrealistic and unreasonable to restrict urban blacks to commissioners' courts in the case of civil litigation. It was also found that separate criminal courts for separate groups of people were unnecessary, humiliating and repugnant. As a result, the *Special Courts for Blacks Abolition Act* was promulgated. This Act introduced important changes, which included the abolition of the commissioners' courts. Although this Act also repealed section 11 of the *Black Administration Act*, the repugnancy clause was taken up in its entirety by section 54A(1) of the *Magistrates' Courts Act* 32 of 1944. However, this section was also later repealed and is now to be found in the *Law of Evidence Amendment Act* 45 of 1988. The latter Act is still applicable. This Act is particularly interesting because it does not require that the parties to a suit have to be black before indigenous law can be applied.

How could the legislation referred to above influence the development of indigenous law?

The most important manner in which the legislation could influence the development of indigenous law was by limiting its application. These laws determined where, when and how indigenous law could apply. The *Black Administration Act* introduced the following mechanisms to limit and control the application of indigenous law:

- Indigenous law could only be applied in disputes between black people.
- It could be applied by special courts of chiefs and headmen which had very limited jurisdiction.
- It could be applied by commissioners' courts and in the ordinary courts, but only if it was not

repugnant to Western perceptions of public policy and natural justice. In other words application of indigenous law was subject to a repugnancy clause.

- It was in the discretion of the ordinary courts and the commissioners' courts to decide whether or not to apply indigenous law in a given case.

Keep in mind that the homelands were given the power to determine how and to what extent indigenous law should be recognised. Their legislation was largely the same as the *Black Administration Act*.

As a result of the implementation of the *Black Administration Act and other legislation, indigenous law was adapted and became distorted.*

In practice, the adaptation and distortion of indigenous law happened in the following way:

- In the ordinary courts (eg the High Court, magistrate's court, small claims court) judicial officers who had to apply the law were **not properly trained** in that law. Further, they applied only official indigenous law. In other words, the officials applied indigenous law which was contained in legislation, codification (such as the Zulu Code) and judicial precedent. That was not a complete picture of indigenous law! The result is that they applied law which was often far removed from the reality of the true, living indigenous law.

Remember!

Before the commencement of the new constitutional dispensation and the constitutional recognition of indigenous law as a source of our law, indigenous law received very little attention at most South African universities. Moreover, the legislation which instituted the small claims courts and the short process courts (ordinary courts which can apply indigenous law) and which gave the magistrates' courts the powers that once rested in the hands of the commissioners, does not require the presiding officers of these courts to have any knowledge of indigenous law. On the contrary, the presiding officers of these courts are required to be trained and experienced in the practice of Western law only.

- Presiding officers at commissioners' courts also had **limited knowledge** of indigenous law.
- In both the ordinary courts and the commissioners' courts it was permissible to apply either indigenous law or Western law. The application of indigenous law was subject to the **repugnancy clause**.
- The application of indigenous law was at the **discretion** of the presiding officer.
- Officials presiding at the special courts were under the **control** of the State. Over the years, commissioners' courts lost all credibility, especially when their criminal jurisdiction later included the enforcement of the notorious pass laws. Much criticism was levelled against them for their **lack of judicial independence** in criminal cases.
- In the chief's court only indigenous law could be applied. However, remember that the State President could **appoint** chiefs. This was important for the development of indigenous law because it was no longer old men with a very good knowledge of indigenous law and the experience of applying indigenous law who became chiefs. You can just imagine that the appointment of chiefs for political reasons had a detrimental influence on the administration of justice.

Let us explain further:

In traditional indigenous societies, the position of chieftainship was hereditary. In other words there were strict rules of succession which determined who should become a chief. Such a person was, as a rule, a senior male member of the community who had a sound knowledge of indigenous law and customs. Moreover, such a chief always acted in-council. That means that decisions in government or in law were made with the help of a council of elders. Remember that we said that because of his

knowledge, an old man in Africa was like a library? In other words, the application of indigenous law by traditional authorities, such as chiefs, was associated with a detailed collective knowledge of indigenous law.

In spite of the State's intervention, the chiefs' courts have been able to adapt to new circumstances and to overcome the stigma of colonisation, indirect rule and apartheid. They still play an important role in indigenous communities and the investigation of the Law Reform Commission has led to the drafting of the *Traditional Courts Bill*, 2008, which, if it becomes law, will regulate and entrench the powers of the traditional leaders.

2.1.4 THE CONSTITUTIONAL ERA

Important

Make sure that you know what period the constitutional era covered. If you do not remember, refer to the discussion of the chronological order of events in study unit 1, section 1.6.

The adoption of a new constitutional democracy introduced important new changes in the recognition and application of indigenous law. The Constitution of the Republic of South Africa, 1996 recognises indigenous law as one of the sources of South African law. Theoretically, this puts indigenous law in the same position as the common law, which is Roman-Dutch law.

Section 211(3) of the Constitution provides:

> The courts must apply customary law [indigenous law] when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

In practice the application of indigenous law is therefore subject to the Constitution and other legislation which deals with indigenous law. The fact that indigenous law is subject to the **Constitution** means, among other things, that all indigenous law should be examined carefully in the light of the equality clause and that many indigenous-law rules may be found to fall short of the standards set in that clause.

For example, in *Bhe v Magistrate Khayelitsha and others; Shibi v Sithole and others; SA Human Rights Commission and others v President of the Republic of South Africa and others* 2005 (1) BCLR 1 (CC) (you may refer to this as the *Bhe* case), the Constitutional Court found that the rule of male primogeniture as it is applied in the indigenous law of succession is unconstitutional because it discriminates unfairly against women and extramarital children and that therefore it should be abolished.

Note

The rule of male primogeniture means that when a man dies he is succeeded by his eldest son. In indigenous law the successor steps into the shoes of the deceased. In other words, he assumes all the responsibilities associated with the position of the head of the household and has a duty to care for the family members.

As a result of the Constitutional Court's decision in the *Bhe case*, the Law Reform Commission investigated the indigenous law of succession.Its recommendations resulted in the publication of the *Reform of Customary Law of Succession and Regulation of Related Matters Bill* 2008 (which you may refer to as the *Customary Law of Succession Bill*). This Bill has been approved by Parliament and will become law as soon as it has been signed by the State President. The purpose of the Bill is

- to abolish the customary rule of male primogeniture as far as it applies to the law of succession in order to bring indigenous law of succession into line with the Constitution
- to give effect to the judgment of the Constitutional Court in the case of *Bhe*

The fact that the application of indigenous law is subject to the Constitution further means that the constitutional protection of the right to a person's culture and cultural practices will offer indigenous law more protection than in the past.

Because indigenous law is also subject to **other legislation** which deals with indigenous law, the *Law of Evidence Amendment Act*, which contains the repugnancy clause, still applies. However, you must keep in mind that all legislation, including legislation of the former homelands, that is against the Constitution is slowly being amended or abolished. An important example is the recent *Repeal of the Black Administration Act and Amendment of Certain Laws Act* 28 of 2005 (you may refer to it as the Act on the *Repeal of the Black Administration Act*). In the preamble to this new Act it is stated that the *Black Administration Act* has to be abolished because ''it is repugnant to the values set out in the Constitution .'' and because it is a reminder of ''past divisions and discrimination''. This Act will come into operation in stages.

It is clear that indigenous law will play an increasingly important role in the future development of our legal system. This influence is already reflected in the work of the South African Law Reform Commission, mentioned above. The growing importance of indigenous law is also evident from the fact that some universities, notably the University of South Africa, now make it compulsory for students to take a course in indigenous law as part of the new four-year LLB degree.

ACTVITY 2.2

To test whether you understand what you have learnt so far, answer the following questions regarding indigenous African law:

(1) (a) Policies of political, social and economic segregation (external legal history) led to the promulgation of legislation (internal legal history) which was aimed at keeping blacks in a position of subordination. This legislation influenced the development of indigenous law (internal legal history). Name two Acts which were promulgated as a result of such policies.

(b) The legislation referred to in 1(a) above put various mechanisms in place to limit and control the application of indigenous law. Name two of these mechanisms.

(c) What was the general effect of the mechanisms mentioned in (1)(b) on the development of indigenous law?

(d) Give specific examples of how these mechanisms affected the application of indigenous law in practice.

(2) (a) How could the Constitution influence the development of indigenous law?

(b) Give one example of how this has happened in practice.

(c) In the *Repeal of the Black Administration Act and Amendment of Certain Laws Act* two reasons are given for the need to repeal the *Black Administration Act*. Name the two reasons.

FEEDBACK 2.2

(1) (a) The *Black Administration Act* and the *Black Authorities Act*.

(b) Any two of the following would have earned you a mark:

- Both Acts regulated the recognition and application of indigenous law.
- Indigenous law could only be applied in disputes between black people.

- It could be applied by special courts of chiefs and headmen which had very limited jurisdiction.
- It could be applied by commissioners' courts and in the ordinary courts, if it was not repugnant to western perceptions of public policy and natural justice.
- The ordinary courts and the commissioners' courts had a discretion whether or not to apply indigenous law in a given case.

(c) Through the years indigenous law was adapted and became distorted.

(d)
- The application of indigenous law was subject to the repugnancy clause.
- The application of indigenous law was at the discretion of presiding officers.
- It was applied by judicial officers who were not trained in indigenous law.
- Only official indigenous law was applied.
- The judicial officers were under the control of the state.

(2) (a) In terms of the Constitution the application of indigenous law is subject to the Constitution. Therefore, indigenous-law rules and principles which are not in line with the Constitution may be abolished.

(b)
- In the *Bhe* case the Court found that the rule of male primogeniture in the indigenous law of succession was unconstitutional because it discriminated unfairly against women and extramarital children and that it should be abolished.
- As a result the *Reform of Customary Law of Succession and Regulation of Related Matters Bill* 2008 has been approved by Parliament and will soon become law. The purpose of this Bill is to abolish the indigenous-law rule of male primogeniture as far as it applies to the law of succession in order to bring indigenous law of succession into line with the Constitution.

(c) It is stated that the *Black Administration Act*
- was against the values set out in the Constitution
- is reminiscent of the divisions and discrimination of the past

2.2 ISLAMIC LAW

As indicated in study unit 1, there are various religious legal systems which apply in South Africa, but which are not officially recognised as part of our law. In this section you will learn how one such system, namely Islamic law, came to apply in South Africa. In other words, we will look, very briefly, at the external legal history of Islamic law in South Africa.

2.2.1 THE COLONIAL ERA

2.2.1.1 The Cape

Muslims first reached the Cape of Good Hope in the 1650s. The first Muslims at the Cape were soldiers employed by the VOC. They were recruited in Ceylon (today Sri Lanka) and sent to the Cape to protect the newly established Dutch settlement. In 1657, a law was promulgated which provided that these soldiers were not to be challenged about their religion. However, they were prohibited from practising their religion publicly or from propagating it. The prescribed penalty for contravention of this law was death.

Some ten years after the first Muslim soldiers set foot on South African soil, the Dutch authorities in Batavia sent large numbers of slaves from East India to the Cape. In the same year they started sending political prisoners, some of whom were Muslim priests (*imams* or *sheikhs*) to the Cape. Of course these priests were also subject to the law which prohibited the practice and preaching of Islam. In

1681, the Cape was chosen as the official place of confinement for high-ranking and noble political prisoners. Thus many Muslim princes and rulers from Indonesia, who had taken up arms against the Dutch, were imprisoned at the Cape.

Important

Batavia was one of the military and administrative outposts of the United Netherlands and was situated in what is known today as Indonesia. All the Dutch colonies in the East as well as the Cape of Good Hope were administered from Batavia. In study unit 8 we discuss the administration seated in Batavia in greater detail.

The Muslims who came to South Africa brought with them the Qur'an (Koran: divine revelation of the prophet Mohammed) and their scholars published works on the Qur'anic law (*Shari'a*). It is interesting to note that the first South African book on the *Shari'a* that was published at the Cape was written in Afrikaans, although Arabic characters were used.

The credit for establishing and spreading Islam at the Cape should go to the slaves who were brought to the Cape from Bengal, the Malabar Coast and the mainland of India. During the 17th and 18th centuries, these people made up the majority of the total slave population at the Cape.

Keep in mind!

We know that the early Muslims of South Africa are often referred to as the ''Cape Malays''. However, this is misleading as the Islamic culture of the Cape has no Malaysian roots. Islam was brought to the Cape by people from Ceylon and Indonesia and was spread by slaves from the east coast and the mainland of India.

In 1804, the Dutch authorities at the Cape proclaimed freedom of religion throughout the Cape colony. Although this was welcomed by the Muslim community, social and political inequalities continued, and impeded the progress of Islam. It is only today, two centuries later, that these inequalities are being addressed by the state. Shortly after the Second British Occupation of the Cape, the administrators at the Cape allowed the Muslims to build their first mosque. In 1834, slavery was abolished and Islam became a flourishing religion at the Cape. By the middle of the 19th century, one-third of the total population of the colony were adherents of Islam.

2.2.1.2 Natal

From the middle of the 19th century, Muslims and Hindus came from India to the British colony of Natal to work as labourers on the sugar-cane plantations. Their skills and spirit of enterprise opened up other avenues of employment to them and many became astute businessmen. The Indian Muslims in Natal never experienced the hardships of the early Cape Muslims, and therefore found it easier to practise their religion and apply Islamic personal law, thereby further entrenching Islam in South Africa. Later, their numbers grew as a result of the arrival of Muslims from Zanzibar and Mauritius.

2.2.1.3 The *Zuid-Afrikaansche Republiek* (Transvaal)

Islam was introduced to the Transvaal by Muslim railway workers, artisans and small traders from Natal. The spread of Islam did not stop in the Transvaal, but later also extended to Zimbabwe, Zambia, Malawi, Botswana, Lesotho and Swaziland.

2.2.1.4 The Republic of the Orange Free State

In 1891 ''Indians'' (a generic term referring to people who originated from India, Ceylon, Indonesia, Bengal and the Malabar Coast) were prohibited from settling or remaining in the Orange Free State for longer than two months without permission from the government. This was the first legislation prohibiting their free movement in that province but restrictive legislation of this kind remained in force until fairly recently.

2.2.2 THE POSTCOLONIAL PERIOD

2.2.2.1 Islamic personal law

From what has been said above, it is clear that from the earliest times of the Dutch settlement at the Cape, the personal law of the Muslims was not recognised. This has caused grave hardship, not only for spouses in Muslim marriages, but also for the children of such marriages who have been regarded as having been born out of wedlock. Although legislation has somewhat improved the position of Muslim wives and children, Muslim marriages are still not officially recognised today.

The conflict between the values that underlie Islamic law and those that underlie Western common law is especially felt in areas such as **marriage** and the **law of succession**. Initially the attitude of the courts was that Muslim marriages could not be recognised because they are potentially polygynous and therefore are against public policy. (One may ask, whose public policy? Certainly, such marriages could not be against the public policy of the Muslim community in South Africa nor, for that matter, against the public policy of the majority of South Africa's population, since indigenous African marriages are also potentially polygynous.)

Keep in mind

- **Monogamy** refers to the practice where only one man and one woman are allowed to be married to each other at the same time.
- **Polygamy** refers to the practice where a man or a woman may be married to more than one spouse at the same time.
- **Polygyny** refers to the practice where a man is allowed to have more than one wife.
- **Polyandry** refers to the practice where a woman is allowed to have more than one husband.

During the 1990s, the High Court indicated its willingness to embrace a new approach to Muslim marriages. This is evident from the cases of *Ryland v Edros* 1997 (2) SA 690 (C) and *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA). In the latter case, the Supreme Court of Appeal recognised a Muslim widow's claim for loss of support following the unlawful death of her husband. In the case of *Ryland v Edros* the court stated that the values of human dignity, equality and freedom must always be at the forefront when the Constitution is interpreted. The court added that the values of equality and diversity are very important values which form the basis of our new Constitution.

In the 2004 case of *Daniels v Campbell NO* 2004 (7) BCLR 735 (CC), the Constitutional Court held that the natural interpretation of the word ''spouse'' in the *Intestate Succession Act* 81 of 1987 and in the *Maintenance of Surviving Spouses Act* 27 of 1990 should include partners in a **monogamous** Muslim marriage (that is a marriage where one man is married to one wife).

Remember!

The latest case which was decided in the Cape High Court (from 1 March 2009 known as the Western Cape High Court) has gone a step further. It was heard on 18 July 2008. In the case of *Hassam v Jacobs and Others* (2008) 4 All SA 350 (C) the Court declared that the word ''spouse''

> in the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act* should be interpreted so as to include spouses in a **polygynous** Muslim marriage (that is a marriage where one man is simultaneously married to two or more wives) and that they should be afforded the same benefits enjoyed by the surviving spouses in a *de facto* monogamous Muslim marriage. This means that with regard to these two pieces of legislation polygynous Muslim marriages will no longer be regarded as contrary to public policy.

In a nutshell, in the *Hassam* case, the court added that the two Acts referred to above should be interpreted in a manner which is consistent with the foundational values of human dignity, equality and freedom as enshrined in the Bill of Rights. To discriminate against a woman who is in a polygynous marriage amounts to a violation of her right to equality and her right to human dignity. In terms of the Bill of Rights such discrimination is also unfair unless there are valid grounds, in terms of section 36 of the Constitution, for limiting her rights. The Court ruled that there is no such justification for excluding the widows of polygynous Muslim marriages from the provisions and benefits of the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act*. The orders of the Cape High Court were confirmed by the Constitutional Court in 2009 and the legal position is now governed by the *Hassam* case.

Finally, the court also referred to the fact that the South African Law Reform Commission, in a proposed *Bill for the Recognition of Islamic Marriages*, has recommended that polygynous Muslim marriages be recognised. The Bill makes provision for, among other things, the status and capacity of the spouses and the dissolution of Muslim marriages.

ACTVITY 2.3

Answer the following questions to determine whether you understood the historical development of the recognition of Islamic law.

(1) Explain how the current position of indigenous law in the South African legal system differs from the position of Islamic law.

(2) Study the following scenario and then answer the questions below:

Azeza has been married to Malik for 20 years. They got married under both South African law and Islamic law. They have three children. In 2003 Malik took a second wife, Mariam, whom he married under Islamic law. Malik dies in 2005 and leaves behind his two wives and children from his first wife. Malik does not leave a will, in other words he dies intestate.

(a) Will both wives be able to inherit a portion of his estate and will both wives be able to claim maintenance? Explain the answer.

(b) Would the position be any different if Malik had died in October 2009? Explain your answer.

(c) In the light of which fundamental constitutional values did the Cape High Court base its decision in the *Hassam* case?

FEEDBACK 2.3

(1) In terms of the Constitution, indigenous law is officially recognised as a source of South African law. Islamic law does not yet enjoy official recognition in this country. However, the Constitution makes it possible for religious laws to be recognised and the Law Reform Commission is investigating the position of Islamic marriages.

(2) (a) The law in 2005 was governed by the 2004 Constitutional Court decision in the case of *Daniels v Campbell*. In this case the court held that the natural interpretation of the word ''spouse'' in the *Intestate Succession Act* 81 of 1987 and the *Maintenance of Surviving Spouses Act* 27 of 1990 should include only partners in a monogamous Muslim marriage, in other words in a marriage between one man and one woman. Therefore, only the first wife,

Azeza, would be able to inherit and claim maintenance. Malik's marriage to Mariam would not have been recognised as a valid marriage.

(b) Yes, the position would be different if Malik had died in October 2009. The law is now governed by the *Hassam* case. In this case the court declared that the word ''spouse'' in the two Acts should be interpreted so as to include spouses in a polygynous Muslim marriage. In other words, where a Muslim man was simultaneously married to two wives, both wives will now be protected in terms of the *Intestate Succession Act* 81 of 1987 and the *Maintenance of Surviving Spouses Act* 27 of 1990. Both Azeza and Mariam would get a share of the estate and both would be able to claim maintenance.

(c) The court stated that legislation should be interpreted in a manner which is consistent with the fundamental values of human dignity, equality and freedom. The court added that to discriminate against a woman in a polygynous marriage amounts to a violation of her right to equality and human dignity.

Test yourself

Answer the following self-assessment questions on the material that you studied in study unit 2. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions. Make sure that you answer these questions to the best of your ability.

- Explain what is meant by ''indigenous law''. (1)
- Briefly summarise the application of indigenous law in the different provinces before 1927. (5)
- What is meant by the ''repugnancy clause''? Is it still applicable today? Give reasons for your answer. (3)
- Explain how the Constitution has changed the position of
  - — indigenous law (1)
  - — Islamic law (2)
  - — Briefly discuss the impact of the final Constitution on Muslim family law, with particular reference to Muslim marriages. In your answer, refer to case law on this matter. (6)

Study unit 3

The Western component: The origins of the Western legal tradition

Learning outcomes

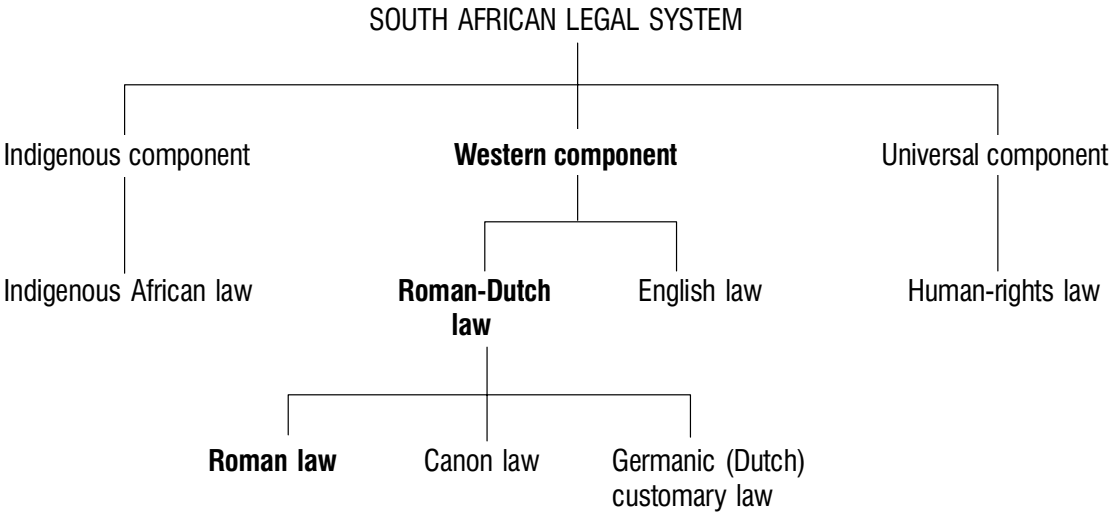
After having studied this study unit, you should be able to

- understand why Roman law is important for South African jurists today
- discuss the importance of ancient Greek philosophical thought for the Western legal tradition
- identify the phases in the political development of the Roman Empire
- understand how the law developed during each of the four political eras of the Roman Empire
- understand why Justinian decided to codify Roman law
- explain the importance of the *Corpus Iuris Civilis* for modern jurists

3.1 INTRODUCTION

In study unit 2 we explained the origins and development of the indigenous African component of our law. Study unit 3 will introduce you to an important part of the **Western component** of the law, namely Roman law. Do you remember that Roman law forms part of Roman-Dutch law? If you have forgotten, read study unit 1, section 1.4.2 again. Although we will concentrate on **Roman law** in this study unit, we will also briefly refer to the roots of critical thinking in the Western tradition, which lie in ancient Greek thought.

The diagram below is a graphic representation of the component that we will study in this unit.



At this stage you may ask yourself: Why is it necessary to study Roman law and the history of its development? After all, the fall of the Roman Empire took place centuries ago (more than 1 500 years ago) and pure Roman law as an independent legal system is not applied anywhere in the world today.

There are nevertheless many good reasons why Roman law is still studied in many countries even today, but we will name only two.

- In the first place, the legal systems of many countries are based on Roman law. These are known as civil-law legal systems. These countries include Germany, France, the Netherlands, Italy, Spain and most other countries on the Western European continent. As you already know, South Africa belongs to the family of countries that have a mixed legal system; such countries include Scotland, Sri Lanka and Zimbabwe. The legal systems of these countries reflect a mixture of Roman law (civil law) and English or common-law influences. Even countries belonging to the common-law family, like England, the United States and many others, show Roman-law influences in their legal systems. You are therefore studying the history of Roman law together with law students in many other countries. In order to truly understand a legal system, one must study the history of its development, just as we did in study unit 2 with indigenous African law.

Keep in mind!

There is a distinction between the scientific and the practical reception of Roman law, as explained in study unit 1. The countries that have civil-law legal systems all experienced a practical as well as a scientific reception of Roman law. In other words, they received both the actual substantive Roman-law rules and the scientific framework (principles, concepts and categories) of the Roman legal system. However, there are also other countries, some of which are in Eastern Europe (eg Hungary and Russia), that experienced only a scientific reception of Roman law.

- Secondly, even though all the countries of Western Europe now have codified legal systems, you must remember that their codes are based on Roman law. Whenever they encounter difficulties with the interpretation of their codes, they have to refer back to Roman law. This is evidence that the ancient Roman legal system has withstood the test of time and can still be of help to modern jurists. When you read South African cases, especially cases relating to the **law of things** and **delict**, you will see how often judges refer to substantive Roman law. The case of *Cooper v Boyes NO* 1994 (4) SA 521 (C) is an example of a case where the judge referred to the Digest. We tell you more about the Digest in section 3.8.3.

Before we turn to the history of Roman law, it is important that you know a little about ancient Greek thought.

3.2 ANCIENT GREEK PHILOSOPHICAL THOUGHT — ATHENS

Although the content and structure of our law did not have their origins in Athens at all, Athens was the source of **critical thinking about the ideals which inspire the Western legal tradition**. The nature of these ideals, and their continued relevance, are discussed in more detail in the course, Legal Philosophy.

Keep in mind!

You must have heard of Greece and Athens before. Yes, in 2004 the Olympic Games were held in Athens, the capital of Greece! However, in the 5th century BC (that is approximately 2 500 years ago), Greece consisted of a number of independent city states and ''Athens'' referred to the State of Athens. In this study unit it is important that you distinguish between the ancient State of Athens and the capital of Greece today. Make sure that you know where on the time-line the 5th century BC fits in.

The heyday of Athenian civilisation was the period from 446 BC to 300 BC, some years before the blossoming of the Roman Empire. Unlike Rome, Athens was not known for its jurists. Its laws were

never properly systematised and therefore had very little influence outside the city itself. However, Athens was, and still is, famous for its philosophers. Greek thinkers like **Socrates**, **Plato** and **Aristotle** left behind a rich body of writing on the purpose of the law, the ideal society and the nature of justice.

Plato was a student of Socrates. He was deeply disillusioned with the democratic politics of Athens after the citizens of the city, sitting as a jury, sentenced Socrates to death on false charges of corruption. To Plato this was a clear sign of the dangers inherent in politics if the state is not governed in a rational manner. Plato set about rectifying the defects of Athenian politics by establishing his own school (the Academy) to educate the political leaders of the future. He wrote a textbook for his students, called *The Republic*. This was the first book to be devoted to politics, law and the state. In the book, Plato rationally set out a constitution for the ideal state and explained why the state should be ruled by a class of philosopher-kings.

Plato's dream of a state and a legal system governed by scientific rational principles was taken further by one of his students, Aristotle, who wrote his own treatise on the state, called *Politics*. Plato's dream was further developed by the Romans, who considered themselves to be the true inheritors of the post-Socratic tradition of rational scientific thinking.

To this day, the ideal of a scientific and rational legal system forms the cornerstone of the Western legal tradition.

ACTVITY 3.1

Test whether you understand what you have learned about the ancient Greek philosophers by completing the following sentences:

(1) Critical legal thinking about the ideals which inspire the Western legal tradition originated in ..... .

(2) The ideal of a scientific and rational legal system originated in *The Republic*, a work by the Greek philosopher ..... .

(3) Athens was famous for philosophers such as ....., ... and ..... .

FEEDBACK 3.1

(1) Critical legal thinking about the ideals which inspire the Western legal tradition originated in **Athens**.

(2) The ideal of a scientific and rational legal system originated in the *The Republic*, a work by the Greek philosopher **Plato**.

(3) Athens was famous for philosophers such as **Socrates**, **Plato** and **Aristotle**.

3.3 ROMAN HISTORY

3.3.1 INTRODUCTION

It is important to realise that, although we are primarily interested in Roman **legal** development, a legal system functions within and serves a society and has to keep up with societal changes. Remember that external legal history (political, social, economic and other external factors) has an influence on the development of internal legal history. (Reread section 1.2 in study unit 1, which deals with internal and external legal history.) Furthermore, the political situation in a state has a profound influence on the legal system and legal development. (Just think how much our South African legal system has changed since 1994. This is mainly because of drastic changes in our government and society.) We therefore require an integrated perspective on Roman society, politics and law throughout Roman history.

We shall follow events chronologically from the legendary founding of Rome in 753 BC to the great codification of Roman law by Emperor Justinian in AD 535. This is a period of more than a thousand years!

Important

Before you continue with this module, go back to the time-line in study unit 1. Make sure that you know which period in time we are dealing with in study unit 3 and that you understand how to read time in history. Go back to the feedback on activity 1.5 in study unit 1.

3.3.2 THE FOUR DIFFERENT POLITICAL STRUCTURES IN ROME AND THE FOUR PHASES IN ROMAN LEGAL DEVELOPMENT

Before we proceed with our integrated study of Roman history, it is important to know that Rome had four different types of government, which followed each other chronologically. These were:

- The **Monarchy** (753 BC–509 BC), when Rome was governed by a king.
- The **Republic** (509 BC–27 BC), when Rome was governed by two officials at a time, called consuls.
- The **Principate** (27 BC–AD 284), when Rome was governed by an emperor.
- The **Dominate** (AD 284–AD 476), when Rome was governed by an emperor who openly called himself a dictator.

We can also distinguish four periods in the development of Roman law. It is important to remember that the dates of the four periods in the development of Roman law and the dates of the periods during which there were different forms of government do not coincide exactly. For example, the period of early Roman law occurred partly during the Monarchy and partly during the early years of the Republic.

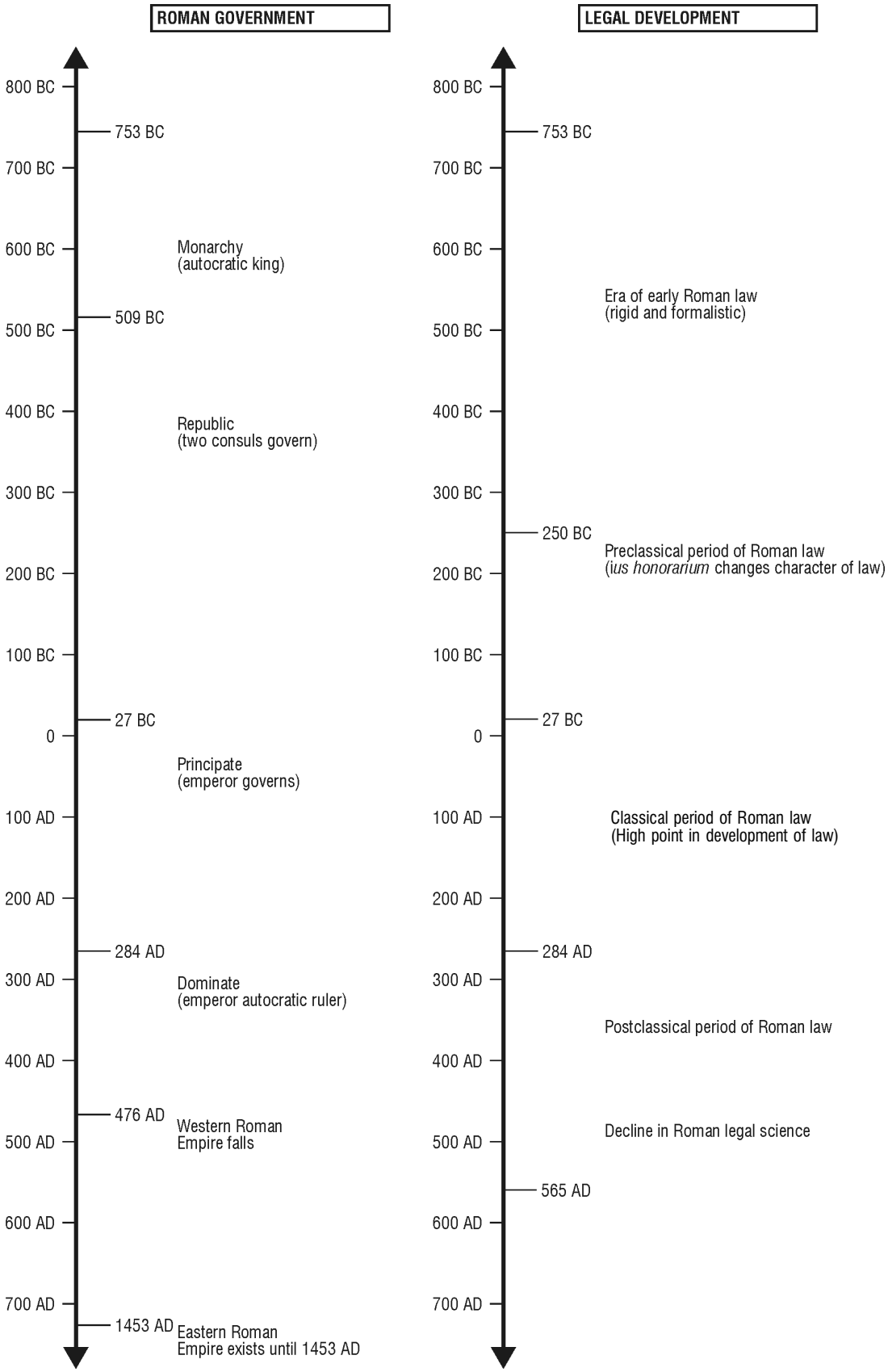
The four periods in the development of Roman law are:

- The era of **early Roman law** (753 BC–250 BC), when the old *ius civile* was the only recognised legal system. This system applied only to Roman citizens and was characterised by rigidity and formalism.
- The **preclassical period of Roman law** (250 BC–27 BC), when a new legal system, called the *ius honorarium*, was established and applied alongside the *ius civile*. The *ius honorarium* was characterised by fairness, flexibility and lack of formalism.
- The **classical period of Roman law** (27 BC–AD 284), when Roman law was developed and refined to such an extent that it was superior to any legal system of any other ancient civilisation and even has a marked influence on lawyers today.
- The **postclassical period of Roman law** (AD 284–AD 565), when efforts were made to simplify the law, and the influence of what is known as ''**vulgar law**'' made itself felt. ''Vulgar law'' was also Roman law, but not pure Roman law as found in the classical period. It was Roman law which was administered by officials in distant parts of the Roman Empire, and which had been influenced by Germanic law. Towards the end of this era there was a renewed interest in classical law. This led to Justinian's codification of Roman law, which preserved it for us today.

Important

Make sure that you are able to show these different periods on the time-line and that you know where these different periods fit into the history of the development of the South African legal system.

Four types of government and the four periods in development of Roman Law



ACTVITY 3.2

Test whether you understand what you have just read by answering the following questions:

(1) Roman legal history may be divided into four phases, namely the era of ..... the ..... period, the ..... period and the ..... period.

(2) During the period of ....., Roman law was characterised by strictness and rigidity.

(3) During the ..... period of Roman law the *ius honorarium* was established. This law was characterised by

..... and ..... .

(4) During the ..... , the power of Rome was at its height and Roman law underwent its greatest development. This period in the development of Roman law is known as the ..... period.

(5) Arrange the following events in chronological order. Use the time-line provided in study unit 1 when you answer this question.

- 27 BC — Beginning of the Principate
- 753 BC — Establishment of the city of Rome
- AD 476 — Fall of the Western Roman Empire
- 250 BC — Beginning of the preclassical period of Roman law

FEEDBACK 3.2

(1) Roman legal history may be divided into four phases, namely the era of **early Roman law**, the **preclassical** period, the **classical** period and the **postclassical** period.

(2) During the period of **early Roman law**, Roman law was characterised by strictness and rigidity.

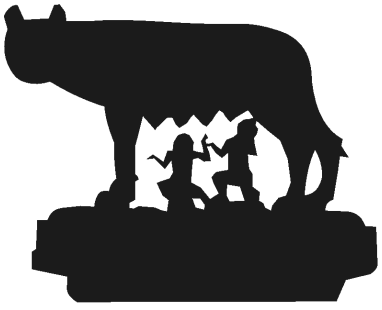
(3) During the **preclassical** period of Roman law the *ius honorarium* was established. This law was characterised by **fairness**, **flexibility** and **lack of formalism**.

(4) During the **Principate**, the power of Rome was at its height and Roman law experienced its greatest development. This period in the development of Roman law is known as the **classical** period.

(5) 753 BC — Establishment of the city of Rome
250 BC — Beginning of the preclassical period of Roman law
27 BC — Beginning of the Principate
AD 476 — Fall of the Western Roman Empire

3.4 THE MONARCHY (753 BC–509 BC)

The well-known image of the she-wolf suckling the twins, Romulus and Remus

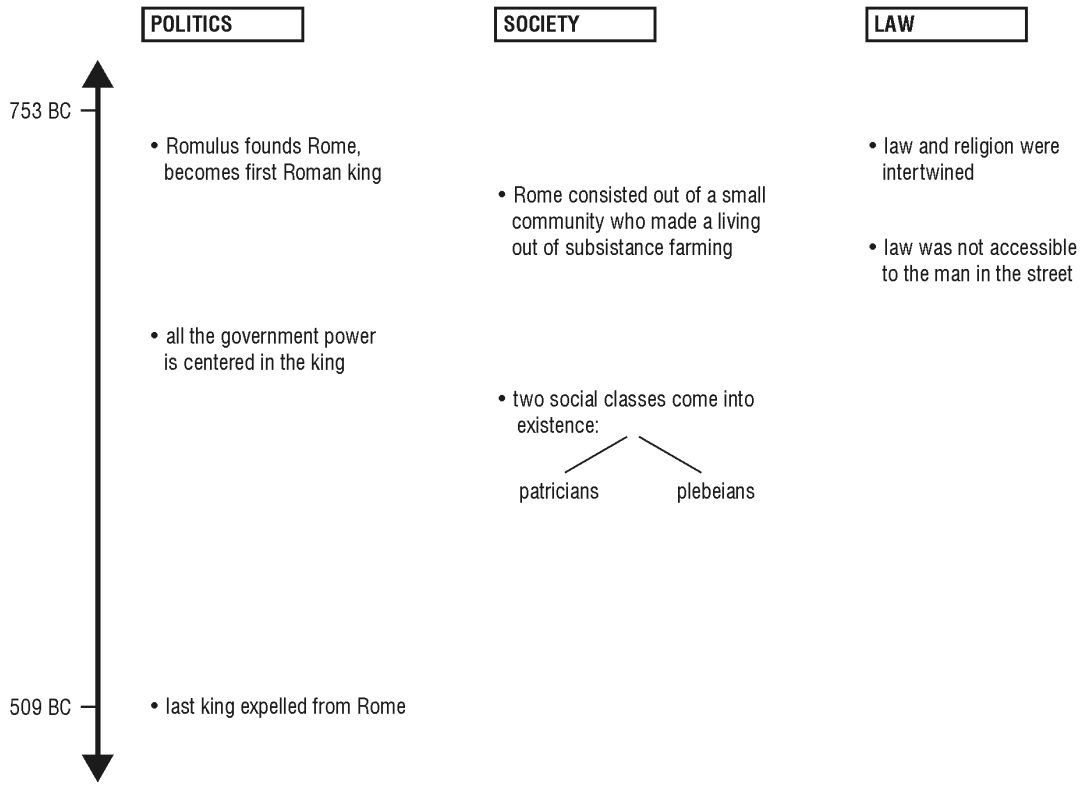


According to legend, Rome was founded in 753 BC on the banks of the river Tiber (in present-day Italy) by Romulus, the first of seven kings to rule Rome.

The legend of the founding of Rome is an interesting story. It belongs to folklore, just like many fables about the origin of certain tribes in Africa. According to this legend, there was once an ancient king who ruled a place called Latium, which was situated where Rome was later founded. This king had a daughter. Mars, the god of War, saw this beautiful princess from the heavens and fell in love with her. They had twins, two little boys named **Romulus** and **Remus**. Then the king's greatest enemy dethroned him and wanted to kill his grandsons as they were heirs to the throne. The princess made baskets, put her baby sons in them, and let them float down the river. A wolf found the boys and reared them. When they were grown up, they went back and killed their grandfather's enemy. Romulus then established the city of Rome on the banks of the river Tiber and became the first Roman king.

- The period in Roman history from 753 BC to 509 BC is known as the **Period of the Kings** or the **Monarchy**. During this time, Rome consisted of a small community which made a living out of subsistence farming.
- The Roman king was an **autocratic** ruler. This meant that not only was full power of governance vested in him, but he was also the supreme judge and he made the law. As high priest he also conducted religious ceremonies. In other words, during the Monarchy, **law and religion were intertwined**.
- Towards the end of the Monarchy, the population of Rome could be divided into two clearly demarcated social classes: the **patricians** and the **plebeians**. The distinction between the two classes probably originated when large numbers of migrant workers flocked to Rome. The original Roman families formed the patrician class and the workers formed the plebeian class. The plebeians had very little political say and were dominated by the patricians. This initiated a **class struggle** that lasted well into Republican times.
- By **509 BC** the Roman people had had enough of autocratic rulers and the last king was expelled by the people in that year.
- Roman society began to change and expand. Existing religious rules and customary law were no longer sufficient to regulate society. Therefore, a more sophisticated legal system gradually began to develop. This brings us to the Roman Republic.

The Monarchy 753 BC - 509 BC



ACTVITY 3.3

Answer the following question to test whether you understand what you have learnt so far:

What evidence would you be able to give to support the following opinion: During the Monarchy, law and religion were intertwined?

FEEDBACK 3.3

The king was an autocratic ruler who was not only the highest judge and lawgiver, but also the high priest. This means that the same person who was the religious leader was also in charge of the administration of justice. He heard disputes and made law. As a result, law and religion became intertwined.

3.5 THE REPUBLIC (509 BC–27 BC)

3.5.1 POLITICS DURING THE REPUBLIC

In 509 BC the government of Rome changed from a monarchy to a republic. The important political role players were

- the magistrates
- the Senate
- the Popular Assembly

3.5.1.1 The magistrates

''Magistrates'' was a collective name for

- two consuls
- one *praetor*
- two *aediles curules*

a The consuls

Rome was governed by two consuls at a time. The Romans wanted to prevent a situation where a single head of state could become a tyrannical or autocratic ruler (as the kings had been during the Monarchy) so they introduced the following measures to prevent authority being vested in one person only and keep corruption in check:

- There were always two consuls at a time.
- No consul could hold office for longer than one year.
- Each consul had the right to veto (reject) any act performed by the other consul.

The consuls, who were elected by the Popular Assembly, were responsible for a number of functions, including convening the Senate, convening the Popular Assembly, publishing edicts regarding the activities of the consuls themselves, punishing Roman citizens for doing wrong and controlling the state treasury (the state's money).

b The praetor

As Rome's territory expanded, the consuls' duties increased to such an extent that they could no longer handle the **administration of justice**. In 367 BC a law was passed creating the praetorship for this purpose. Like the consuls, the *praetor* was elected annually by the Popular Assembly. The *praetor's*

most important function was the administration of justice and by performing this task the **praetor** made a tremendous contribution to the development of Roman law. We will discuss this in more detail later on.

c The aediles curules

This office was held by two officers who were elected annually by the Popular Assembly. They were chiefly responsible for maintaining order in the market and on the public roads. They had jurisdiction over crimes committed within the area of their work as well as over legal disputes which arose out of transactions at the markets.

3.5.1.2 The Senate

The Senate, or Council of Elders, was an advisory body to the magistrates. All ex-magistrates could become members of the Senate. At first, senators had to be patricians, but later on the plebeians were also admitted. The Senate gave its opinion, in the form of decisions, on matters of state which required attention. The Senate had no legislative powers, but by the time of the Empire (which began in 27 BC) its decisions were regarded as important enough to be treated as equal to laws.

3.5.1.3 The Popular Assembly

The Popular Assembly represented all the people of Rome. It was supposed to be the true ruler of Rome, but in practice its power was undermined as it was impossible to get all the people together at one meeting.

In the latter days of the Republic, after the great territorial expansion of Rome, the Popular Assembly could hardly function as an assembly of the whole population. It was no longer practically possible for the Popular Assembly to meet, as the population had become too numerous, so it was the Senate that was the true governing body in Rome.

Note the following

Look at the map of the Roman Empire on page 56. Although this map shows the Empire after it had split into the Western and Eastern Empires, it still gives you a good idea of the huge areas that became part of the Empire after the great territorial expansion by the Roman armies.

3.5.2 LAW DURING THE PERIOD OF THE REPUBLIC

During the republican period, Rome grew from a small community into an empire. At the same time, Roman law developed from a primitive system to a complex system of law that was suited to the requirements of a highly developed community with an intricate social system. The most important factors which influenced legal development during the Republic were

- the law of the Twelve Tables
- the activities of the *praetor*
- the work of the jurists

3.5.2.1 The Twelve Tables

The law of the Twelve Tables was promulgated in 450 BC. It had its origin in the **class struggle** between the patricians and the plebeians. The plebeians were unhappy that the law was not known to them and that they were at the mercy of the priests, who were patricians and who were the only people who had any knowledge of the law. It was out of this unhappiness that the codification of the Twelve Tables was born. The law in existence at that time was written on twelve tables made of bronze and placed in the *forum* (the market place). Anyone who wanted to know more about the law could go and read the tables.

The law of the Twelve Tables was important for four reasons:

- It was a **triumph** for the plebeians as it reduced the patricians' exclusive control over the law.
- It marked the **division between the rules of law and the rules of religion**. The Twelve Tables was a collection of civil-law rules and was separate from religious rules.
- Everybody had access to the legal rules, thus everybody knew what the law said. This created **legal certainty**.
- By the time this codification took place, the Romans had begun to realise that their law could be treated systematically, and we therefore find the beginnings of a **legal science** in the Twelve Tables.

3.5.2.2 The *praetor*

As you already know, the office of *praetor* was created in 367 BC. The task of the *praetor* was to **administer justice**. He did this by determining the civil **procedure** that parties should follow in a lawsuit. The *praetor* published this civil procedure in edicts that were placed in the market for all to see. Roman civil procedure consisted of two phases:

- The parties to a legal dispute appeared before the *praetor*. He determined if there was a dispute, what the nature of the dispute between the parties was and whether the dispute should go before a judge.
- The *praetor* then appointed the judge, who made a finding on the facts of the case.

Note the following

The following scenario demonstrates the different functions of the *praetor* and the judge in legal disputes during Roman times:

> Paulus and Antonius are both Roman citizens. They live on adjoining properties. Paulus has a huge tree on his property, some of the branches of which hang over onto Antonius' property. Antonius is unhappy about this tree because it casts a big shadow over his vegetable garden. As a result, Antonius' vegetables are not doing well. Antonius has asked Paulus a few times to remove the overhanging branches of his tree, but Paulus feels that no living thing, including trees, should be prevented from living or growing wherever it wants. Paulus therefore refuses to trim the tree. Antonius decides to take the matter to court. He summons Paulus to appear before the *praetor urbanus*. The *praetor* listens to both sides of the story. He then decides that the provisions of the Twelve Tables regarding the limitation on a person's property rights, namely that they may not adversely affect his neighbour's property rights, are applicable. The *praetor* then issues an edict stating which remedy should be used, and appoints a judge. Antonius and Paulus then appear before the judge, who makes a finding on the facts of the case.

The *praetor* applied the *ius civile*. This *praetor*, who was known as the *praetor urbanus*, could only administer justice between Roman citizens, since the Roman *ius civile* was only applicable to Roman citizens. This explains why the dispute between Paul and Antonius was heard by the *praetor urbanus* — they were both Roman citizens.

However, as Rome expanded, trade opportunities increased and foreigners flocked to Rome. This led to the creation of a new office in 242 BC, that of the *praetor peregrinus*. He was responsible for the administration of justice in matters involving foreigners.

The ***praetor peregrinus*** played an important role in the development of Roman law. As we said previously, the *ius civile* could not be applied to legal disputes involving foreigners. It was only applied in legal disputes between Roman citizens. It was up to the *praetor peregrinus* to develop a body of legal rules which could be applied in cases under his jurisdiction that is cases between foreigners or between foreigners and Roman citizens. In order to do this, the *praetor peregrinus* relied heavily upon the ***ius gentium***.

Did you know?

The *ius gentium* was a body of international law with a less formalistic and fairer character than the Roman *ius civile*.

The *praetor urbanus* in turn developed a new law which was based on the *ius civile*, but influenced by the equitable principles of the *ius gentium*. This law was called the *ius honorarium* and was applicable in disputes between Roman citizens. The *ius honorarium* eventually replaced the *ius civile*.

Important

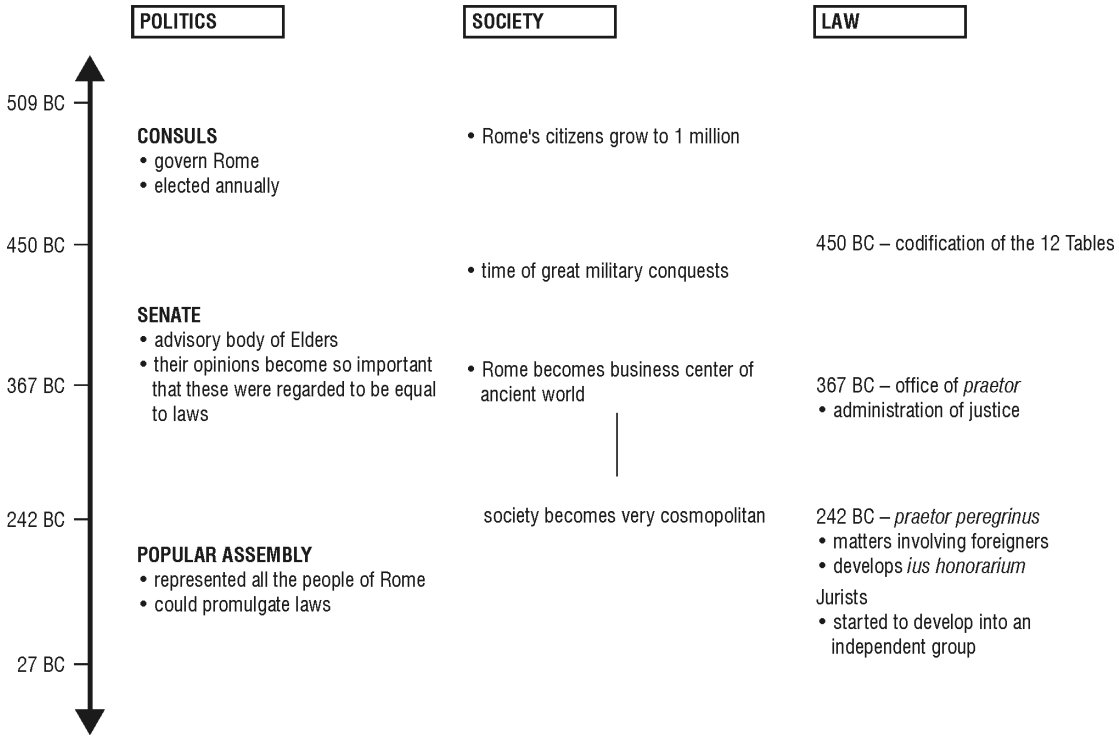
The important function of the *praetor* of developing new law came to an end in AD 130, when all the praetorian edicts were codified as the *Edictum Perpetuum*.

In AD 212, Emperor Caracalla abolished the distinction between Roman citizens and foreigners. From then on there was no longer any need to distinguish between the *ius civile*, the *ius gentium* and the *ius honorarium*. A ''new'' legal system evolved which was based on the *ius gentium* and the *ius honorarium*.

3.5.2.3 The jurists

Unlike the *praetor*, the jurists did their most important work during the imperial period (from 27 BC to AD 476). At first, during the Republic, jurists were not professional lawyers, but simply laymen who took an interest in the study of the law. During the latter years of the Republic, they developed into a separate group. They gave free legal advice to the public. The jurists played an extremely important role in the development of Roman legal science. Their activities during the imperial period will be discussed in greater detail below.

The Republic 509 BC - 27 BC



ACTVITY 3.4

Test whether you understand what you have learnt about the Roman Republic by answering the following questions:

(1) Which were the three most important factors that contributed to the development of Roman law during the Republic?

(2) Explain why the promulgation of the Twelve Tables should be regarded as a milestone in the development of Roman law.

(3) What was the most important task of the *praetor urbanus*?

(4) (a) Why was the office of the *praetor peregrinus* instituted?

(b) How did the *praetor peregrinus* contribute to the development of Roman law?

(5) How did the *ius honorarium* come into being?

(6) Complete the following table which covers the three legal systems applied during Roman times:

Legal system	**Applied by which *praetor?***	**Applicable to whom?**	**Characteristic(s) of the legal system**
			rigid and formalistic
	praetor peregrinus		
ius honorarium			

FEEDBACK 3.4

(1) The Twelve Tables, the activities of the *praetor* and the work of the jurists.

(2) The law of the Twelve Tables was important for four reasons:

- It was a **triumph** for the plebeians as it reduced the patricians' exclusive control over the law.
- It marked the **division** between the rules of law and the rules of religion. The Twelve Tables was a collection of civil-law rules and was separate from religious rules.
- The whole population had access to the legal rules, so everybody knew what the law said. This created **legal certainty**.
- By the time this codification took place, the Romans had begun to realise that their law could be treated systematically, and we therefore find the beginnings of a **legal science** in the Twelve Tables.

(3) The *praetor urbanus* had to administer justice in disputes between Roman citizens.

(4) (a) The *praetor urbanus* could only administer justice between Roman citizens. The office of the *praetor peregrinus* was therefore instituted to administer justice between foreigners or foreigners and Roman citizens.

(b) As a result of the activities of the *praetor peregrinus*, the *ius gentium* developed. The *ius gentium* was a body of international law based on equity. The *ius gentium* was much more flexible and less formalistic than the *ius civile* applied by the *praetor urbanus*.

(5) The *praetor urbanus* integrated the equitable *ius gentium* into the *ius civile* and in so doing developed a less formalistic and fairer legal system which became known as the *ius honorarium*.

Legal system	Applied by which *praetor?*	Applicable to whom?	Characteristic(s) of the legal system
ius civile	*praetor urbanus*	Roman citizens	rigid and formalistic
ius gentium	*praetor peregrinus*	— foreigners — disputes between Roman citizens and foreigners	— fairer and less formalistic — *ius gentium* was a set of international law rules.
ius honorarium	*praetor urbanus*	Roman citizens	— based on the *ius civile*, but influenced by the fairness of the *ius gentium.*

ACTVITY 3.5

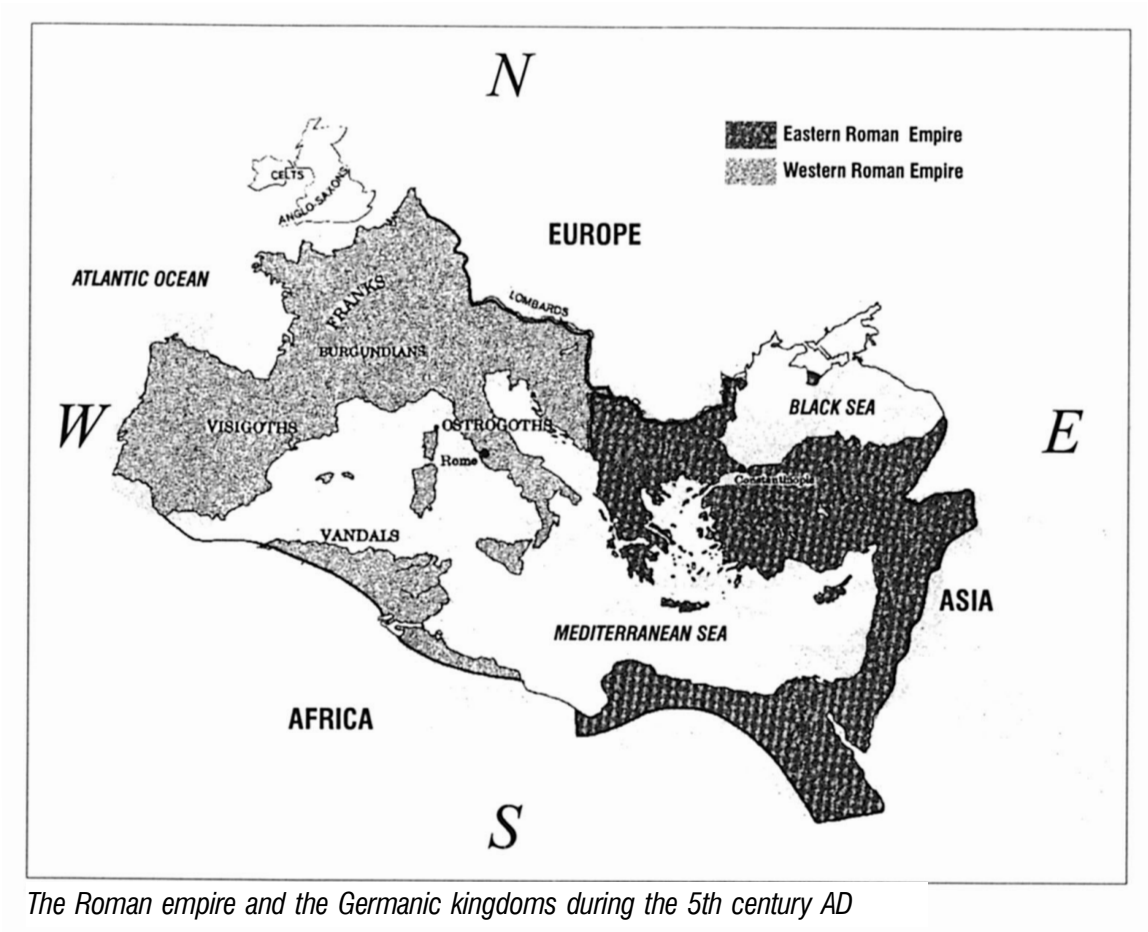
Check whether you understand what you have learnt so far by completing the following table regarding the Roman Republic:

The Roman Republic		
Politics	**Society**	**Law**
Rome was governed by	Rome became the ..... centre of the world.	In 450 BC a ..... was issued.
The role of the Senate was	During this time the Roman army achieved great military conquests.	In 367 BC the office of the *praetor urbanus* was created.
The Popular Assembly represented	Roman society became very	In 242 BC ..... was created.

FEEDBACK 3.5

The Roman Republic		
Politics	**Society**	**Law**
Rome was governed by **two consuls**.	Rome became the **business** centre of the world.	In 450 BC a **codification of Roman law, called the Twelve Tables**, was issued.
The role of the Senate was **to act as an advisory council**.	During this time the Roman army achieved great military conquests.	In 367 BC the office of the *praetor urbanus* was created.
The Popular Assembly represented **all the people of Rome**.	Roman society became very **cosmopolitan**.	In 242 BC **the office of the *praetor peregrinus*** was created.

3.6 THE PRINCIPATE (27 BC–AD 284)



The Roman empire and the Germanic kingdoms during the 5th century AD

3.6.1 POLITICS DURING THE PRINCIPATE

Rome's power grew to such an extent that it dominated the whole of the known world. It became apparent that republican government institutions could not govern a world power effectively. At that stage, Rome had a mighty army and the general commanding the Roman army wielded enormous power. During the latter years of the Roman Republic there were numerous **military dictatorships**, the best known of which was probably that of Julius Caesar.

Did you know?

A military dictatorship is a form of government in which the country is ruled by the head of the armed forces. A military dictatorship is established through the seizing of power by the military, usually by means of force. In Roman times, a military dictatorship was established when a victorious Roman general returned from the battlefield after waging war against the enemies of Rome (like the Germanic tribes) and, with the support of the army, marched on Rome and took control of the government.

Julius Caesar named **Augustus** his successor. However, Augustus wanted to make his position constitutional, so he gave up his autocratic powers in **27 BC** and pretended to restore the Republic. In truth, however, he made sure that enough power was given to him by the Senate and Popular Assembly to make his position supreme, and in time these powers came to be regarded as the legitimate powers of the emperor. In other words, although Augustus' position as emperor was theoretically approved by the Senate and Popular Assembly, in practice Augustus had so much power that he must be seen as an autocratic ruler.

Therefore, we say that 27 BC marks the beginning of the **Principate**. From 27 BC to AD 284, Rome was governed by an **emperor** or *princeps*. The most important political roleplayers during this time were the

- *princeps* (emperor)
- Popular Assembly
- Senate
- magistrates

3.6.1.1 The *princeps* (emperor)

In theory, the Roman Empire was governed by the emperor and the Senate, but in practice all power was vested in the emperor. In other words, the emperor enjoyed supreme power.

The emperor had the power to make laws. He consulted his council whenever he had to make a major decision. This council was mostly made up of leading public figures. The **jurists**, being members of the emperor's council, exercised considerable influence over the administration of law and the emperor's legislative body in general.

Note the following

You need to distinguish between the Senate, a body which consisted of democratically elected Roman citizens in charge of policy decisions, and the Emperor's council. The council consisted of personal advisers to the Emperor who had to advise the Emperor on various issues of state.

3.6.1.2 The Popular Assembly

Towards the end of the Republic, all inhabitants of Italy were made Roman citizens and the members of the Popular Assembly were thus spread over a very large geographical area. Apparently the Popular Assembly still convened occasionally, but eventually only a handful of people attended and the Assembly lost its importance. It must also be borne in mind that the true legislative power lay in the hands of the emperor and that the Popular Assembly had therefore in effect lost its power.

3.6.1.3 The Senate

Although the Senate was regarded as the true governing body of Rome, in practice it was nothing more than an instrument of the emperor and it did nothing that was not in accordance with his wishes. During this period, the Senate's resolutions were given the force of law, but the Senate passed legislation at the request of the emperor.

3.6.1.4 The magistrates

These important republican officials (the magistracy) lost most of their influence during the Principate, since the emperor and his officials took over their functions.

3.6.2 LAW DURING THE PRINCIPATE

The most important contributions to legal development during the Principate were made by the

- *praetor*,
- jurists and
- emperor.

3.6.2.1 The *praetor*

During the period of the Principate, the *praetor* was elected by the emperor and acted only on his instructions. In practice, the functions of the *praetor* had largely been taken over by the Emperor. This can be attributed to the fact that all praetorian edicts were codified in the *Edictum Perpetuum* in AD 130. After the promulgation of this Edict, the *praetor* was bound by it and could neither deviate from, nor add to, the law as codified in the Edict. In other words, the praetor was not able to develop new remedies or to update old remedies. This marked the end of the *praetor's* contribution to Roman legal development.

3.6.2.2 The jurists

The jurists contributed greatly to legal development during the Principate. As you already know, the jurists became an elite group of law experts during the latter years of the Republic. The best description of what the jurists occupied themselves with is to be found in Cicero's list of a jurist's functions. (Cicero was a famous jurist, public speaker and politician during the late republican period.) He summed up a jurist's functions as follows:

- **Giving advice**: The first function of a jurist was to give legal advice to those who wished to consult him, be they the *praetor*, a judge or an ordinary citizen. The jurists' opinions were not binding, but eventually their influence became so great that their decisions were regarded as having the force of law.
- **Teaching**: Since anyone was free to listen to the jurists, those who had no knowledge of law could learn the legal rules from them. The law students of those times followed the jurists around and listened to their discussions of legal points.
- **Assistance in legal transactions**: Jurists assisted their clients in legal transactions such as the drafting of legal documents.
- **Assistance in court**: Jurists assisted their clients in court (although not in the same way as legal representatives do today).

Did you know?

In Roman times, women were prohibited from practising as attorneys after an incident in which a female lawyer upset the court. A woman named Calphurnia lost the case that she had argued. To show her disapproval, she then apparently turned her back to the judges, lifted her robes and

displayed her bottom! This incident upset the courts so much that it was decided that women would no longer be allowed to practise as attorneys.

- **Interpretation**: The jurists made a major contribution to the development of Roman law through interpretation. By this we mean that the jurists applied existing legal rules to cases for which these rules had not been intended originally. They had to amend where needed the existing rules to make them applicable to new problems.
- **Writing**: The writings of Roman jurists were of great importance in the development of Roman legal science.

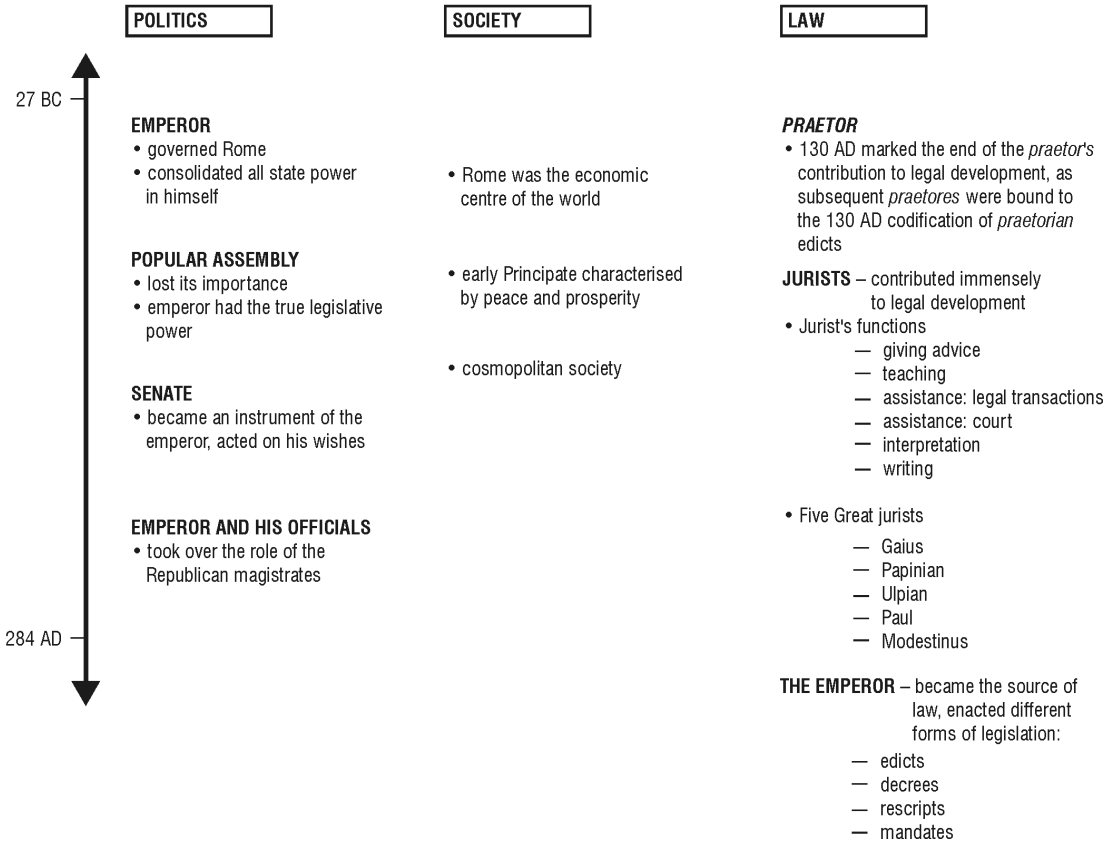
We will now take a brief look at the **"Five Great"** Roman jurists. The reason they were regarded as so important is that their work comprised two-thirds of the jurists' writings that were codified by Emperor Justinian in the 6th century AD. Further, in terms of the Statute of Citation of AD 426 they were the only jurists who could be regarded as authoritative. (We will tell you more about this Statute in 3.7.2.3.)

- **Gaius**: Gaius lived during the 2nd century AD and wrote a book called the *Institutiones* or the *Institutes*. This was a law textbook for students. He is regarded as one of the most influential jurists of the classical period.
- **Papinian**: Papinian was an extremely influential jurist. He published discussions on various legal problems, often with reference to other writers of the classical period.
- **Ulpian**: Ulpian was a younger contemporary of Papinian. He wrote commentaries on the *ius civile* law and the praetorian edicts.
- **Paul**: Paul was a contemporary of Ulpian. He held various important offices and wrote extensively. His major works were commentaries on the *ius civile* and on the edicts of the officials.
- **Modestinus**: Modestinus is noted for the fact that his work portrays Roman law as it was at the end of the classical period.

3.6.2.3 The emperor

Imperial legislation became a very important branch of the law. By the 2nd century AD, most legislation originated from the emperor or his officials. However, this legislation was not of a very high standard. The emperor's contribution to the development of the law was hardly equal to the creative activities of the *praetor* during the republican period or of the jurists. The emperor's direct legislation, which took various forms, illustrates the way he took over the functions of other officials and concentrated so much power in his own hands. The emperor's direct legislation took the following forms:

- **Edicts**: By publishing edicts, the emperor took over the role of the *praetor*.
- **Decrees**: Decrees were rulings by the emperor in his capacity as judge. The court of the emperor became the highest court and soon the emperor took over the function of independent judges.
- **Rescripts**: Rescripts were legal opinions by the emperor in the form of answers to legal questions that government officials or private persons asked the imperial legal office.
- **Mandates**: Mandates were directions of the emperor to his officials.



ACTVITY 3.6

Test whether you understand what you have learnt so far by answering the following questions:

(1) In what way did the jurists' function of interpretation contribute to the development of Roman law?

(2) (a) Who were the ''Five Great'' Roman jurists?

(b) Why were they important?

(3) How important were the Emperor's creative activities during the Principate in the development of Roman law?

FEEDBACK 3.6

(1) The jurists applied existing legal rules to cases for which these rules had not originally been intended. They had to amend the existing rules to make them applicable to new problems.

(2) (a) Gaius, Papinian, Ulpian, Paul and Modestinus

(b) They were important because their work comprised two-thirds of the jurists' writings that were codified by Emperor Justinian in the 6th century AD.

(3) Legislation was not of a high standard and it cannot be compared with the creative activities of the *praetor*. Legislation issued by the emperor therefore did not have much of an impact on the development of Roman law.

3.7 THE DOMINATE (AD 284–AD 476)

3.7.1 POLITICS DURING THE DOMINATE

During the period of the Dominate there was no longer any question of shared rule. Until then, the Senate used to confirm the appointment of emperors. From AD 284, this was no longer the case, since the emperors were no longer chosen officials, but **autocratic rulers**. All the power in the state — legislative, executive and judicial — was vested in the emperor. The first autocratic emperor was Diocletian, who became emperor in AD 284.

In **AD 395 the Roman Empire was divided** into a Western Empire, with Rome as its capital, and an Eastern Empire, with Byzantium (now Istanbul, in Turkey) as its capital. This was done for administrative purposes because the Roman Empire stretched over such a vast area that it could not be governed effectively from a single city. The Western Roman Empire was invaded by Germanic tribes and fell in AD 476. We will tell you more about the survival of Roman law in the Western Empire in study unit 4.

The Eastern Roman Empire continued to exist until AD 1453. It must be kept in mind that the Eastern Empire never adopted Roman culture, but was dominated by **Greek culture** from the outset, and was Greek-speaking. The law of the Eastern Roman Empire was influenced by Greek culture and did not have any impact on the legal systems of Western Europe. For this reason we shall not study the history of the Eastern Roman Empire after AD 565.

3.7.2 LAW DURING THE DOMINATE

This era was known as the **postclassical era** of Roman law and was characterised by the **decline of classical Roman legal science**. Factors which had previously been responsible for legal development either disappeared or no longer had any substantial influence on the law. The jurists were absorbed into the imperial law office and ceased to exist as an independent group. The Senate now functioned merely as an institution in which imperial legislation was announced, and the Popular Assembly had long since ceased to exist.

We will now take a brief look at the important features of postclassical Roman law.

3.7.2.1 Collections of imperial laws

Imperial laws were issued in such large numbers by each successive emperor that they soon became an unmanageable and contradictory mass of legislation. It was necessary to collect and systematise them. As far as we know, there were three such collections, namely

- the ***Codex Gregorianus***, a private collection,
- the ***Codex Hermogenianus***, a private collection and
- the ***Codex Theodosianus***, an official collection of imperial legislation, which was the product of a commission appointed by Emperor Theodosius II of the Eastern Roman Empire. It was published and came into force in AD 438. The *Codex Theodosianus* influenced later codifications in the West (eg, the *Lex Romana Visigothorum*) and the East (eg, the *Corpus Iuris Civilis*) (More about both these two codifications later.)

3.7.2.2 Collections and simplifications of classical writings

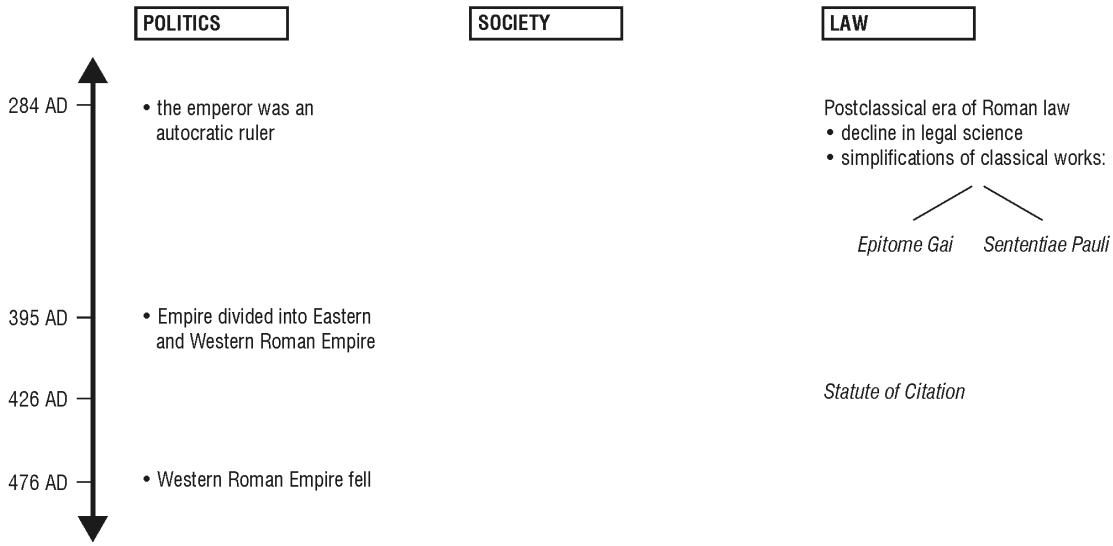
The jurists of the postclassical period were apparently incapable of mastering the law as described in the works of the classical jurists. They produced a number of short, elementary works, which consisted of nothing more than extracts from the great classical writings. In addition, simplified and abridged editions of the works of the most important classical jurists were published. Examples of these are the ***Epitome Gai*** and the ***Sententiae Pauli***, adaptations of Gaius's and Paulus's most important works.

3.7.2.3 The Statute of Citation, AD 426

This statute is a good example of how postclassical law was simplified and how legal science deteriorated. This statute, pertaining to the works of the jurists, was promulgated in the East by Emperor Theodosius II and in the West by Emperor Valentian III and proclaimed the following:

- Only the works of the Five Great jurists (Papinian, Ulpian, Paul, Modestinus and Gaius) would in future be seen as authoritative.
- If these five jurists differed from each other on a legal issue, the opinion of the majority was to be followed.
- If there was no majority opinion, the view of Papinian was to be followed.
- Only if Papinian was silent on the matter, did the judge have a discretion.
- In exceptional cases the works of other jurists could be consulted.

The Dominate 284 AD – 476 AD



ACTVITY 3.7

Test whether you understand what you have just learnt by answering the following questions:

(1) Why did the law deteriorate in the postclassical era of Roman law?
(2) How was Roman law simplified in the Statute of Citation of AD 426?

FEEDBACK 3.7

(1) There are basically three reasons:

- The jurists were absorbed into the imperial law office and ceased to exist as an independent group. This implies that legal opinions were no longer impartial, but would favour the interests of the emperor. This was of course not good for scientific legal development.
- The Senate functioned merely as an institution in which imperial legislation was announced. In other words, there was no longer any institution to keep the emperor in check: the emperor could issue any legislation he wanted. This situation led to an abuse of power and corrupt practices. Much of this legislation was not good in law, nor scientifically correct.
- The Popular Assembly had long since ceased to exist. As a result the public did not really have a say in the law-making process any longer.

(2)
- Only the works of the five great jurists (Papinian, Ulpian, Paul, Modestinus and Gaius) would in future be seen as authoritative.
- If these five jurists differed from each other on a legal issue, the opinion of the majority was to be followed.
- If there was no majority opinion, the view of Papinian was to be followed.
- Only if Papinian was silent on the matter did the judge have a discretion.
- In exceptional cases the works of other jurists could be consulted.

3.8 EMPEROR JUSTINIAN'S CODIFICATION: THE *CORPUS IURIS CIVILIS*

3.8.1 BACKGROUND: JUSTINIAN

Justinian was the emperor of the Eastern Roman Empire from AD 527 until his death in AD 565. His ideal was to reunite the Roman Empire and to restore it to its former glory. He managed to reconquer some former Roman territory, for example North Africa, through Bellisarius, the very able general of his army.

It must be borne in mind that Justinian was not a jurist. The driving force behind his great codification was **Tribonian**, who held an office in Justinian's government that can be compared to that of a modern minister of justice. Tribonian was a brilliant jurist.

It is important to understand the reasons behind Justinian's codification, and we will examine them briefly.

3.8.2 REASONS FOR CODIFICATION

- By the time Justinian became emperor, the law was a disorganised mixture of different types of legislation, regulations, opinions and the like. It included centuries of lawmaking by the *praetor*, the Senate, the Popular Assembly and the emperors. Justinian realised that the law needed to be **systematised**.
- By the 6th century AD, much of the body of Roman law that had originated in the 8th century BC was outdated. Justinian wanted to **eliminate outdated legislation** by codifying the law that was still applicable. This meant that persons involved in the administration of justice at the time of Justinian had to take into account legislation spanning more than 1 400 years! Can you imagine what a daunting task a legal practitioner faced when writing a legal opinion?
- Justinian wanted to create a single source of law that contained all the applicable law, thereby making the law **accessible** to everybody.
- The law was a vast conglomerate containing many contradictions. Justinian wanted to **eliminate inconsistencies** in the law.

3.8.3 THE CODIFICATION PROCESS

Justinian codified the different types or branches of law in different volumes or parts. The final *Corpus Iuris Civilis* consisted of four parts and we will trace the codification of each of these. The four parts were the

- *Codex*
- *Digesta* (the *Digest*)
- *Institutiones* (the *Institutes*)
- *Novellae* (the *Novels*)

3.8.3.1 The *Codex*

Justinian appointed a ten-man commission, which included Tribonian, to codify the **imperial legislation**. The commission's task was to collect, systematise and update all existing imperial legislation and eliminate inconsistencies. The commission published the collection of imperial legislation known as the *Codex Justinianus.* Of course new legislation was continually published, and this *Codex* soon became outdated. When it was replaced by a new updated collection the name of the first collection was changed to *Codex Vetus* (Old *Codex*). The new collection was then called the *Codex Justinianus* or the *Codex Repetitae Praelectionis*. This new collection came into force in AD 534. Today we simply speak of the *Codex*, referring to the last-mentioned collection.

😉 Don't worry! You do not have to memorise the different names of the *Codex*. Just remember that the old *Codex* was later replaced and that today the *Codex* refers to the updated collection of imperial laws.

3.8.3.2 The *Digest*

Secondly, Justinian wanted to codify the law as reflected in the **writings of the jurists**. He appointed a commission of sixteen, under the leadership of Tribonian, to collect, update and systematise the juristic law and eliminate inconsistencies. In compiling the *Digest*, the commission drew on the works of 39 jurists, but the largest percentage of the *Digest* consists of the works of the Five Great jurists mentioned above.

The *Digest* was divided into 50 books. Each book was then divided into titles. Each title contained a number of fragments (quotations from jurists' writings) on a certain topic. Justinian gave the *Digest* force of law in AD 533.

3.8.3.3 The *Institutes*

The *Institutes* was a **textbook** on the law intended for students. It was based on Gaius's *Institutes* and was completed in AD 533.

3.8.3.4 The *Novellae*

The *Novellae* consisted of **new imperial legislation** that was promulgated after the publication of the *Codex*.

3.8.4 THE IMPORTANCE OF THE *CORPUS IURIS CIVILIS*

The *Codex*, the *Digest*, the *Institutes* and the *Novellae* together comprise the codification of Roman law which has become universally known as the *Corpus Iuris Civilis*. This name was given to this codification only in the 16th century, by the jurist Gothofredus.

Justinian's codification was not particularly successful in his own time, for the following reasons:

- It was written in Latin, while the *lingua franca*, or common language, of the territory was Greek.
- It was too difficult for postclassical jurists to understand.
- Justinian forbade the writing of commentaries on the *Corpus Iuris Civilis* which might have made it more accessible.

The *Corpus Iuris Civilis* is nevertheless of great importance to us today. It provides modern society with a version of Roman law as it was at the end of its development.

After Justinian's death, the *Corpus Iuris Civilis* was forgotten for seven centuries. However, it was

rediscovered in the 12th century and has subsequently had an influence on the legal systems of most modern countries. In the following study units we will take a look at how this happened.

ACTVITY 3.8

Test whether you understand what you have learnt about the codification of Justinian by answering the following questions:

(1) Name four reasons for the codification of the *Corpus Iuris Civilis*.
(2) Name and discuss the content of the four final components of the *Corpus Iuris Civilis*.
(3) Why is the *Corpus Iuris Civilis* still of importance for modern jurists?

FEEDBACK 3.8

(1) The four most important reasons for this codification were the desire to

- systematise the law
- eliminate outdated legislation
- make the law accessible to everybody
- eliminate inconsistencies

(2) The four components of the *Corpus Iuris Civilis* are:

- The *Codex*, which is a codification of imperial legislation.
- The *Digest*, which is a codification of the work done by jurists of the period of classical Roman law.
- The *Institutes*, which was written as a textbook for students.
- The *Novellae*, which is a collection of new imperial legislation issued after the *Codex* was completed.

(3) The legal systems of many countries today have been influenced by Roman law. The *Corpus Iuris Civilis* is one of the most complete sources of Roman law. It came into being after the classical period when Roman law was at the peak of its development. Remember that although the codification was commissioned by Justinian only in the 6th century AD, the law that was codified dates from the period of classical Roman law, that is from around the 2nd century AD (Do you remember from which period classical Roman law dates? It was primarily from the 2nd century AD. Reread sections 3.3.2 and 3.6.2.)

Test yourself

Answer the following self-assessment questions with reference to the material that you have studied in study unit 3. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions. Make sure that you answer these questions to the best of your ability:

- Explain the importance of ancient Greek philosophy in the development of Western legal systems. (2)
- How did Roman law develop during each of the eras of Roman politics? (4)
- Explain the importance of the activities of the *praetor* in the development of Roman law. (6)
- Explain why the *Corpus Iuris Civilis* is still important to modern jurists. (1)

Study unit 4

The Western component: the survival of Roman law in the West during the early Middle Ages

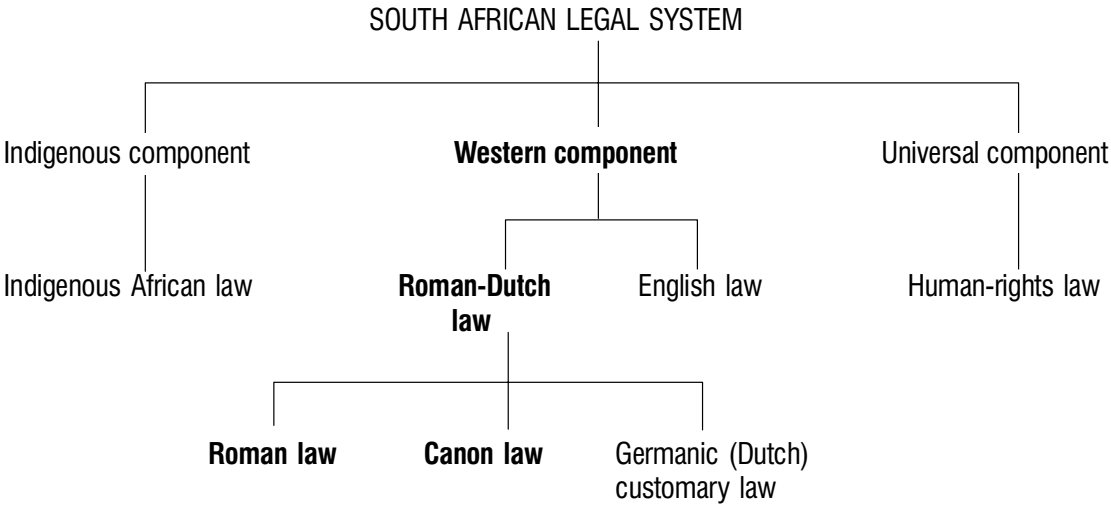
Learning outcomes

After having studied this study unit, you should be able to

- explain how Germanic customary law came to apply in Western Europe
- describe where Church (or canon) law came from
- explain how Roman law survived in the West after the fall of the Roman Empire

4.1 INTRODUCTION

In study unit 3 we dealt with the history of Roman law and the legal sources up to the time of Justinian. You discovered how the law developed along with the Roman Empire, from a narrow, formal and restricted system to an advanced legal system which influenced just about the whole of the known world as it was then! This Roman law was later to become part of the Western component of the South African legal system. The diagram below is a graphic representation of where the discussion in study unit 4 fits into the development of our legal system.



However, it is important that you understand that the Western component of the South African legal system is not rooted only in Roman law. Other legal systems, such as Germanic law and canon law, influenced the development of Roman law during the Middle Ages and even after that. And, of course, English law also played a role in the development of South African law. Canon law and Germanic customary law will be briefly discussed in this study unit. The earliest origins of English law and the characteristic features of that legal system will be dealt with in study unit 6, where we will discuss legal development in Western Europe from the 16th century onwards.

Important

You should be aware that there are different academic opinions regarding the exact dates for the period called the Middle Ages. However, for the purposes of this module, the term ''Middle Ages'' refers to the period from the 5th century AD to the 15th century AD. We also distinguish between the

- early Middle Ages (5th–11th centuries AD), and the
- late Middle Ages (12th–15th centuries AD).

Consult the time-line in study unit 1. Make sure that you understand where the Middle Ages fit in on the time-line. That's right! The Middle Ages cover the period from AD 400 to AD 1500.

In this study unit, you will learn what happened to Roman law in the period after the fall of the Western Roman Empire in AD 476, but before the revival of interest in Roman law in the 12th century AD. You may well ask yourself how Roman law managed to survive for more than 15 centuries. After all, the Western Roman Empire fell in AD 476, and that was over 1500 years ago! This study unit deals with the survival of Roman law in the West after the fall of the Western Roman Empire. There are various factors which played a role in the survival of Roman law in the West between the 5th and the 12th centuries. These factors include the following:

- the ''Rome idea''
- the codification of Germanic law
- the enactments (legislation) of the Frankish kings
- the application of the personality principle
- the codification of Roman law by the Germanic invaders
- the Roman Catholic Church
- the rise and spread of feudalism
- the application of the principle of territoriality

Each one of these factors will now be discussed individually.

Note the following

This period, which covers the first phase of the reception of Roman law, is referred to as the pre-reception phase. Take another look at study unit 1 where we explained the meaning of the word reception and the different phases of the reception of Roman law. It is important to make sure that you understand these concepts before you continue with this study unit.

4.2 THE ''ROME IDEA''

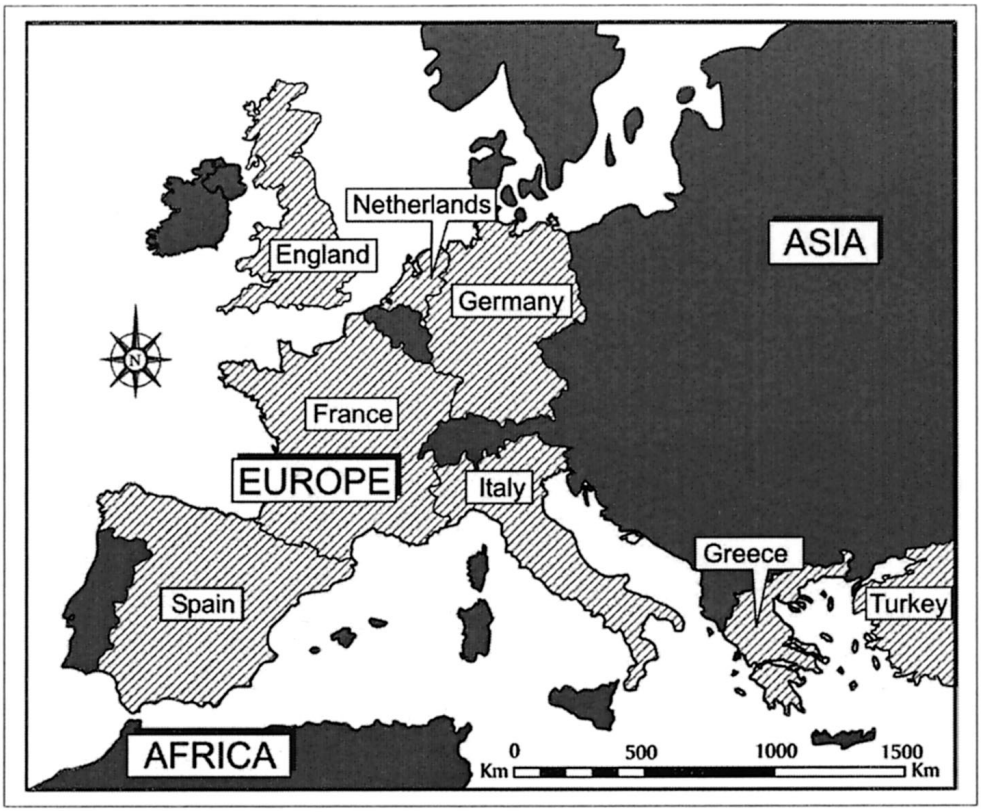
In the early Middle Ages, many tribes inhabited what is known today as Western Europe. These tribes included the Franks, the Burgundians, the Lombards and the Visigoths. The collective name for all these different tribes is the Germanic peoples. All the Germanic tribes were branches of the Aryan race which had earlier migrated from the regions around the Black and Caspian Seas to the present-day continent of Europe.

Please note

Do not confuse the terms ''Germanic'' and ''German''. Remember that there were many different Germanic tribes which invaded the Roman Empire. ''German'' is an adjective which describes

anything relating to Germany, a country in modern Western Europe. In other words, ''German culture'' refers to the culture of Germany (eg the famous *Oktoberfest,* which includes beer festivals), and ''German people'' refers to people born in or living in Germany.

The Germanic tribes lived in close proximity to one another and each tribe had its own culture and customary law. From about the middle of the 2nd century AD, Germanic tribes continuously infiltrated the Roman Empire. In the course of the 5th century AD, practically the whole of the Western Roman Empire was conquered by the invading Germanic tribes. The most extensive of all the Germanic invasions was the invasion of the Franks. By the 9th century AD, the Frankish Empire stretched across the countries today known as France, Belgium, the Netherlands, Germany, northern Italy, Austria, Switzerland and parts of what were formerly referred to as the eastern-bloc countries (ie Hungary, Bulgaria and Romania).



A map of modern Europe

At the beginning of the 9th century AD, the Frankish king, Charlemagne, attempted to revive the old Roman Empire through the establishment of the so-called ''Holy Roman Empire''. All this really meant was that Charlemagne decided to refer to the Frankish Empire as the ''Holy Roman Empire''. The Holy Roman Empire played an important role in the survival of Roman law in the West, after the fall of the Western Roman Empire in AD 476. The establishment of the Holy Roman Empire by a Germanic king may seem strange, but it was one of the products of the ''Rome idea'' which prevailed in Western Europe during this period.

What was this ''Rome idea''?

When the Western Roman Empire came to an end, Rome became even more important as an idea. By this we mean that the Germanic peoples admired Roman culture immensely for its law, ordered government, skills and engineering. One of the ways in which the Germanic peoples tried to imitate the Roman way of life was by applying Roman law, even though Roman law was no longer recognised as the official legal system of the territory. In this way the ''Rome idea'' contributed to the survival of Roman law after AD 476.

ACTVITY 4.1

Answer the following short questions to see whether you understand what you have read so far. Use the spaces provided to complete the sentences.

(1) The ''Germanic peoples'' is a collective name for the different tribes that inhabited Western Europe in the early Middle Ages. Examples of such tribes include the ....., the ....., the ..... and the ..... .

(2) The establishment of the Holy Roman Empire by a Germanic king was a result of the ..... .

(3) The ''Rome idea'' refers to the Germanic peoples' admiration of Roman culture, particularly its ..... and ..... This contributed to the survival of Roman law after the fall of the Western Roman Empire in AD 476.

FEEDBACK 4.1

(1) The ''Germanic peoples'' is a collective name for the different tribes that inhabited Western Europe in the early Middle Ages. Examples of such tribes include the **Franks**, the **Burgundians**, the **Lombards** and the **Visigoths**.

(2) The establishment of the Holy Roman Empire by a Germanic king was a result of the ''**Rome idea**''.

(3) The ''Rome idea'' refers to the Germanic peoples' admiration of Roman culture, particularly its **legal system** and **ordered government**. This contributed to the survival of Roman law after the fall of the Western Roman Empire in AD 476.

4.3 THE CODIFICATION OF GERMANIC LAW

4.3.1 THE OLD GERMANIC LAW

Very little is known of the old Germanic law. You should note that Germanic society also went through a preliterate stage in its development. Thus, in the early stages of its development, Germanic law shows an interesting similarity to early Roman law and to indigenous African law. They have the following in common:

- The law was unwritten.
- The law was preserved and communicated through emblems, symbols, legends and legal maxims.
- The law could not be distinguished from religion and morality.

However, unlike in the early Roman political structures, the highest authority in Germanic societies rested with the people's meeting. In other words, the people helped to make the law. This meant that Germanic law had the character of national law.

4.3.2 GERMANIC RECORDS *(LEGES BARBARORUM)*

From the 5th century AD, the Germanic peoples began to record their tribal laws. These recorded or written tribal laws were known as the *leges barbarorum*.

Keep in mind!

The Latin term *leges barbarorum* literally means ''the laws of the barbarians''. The Romans

regarded the Germanic tribes as barbarians and that is why they referred to the written records of Germanic tribal law as *leges barbarorum*. Interestingly, more than a thousand years before, the ancient Greeks regarded the Romans as barbarians when the Romans invaded Greece!

There are two reasons why the Germanic recordings or compilations are important:

- They are sources of Germanic law.
- They played a role in the survival of Roman law after the fall of the Western Roman Empire.

But how could recordings of Germanic law have helped with the preservation of Roman law?

We have already referred to the fact that the Germanic peoples admired the Roman way of life and tried to imitate the Roman way in many aspects of their everyday lives. This resulted in the romanisation of the Germanic culture, including their law. At first, isolated rules of Roman law were randomly adopted in indigenous Germanic law. In time, these random Roman rules became so much a part of indigenous Germanic law that they were incorporated into the Germanic codifications of their law. Furthermore, in those days most people were illiterate (in other words, they could not read or write). The literate group were mostly the officials of the Roman Catholic Church. These officials or clerics were schooled in the universal language of that time, namely Latin, and they studied Roman law. The codification of the *leges barbarorum* was mainly the work of these clerics, who included principles of Roman law in these records of Germanic law. As a result some of the rules of Roman law were preserved in the Germanic codifications.

4.4 THE ENACTMENTS (LEGISLATION) OF THE FRANKISH KINGS

Another important (Frankish) source of Germanic law is found in the enactments of the Frankish kings. These pieces of legislation, promulgated by the Frankish kings, were also called *capitularia*. Like the *leges barbarorum*, the *capitularia* also contained Roman rules and thus helped to preserve Roman law. Once again, the actual writing of these enactments was done by clerics who were schooled in Latin and in Roman law, and who therefore incorporated Roman-law rules when recording these enactments.

ACTVITY 4.2

Answer the following short questions to see whether you understand what you have learnt so far:

(1) The *leges barbarorum* were the recorded tribal laws of the ..... peoples.

(2) Explain how the recordings of Germanic customary law and legislation of the Frankish kings helped with the preservation of Roman law.

FEEDBACK 4.2

(1) The *leges barbarorum* were the recorded tribal laws of the **Germanic** peoples.

(2) Because of the contact between the Germanic and Roman peoples, isolated rules of Roman law were randomly adopted in indigenous Germanic law. These rules were later recorded as part of Germanic law. The clerics, who were schooled in Latin and Roman law, drafted the records and legislation and incorporated Romanist principles into the fabric of Germanic law. In this way some Roman-law rules were preserved in written form.

4.5 THE PERSONALITY PRINCIPLE AND THE CODIFICATION OF ROMAN LAW

4.5.1 THE APPLICATION OF THE PERSONALITY PRINCIPLE

Do you remember what we said about the various Germanic tribes above? All these tribes lived in close proximity to one another and each tribe had its own law. It was felt among the tribes that it would be undesirable to apply one general law to all the different tribes. Therefore the ''personality principle'' came to be applied.

What was the meaning of the personality principle?

The personality principle meant that each person lived according to the law of his or her own tribe. For example, the relationship between Burgundian and Burgundian was governed by Burgundian tribal law and the relationship between Frank and Frank was governed by Frankish law.

4.5.2 THE CODIFICATION OF ROMAN LAW (*LEGES ROMANORUM*) BY THE GERMANIC INVADERS

Because of the application of the personality principle the Germanic peoples also recorded Roman law for the Romans who lived in the Germanic territories. These recordings were known as *leges Romanorum or leges Romanae barbarorum*.

Important

These are both Latin terms. *Leges Romanorum* literally means ''the laws of the Romans'' and *leges Romanae barbarorum* literally means ''the Roman laws of the barbarians''. The codifications of Roman law compiled by the Germanic peoples were regarded as ''barbarian'' codifications. These recordings or codifications of Roman law by the Germanic peoples should not be confused with the later codification of Roman law by the emperor Justininian. His codification, later known as the *Corpus Iuris Civilis*, was promulgated in the Eastern Roman Empire (see study unit 3, sec 3.8 in this regard). Keep in mind that the *leges Romanae barbarorum* never applied in the Eastern Roman Empire. They were compiled for the Romans who lived under Germanic rule in the West. In other words, the *leges Romanae barbarorum* applied in the Western Roman Empire of old.

These codifications did not contain pure Roman law; rather, they contained vulgar Roman law, in other words Roman law which reflected a Germanic influence. The *leges Romanae barbarorum* nevertheless played an important role in keeping Roman law alive and these recordings prepared the way for the reception of Justinian Roman law in centuries to come. At this point it is important to note that the contact between the Romans and the Germanic tribes brought about not only the romanisation of the Germanic peoples, but also the germanisation of the Romans. In other words, just as the Germanic peoples adopted certain aspects of Roman culture (including law), the Romans also adopted certain aspects of Germanic culture (including law).

The most famous of these codifications is the recording of Roman law by the Visigoths: the *Lex Romana Visigothorum*, also known as the *Breviarum Alarici*. It was proclaimed in Toulouse in France in the year AD 506 and was applicable in the countries today known as Italy, France and Spain. The Justinian code was only completed some 30 years later in the Eastern Roman Empire. The *Lex Romana Visigothorum* played a very important role in preserving Roman law in the West, for the following reasons:

- It was widely applied until the revival of the study of Roman law in the 12th century.

- It was used by the Roman Catholic Church as a source of Roman law.
- It was the most important source of Roman law in the **West** until the revival of interest in the study of Roman law in the 12th century. It is important to keep in mind that the most important source of Roman law in the **East** was the *Corpus Iuris Civilis*.

Keep in mind!

So far you have learnt about different codifications that were compiled during the early Middle Ages. It is important that you are able to distinguish between the different codifications. Make sure that you can explain what each of the following was: the *leges barbarorum*, the *leges Romanae barbarorum, Lex Romana Visigothorum* and the *Corpus Iuris Civilis*.

ACTVITY 4.3

Complete the following sentences to see whether you have followed the discussion so far and whether you are achieving the outcomes set out at the beginning of this study unit.

(1) The survival of Roman law in the West from the fall of the Western Roman Empire until the 12th century was due, in part, to the codifications of Roman law by the ''barbarians''. These codifications were called the ..... The best-known of these codifications is the ....., also called the ..... .

(2) In the early Middle Ages many tribes inhabited Western Europe. It was not desirable to apply one general law to all the different tribes. Instead, every person lived according to the law of ..... This is referred to as the ..... .

Note the following

Reflect for a while on this phenomenon, namely that groups of people apply their own laws. Is this true of South Africa? Yes, of course! Indigenous African law as well as Islamic personal laws are applied to certain groups of people. That is nothing less than an application of the personality principle!

FEEDBACK 4.3

(1) The survival of Roman law in the West from the fall of the Western Roman Empire until the 12th century was due, in part, to the codifications of Roman law by the ''barbarians''. These codifications were called the ***leges Romanorum*** or the ***leges Romanae barbarorum***. The best-known of these codifications is the ***Lex Romana Visigothorum***, also known as the ***Breviarum Alarici***.

(2) In the early Middle Ages many tribes inhabited Western Europe. It was not desirable to apply one general law to all the different tribes. Instead, every person lived according to the law of **his or her own tribe**. This is referred to as the **personality principle**.

4.6 ROMAN LAW, THE CHURCH AND CANON LAW

Emperor Constantine (one of the emperors of the Western Roman Empire) granted religious freedom and protection to the Christians in the 4th century AD. As a result, the Christian religion expanded

rapidly throughout the Roman Empire. After the Germanic tribes had conquered the Western Roman Empire, many of the Germanic people converted to Christianity. The Roman Catholic Church was the official Christian church at that time and throughout the Middle Ages. Since Christianity was flourishing, the Roman Catholic Church, unlike the Western Roman Empire, did not disappear, but survived as a powerful force.

Note the following

If you are a member of the Catholic Church, then this is your heritage! Have you ever heard Latin spoken during church ceremonies? It is because this church has its origins in the Roman Empire where Latin was the official language of the Church and of the aristocracy (ie, emperors and high officials). Do yourself a favour and ask your priest or bishop which of the laws of the Catholic Church are directly related to the laws of the Roman Empire.

In Roman times the Catholic Church in the West was built on a Roman legal foundation:

- Internal relations in the Church were governed by Roman law.
- Special legislation was enacted by the Roman emperors with regard to the Church and to church affairs.

In the Germanic kingdoms, the Church continued to flourish in accordance with Roman law. However, the Roman law by which the Church was governed was not identically applied everywhere. It varied from area to area. In some areas the Church used the *Breviarum Alarici* as the source of Roman law, and in other areas, such as Rome and Ravenna, the *Corpus Iuris Civilis* was used by the Church as the source of Roman law.

At that time (the early Middle Ages) church law had not yet reached such a stage of development that it could be seen as a separate legal system. It was still Roman law (which was a mixture of the Justinian Code, namely the *Corpus Iuris Civilis*, and Western codifications, such as the *Lex Romana Visigothorum*) supplemented by the legislation of the Frankish kings, the resolutions of church meetings, and papal decrees and instructions. Although the law used by the Church was based on Roman law, in the course of time a special type of church law evolved, which we refer to as canon law. In other words, it was the law of the Church of the early Middle Ages that laid the foundation for the development of canon law. It is true that the foundation of canon law was Roman law, but it was a Roman law adapted and amended to suit the needs of the Church, expressed through the resolutions passed at church meetings.

Collections of supplementary sources (sources other than Roman law referred to above) were made quite early on. The best-known collection of church laws is that of the monk Dionysius, which was compiled early in the 6th century AD. It is called the *Collectio Dionysiana* (literally ''the collection of Dionysius'').

Note the following

Students of world history should not be surprised to find instances where church institutions mirror those of the state. South Africa is a good example of this. During the apartheid era the Dutch Reformed Church (the largest of the Afrikaner established churches) had a policy of separate churches based on people's race (one for whites, one for blacks, one for coloureds and one for Indians). This was perfectly in accord with the policy of separateness (apartheid) that was practised by the state during those days.

There are many reasons why canon law is important for the purposes of this module:

- It was an important factor in the survival of Roman law during the early Middle Ages.
- Canon law was not as formal and rigid as Roman law and it therefore tempered the severity of Roman law. This influence can still be seen in various fields of modern South African law, such as the law of contract, family law, criminal procedural law and the law of evidence.

Did you know?

For example, in the law of contract, Roman law provided that *ex nudo pacto non oritur actio* (meaning, a mere agreement does not give rise to an action). However, canon law relaxed this rule and held that, according to Christian principles, one's word should be good enough. As a result, canon law provided that a person could be held accountable for any agreement *(pacta sunt servanda)*. This rule (*pacta sunt servanda*) is still part of South African common law today.

- Canon law was not used only by the Church. Together with Roman law, it was received into the customary Germanic legal systems and became part of Roman-Dutch law, which was brought to South Africa in 1652. (See study unit 7 sec 7.2 for an explanation of the components of Roman-Dutch law.)

You will come across the concept of canon law regularly throughout the rest of this module. Canon law impacted on the development of modern law in spite of the hostility between the Church and the state, that is, between the pope, as head of the Church, and the king, as head of the state. In later study units, you will be told how canon law was accommodated in the law schools of the late Middle Ages (12th–15th centuries AD) and how it subsequently became part of the European common law or *ius commune*.

ACTVITY 4.4

Complete the following statements which illustrate the role of canon law in the development of South African legal history.

(1) The Church was an important factor in the survival of Roman law in the period between the fall of the Western Roman Empire in AD 476 and the 12th century AD. The expansion of the Christian religion was largely due to the granting of ..... to the Christians by the Emperor Constantine. The Church was governed by ..... law.

(2) Between the 5th and the 12th centuries AD, two of the sources of Roman law used by the Church were the ..... and the ..... . During this period the law of the Church had not yet reached the stage where it could be regarded as a separate legal system.

(3) The *Collectio Dionysiana* is an important collection of ..... which was compiled during the 6th century AD.

(4) The law of the Church of the early Middle Ages laid the foundation for the development of a separate system of church law, namely ..... . This law, together with ....., was received into the Germanic legal systems during the later Middle Ages. One of the most important influences of this law was that it served to temper the ..... of Roman law. It later became part of ....., which was brought to South Africa in 1652.

FEEDBACK 4.4

(1) The Church was an important factor in the survival of Roman law in the period between the fall of the Western Roman Empire in AD 476 and the 12th century AD. The expansion of the Christian

religion was largely due to the granting of **freedom of religion** to the Christians by the Emperor Constantine. The Church was governed by **Roman** law.

(2) Between the 5th and the 12th centuries AD, two of the sources of Roman law used by the Church were the ***Lex Romana Visigothorum*** and the ***Corpus Iuris Civilis***. During this period the law of the Church had not yet reached the stage where it could be regarded as a separate legal system.

(3) The *Collectio Dionysiana* is an important collection of **church laws** which was compiled during the 6th century AD.

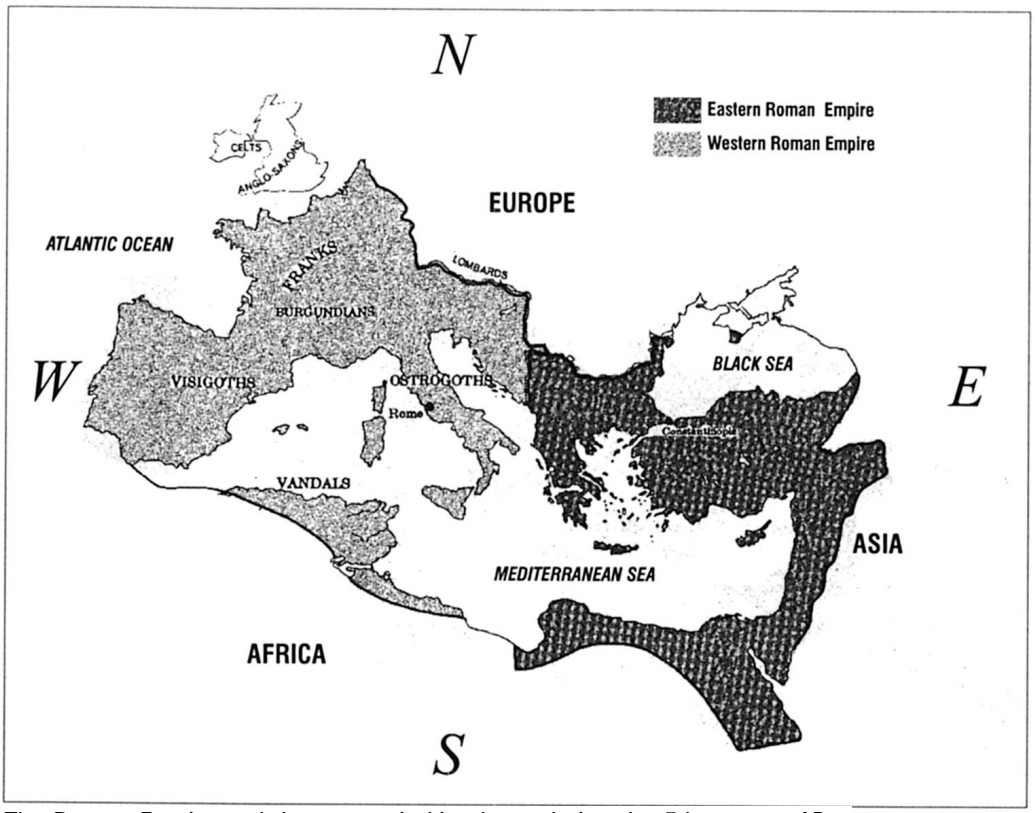
(4) The law of the Church of the early Middle Ages laid the foundation for the development of a separate system of church law, namely **canon law**. This law, together with **Roman law**, was received into the Germanic legal systems during the later Middle Ages. One of the most important influences of this law was that it served to temper the **strictness** of Roman law. It later became part of **Roman-Dutch law**, which was brought to South Africa in 1652.

Keep in mind!

The missionaries who came to South and Southern Africa did not bring canon law to South Africa, even though some of those missionaries were in the service of the Roman Catholic Church. Canon law became part of South African law through Roman-Dutch law.

ACTVITY 4.5

Study the following map of Europe showing the Eastern Roman Empire and the Western Roman Empire (which was invaded by Germanic tribes) during the 5th century AD and answer the questions that follow:



The Roman Empire and the germanic kingdoms during the 5th century AD

(1) Find Rome on the map. Why do you think it is considered important to show where Rome is situated?

(2) Find Constantinople on the map. Why do you think it is considered important to show where Constantinople is situated?

(3) Name any two modern countries that, according to the map, would have been part of the Eastern Roman Empire during the 5th century AD.

(4) Name two Germanic tribes indicated on the map.

(5) Who was the Frankish king who established the Holy Roman Empire in the 9th century AD?

(6) Find the Anglo-Saxon peoples as indicated on the map. What is the modern name of the country where they lived? What is the relevance of this country to South African legal history?

FEEDBACK 4.5

(1) Rome is situated in what is often referred to as the ''boot of Europe''. Look at the map. Have you found Rome? Now see if you can find the outline of a shoe or a boot north of the Mediterranean Sea. This ''boot'' is the area today known as Italy.

Of course it is very important to indicate Rome on a map of this kind. Why? Rome was the capital of the ancient Roman Empire and it was the city from which the Empire was administered. After the Empire split into the Eastern and Western Empires in AD 395, Rome was still the administrative capital of the Western Roman Empire until its fall in AD 476.

(2) After the Roman Empire split into two in AD 395, Constantinople became the capital of the Eastern Roman Empire. Even after the fall of the Western Roman Empire in AD 476, the Eastern Roman Empire was administered from Constantinople. Constantinople still exists today and is today known as the city of Istanbul.

Do you remember Justinian? He was the Emperor of the Eastern Roman Empire who became famous for the codification of Roman law, namely the *Corpus Iuris Civilis*. (See study unit 3 sec 3.8.) While he was Emperor, he lived in and ruled from Constantinople.

(3) This is a more difficult question. To answer this question, you need to compare this map with the modern map of the same area (see map below sec 4.2). The answer is **Greece** and **Turkey**.

Other present-day countries not depicted on the map below section 4.2 that used to be part of the Eastern Roman Empire include **Egypt**, **Bulgaria**, **Lebanon**, **Syria** and **Palestine**.

(4) There are various Germanic tribes shown on the map. However, you have only learnt about a few of them in this study unit. Of those indicated on the map, you have learnt about the Franks, the Burgundians, the Lombards and the Visigoths.

(5) Charlemagne was the king of the Franks who established the Holy Roman Empire. However, remember that he only became king around the 9th century AD. This map shows Europe at least 400 years before he was born!

(6) The Anglo-Saxons are indicated on the north-western corner of the map. The country in which they lived is today known as England. What is the relevance of England to South African legal history? English law is, of course, one of the legal systems that had an influence on the Western component of our legal system. If you do not remember, reread study unit 1.

4.7 FEUDALISM AND THE PRINCIPLE OF TERRITORIALITY

4.7.1 THE RISE AND SPREAD OF FEUDALISM

After the death of Charlemagne in the 9th century AD, the Frankish Empire disintegrated. Europe, under constant foreign attack, entered a period of cultural and economic stagnation. It was during that time that feudalism emerged in Western Europe.

Feudalism owes its origin to the accumulation of land in the hands of the great landowners (feudal lords or overlords). Under this system, the great landowners allowed non-landowners (also known as vassals) to cultivate the land in exchange for the performance of certain services. This was accompanied by a reciprocal bond of loyalty. In other words, the feudal lord allowed the vassal to live and work on his (the feudal lord's) land. In exchange, the vassal had to pay tax to the feudal lord. The vassal also owed allegiance to his feudal lord and was obliged to follow him in wartime, while the feudal lord had to protect his vassal.

Feudal law, which regulated the relationship between the feudal lord and the vassal, gradually evolved. The best-known feudal law is the *Libri Feudorum*, recorded in the 12th century AD. The *Libri Feudorum* was incorporated into the *Corpus Iuris Civilis* by jurists of the late Middle Ages.

The feudal system exercised an enormous influence on the later constitutional structure of Western Europe and contributed indirectly to the survival of Roman law during the Middle Ages. The system of feudalism led to legal diversity (differences) and legal disruption in Western Europe in the 10th and 11th centuries and even after that. This is because each feudal lord developed his own feudal laws. In other words, different laws applied to different feudal areas. This diversity in the law was one of the reasons why jurists felt a need for one universal, written legal system. Roman law was able to meet this need for a universal, written legal system and from the 12th century onwards jurists began to show renewed interest in the *Corpus Iuris Civilis*.

The feudal system contributed indirectly to the survival of Roman law during the Middle Ages because it emphasised the territoriality principle. This will be discussed in the next section.

4.7.2 THE APPLICATION OF THE TERRITORIALITY PRINCIPLE

As discussed above, the feudal system led to legal diversity. The Germanic peoples no longer lived exclusively in tribal formation, but in different feudal areas. This caused great legal uncertainty, because people's tribal law was frequently not the same as the feudal law of the area in which they were living. As a result, the personality principle gradually gave way to the territoriality principle. In other words, the principle that people had to live according to the laws of the tribe of which they were members was replaced by the principle of territoriality.

But what is meant by the principle of territoriality?

The territoriality principle is the principle that everyone living in a specific territory is subject to one law. In other words, when deciding which law to apply to a situation, it no longer mattered whether a person was a Visigoth, a Lombard or a Frank. Instead, the law that was applied was the law of the area in which that person lived. In other words, territorial law replaced personal or tribal law.

The territorial or regional law which superseded the old tribal laws was mainly customary law, but it was influenced, to a greater or lesser extent, by Roman law.

We have now explained to you how Roman law managed to survive in the West after the fall of the Western Roman Empire. In the 12th century, jurists actively started studying Roman law again. This ''rebirth'' of Roman law will be dealt with in the following study unit.

ACTVITY 4.6

Answer the following short questions to see whether you understand what you have read so far. Use the spaces provided to complete the sentences.

(1) With the accumulation of land in the hands of powerful landowners, people living within a specific feudal territory became subject to the law of that area. This is known as the ..... principle.

(2) After the death of Charlemagne, Europe entered a period of cultural and economic stagnation and

..... became the order of the day. Under this system, the landowners allowed the non-landowners (vassals) to cultivate the land in exchange for the performance of certain services.

(3) The *Libri Feudorum* is the best-known recording of ....., which was incorporated into the ..... during the late Middle Ages.

FEEDBACK 4.6

(1) With the accumulation of land in the hands of powerful landowners, people living within a specific feudal territory became subject to the law of that area. This is known as the **territoriality** principle.

(2) After the death of Charlemagne, Europe entered a period of cultural and economic stagnation and **feudalism** became the order of the day. Under this system, the landowners allowed the non-landowners (vassals) to cultivate the land in exchange for the performance of certain services.

(3) The *Libri Feudorum* is the best-known compilation of **feudal law** which was incorporated into the ***Corpus Iuris Civilis*** during the late Middle Ages.

ACTVITY 4.7

Answer the following questions to determine whether you understand what you have learnt so far in this study unit:

(1) Which one of the following factors contributed to the preservation of Roman law in Western Europe in the early Middle Ages, that is between the 5th century AD and the 12th century AD?

(a) the *Corpus Iuris Civilis*
(b) the early Germanic law, as preserved through emblems, legends and legal maxims
(c) the *Institutes* of the classical jurist Gaius
(d) the *capitularia*, that is the enactments of the Frankish king

(2) In this study unit you learnt about various recordings, compilations and codifications of laws that were made during the Middle Ages. All of these codifications contributed, whether directly or indirectly, to the survival of Roman law during this period. It is important that you should be able to distinguish between these codifications and explain the importance of each one. Complete the following table to help you test your understanding of these codifications.

	What was it?	**By whom was it compiled?**	**In which century was it compiled?**
Leges barbarorum			
Leges Romanae barbarorum			
Lex Romana Visigothorum			
Corpus Iuris Civilis		Justinian, emperor of the Eastern Roman Empire	
Collectio Dionysiana			
Libri Feudorum	A compilation of feudal law that was based on Roman law		

FEEDBACK 4.7

(1) In activity 1.4 in study unit 1 we introduced you to multiple-choice questions. In the feedback we pointed out that it is important to read the question or the stem of the multiple-choice question very carefully. This question deals with the preservation of Roman law during the early Middle Ages in Western Europe. Again, by reading the question, you should be able to provide an answer without even looking at the options that are listed. In this question there are two important aspects to keep in mind: place and time. The question refers to a specific locality, namely Western Europe, and it refers to a specific period in the history of South African law, namely the early Middle Ages, which spanned the period from the 5th century AD to the 12th century AD.

Now take a look at option (a). The *Corpus Iuris Civilis* was promulgated in the 6th century AD by Emperor Justinian in the Eastern Roman Empire. Although the time frame is correct, the answer is nevertheless incorrect because the *Corpus Iuris* was promulgated in the **Eastern** Roman Empire and therefore had nothing to do with the preservation of Roman law in the **West**. You could refresh your memory by rereading study unit 3, section 3.8, which deals with the codification of Roman law.

Option (b) is also incorrect. Although the Germanic tribes inhabited what is today known as Western Europe, the time frame is wrong: It was early Germanic law which was preserved through emblems, legends and legal maxims. From the 5th century AD the Germanic people started recording their laws in writing. In other words, early Germanic law precedes the period known as the early Middle Ages and falls outside the time frame of this question. In this regard reread sections 4.2; 4.3.1 and 4.3.2.

Option (c) is not correct either, because Gaius lived and wrote this important work in the 2nd century AD which falls outside the given time frame. Here you must bear in mind that the works on Roman law in its pure form played no role in the preservation of Roman law after the fall of the Roman Empire in the West in AD 476. It was only from the 12th century onwards that a renewed interest in Roman law emerged and the medieval law schools started using the works of the classical writers again. Read study unit 3, section 3.6.2.2 and study unit 5, section 5.1.

The last option (d) is correct since the Frankish Empire was situated in Western Europe during the early Middle Ages. It started disintegrating only after the death of Charlemagne in the 9th century AD. Reread sections 4.4 and 4.7.1.

	What was it?	**By whom was it compiled?**	**In which century was it compiled?**
Leges barbarorum	Compilations of Germanic tribal law, as influenced by Roman law.	The various Germanic tribes. However, the actual writing down of the law was done by clerics.	There were various compilations which were compiled at different times from the 5th to the 9th centuries AD.
Leges Romanae barbarorum	Compilations of Roman law, as influenced by Germanic tribal law, applicable to Romans who lived in Germanic territories.	The various Germanic tribes. However, the actual writing down of the law was done by clerics.	There were various compilations, most of which were compiled during the 5th and 6th centuries AD.

Lex Romana Visigothorum	A compilation of Roman law as influenced by the law of the Visigoths. It was applicable to Romans who lived in Visigoth territory. It is also called the *Breviarum Alarici*.	The Visigoths	In AD 506 (ie the 6th century AD)
Corpus Iuris Civilis	A compilation of Roman law, consisting of the *Codex, Digesta, Institutiones* and *Novellae*.	Justinian, the emperor of the Eastern Roman Empire, commissioned the codification. However, the actual work was done under the supervision of his legal adviser, Tribonian.	In the 6th century AD.
Collectio Dionysiana	A compilation of church laws, which was based on Roman law as adapted to the needs of the Roman Catholic Church.	The monk Dionysius.	In the 6th century AD.
Libri Feudorum	A compilation of feudal law that was based on Roman law.		In the 12th century AD.

Test yourself

Answer the following self-assessment question with reference to the material that you studied in study unit 4. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer the question. Make sure that you answer the question to the best of your ability.

- Which five of the eight factors discussed in this study unit do you think had the greatest influence on the survival of Roman law in Western Europe between the 5th and 12th centuries? Give adequate reasons for your opinion, based on the study unit. Remember that there may be more than one correct answer. Try to persuade someone by your argument! (10)

Study unit 5

Roman law and canon law in the late Middle Ages (12th century – end of the 15th century)

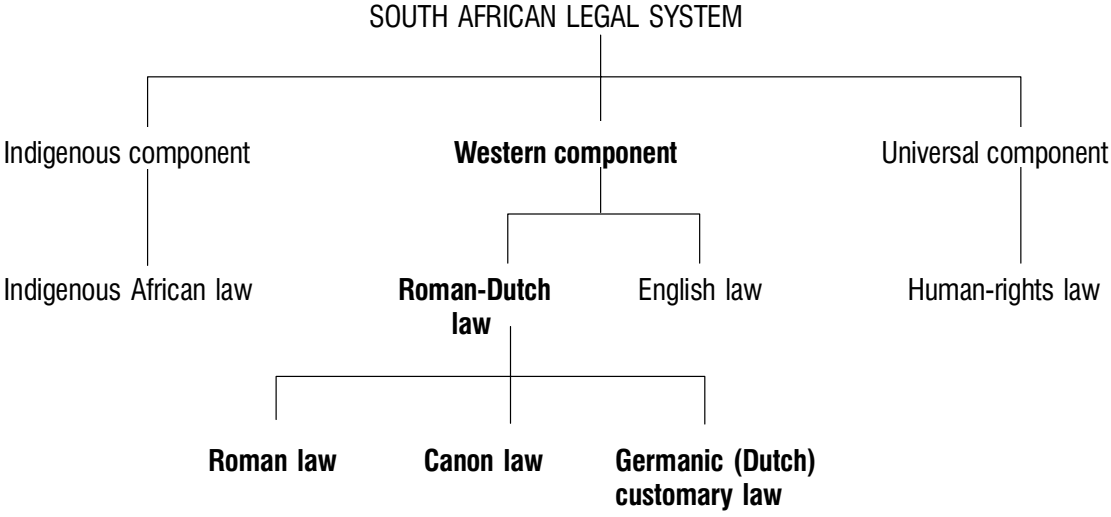
Learning outcomes

After having studied this study unit, you should be able to

- give the reasons for the renewal of interest in Roman law in the 12th century
- explain how the different medieval law schools contributed to the reception of Roman law in the Middle Ages
- relate how each of the different medieval law schools dealt with canon law
- explain the relevance of the *ius commune*

5.1 INTRODUCTION

In study unit 4, you were told what happened to Roman law in the early Middle Ages, a time when the Roman Empire was invaded by Germanic tribes and when Roman law survived in the Germanic territories without the backing of the Roman state. In this study unit you will learn how Roman law was revived by specific groups of jurists studying and teaching at different medieval law schools. The diagram below shows where the discussion in study unit 5 fits into the development of our legal system.



5.1.1 REASONS FOR THE REVIVAL OF ROMAN LAW

There were various reasons why a need arose for a new legal system which could fulfil the demands of the developing Western European society. The main reasons may be summed up as follows:

- **Cultural and economic prosperity**

By about the 11th century, the cities of Italy were enjoying a period of cultural and economic prosperity,

which later spread to the rest of Western Europe. The law of that time could no longer satisfy the needs of a more complex and sophisticated society. The need therefore arose for a new legal system to meet the demands of the rapidly developing European societies. What was required was a system of law that

— was universal and could be understood by all, in other words was applicable everywhere and to everyone.
— would be easily accessible, in other words was not known only by a handful of jurists, academics or clerics.
— could fill the gaps in the various customary legal systems, in other words could meet the demand for legal remedies that could not be found in the various customary legal systems.
— would form a bridge between the different legal systems, in other words minimise the differences between the different legal systems.

It is not surprising that the jurists turned to Roman law, a sophisticated legal system which was known to everybody and which was easily available in the form of the *Corpus Iuris Civilis*. The revival of Roman law took the form of a scientific study of Justinian's codification of the law by certain groups of jurists

- **Legal diversity**

You should know by now that feudalism caused legal diversity and disruption. If you do not remember what feudalism is, please reread study unit 4, section 4.7. Each region, city or town had its own separate legal system which caused legal uncertainty and hampered the development of trade. For example, a person who travelled from place to place selling his goods or services was subject to different laws in each region, city or town in which he carried on his trade. Can you imagine how confusing this must have been?

5.2 THE GLOSSATORS

The first group of jurists who scientifically studied Justininian's codification of Roman law were the glossators. The school of the glossators was established at the beginning of the 12th century AD in **Bologna** in Italy.

It is not surprising that the first law school responsible for the revival of Roman law was established in an Italian city. As indicated above, the cities of Italy were the first to experience a period of cultural and economic prosperity. Therefore, the need for a new, universal legal system was greater at first in these Italian cities than in the rest of Western Europe. Later, the glossators were also represented in the south of France, in **Montpellier**. These jurists saw it as their duty to rediscover and restore Roman law. They chose the *Corpus Iuris Civilis* as the basis for their studies.

Important

Remember that this codification by Justinian came to be known as the *Corpus Iuris Civilis* only after it was published in 1583 by Dionysius Gothofredus. Revise section 3.8 in study unit 3 on the *Corpus Iuris Civilis*.

5.2.1 THE TECHNIQUE OF THE GLOSSATORS

When we discuss the technique of the glossators, we will focus on their study method, the sources they used and how they eventually extended their activities.

What was their study method?

The glossators followed an **exegetical** or **interpretative** method of study. This means that they

- analysed the text
- tried to understand the difficult passages
- tried to find the meaning of any obscure (unclear) words

The technique of the glossators was not really new. It was similar to the technique followed in Pavia, one of the early Italian law schools, and it had previously been used by scholars in their analysis of the Bible.

The glossators first concentrated on understanding the manuscript of the *Corpus Iuris Civilis*. They wrote explanatory grammatical notes in the margin of the text and also between the lines. These notes were called ''**glosses**'' and that is why these scholars were called the glossators. Their analysis of the text was important, because it soon revealed contradictions.

Which sources did the glossators use?

- ***Corpus Iuris Civilis***

Although the glossators concentrated on the *Digest*, they did not ignore the *Codex*, the *Institutes*, or the *Novellae*. It is because of the efforts of the glossators that we have a complete *Codex*. They also discovered a manuscript containing 134 of Justinian's *Novellae*. Since they thought that this manuscript was the original text of the *Novellae*, they called it the *Authenticum*.

How did they extend their activities?

Eventually the glossators' glosses became so numerous that the original text of the *Corpus Iuris* was almost drowned in a sea of ink! (Look at the example of a text worked on by the glossators on page 84 of the study guide. The original text is the small passage in the largest font in the middle of the top half of the page. The rest of the text consists of glosses, probably made by different glossators! Subsequent glossators used to write notes not only on the original text but also on the glosses added previously by other glossators.) For this reason, the glossators decided to extend their activities and began writing more detailed explanations, such as

- concise summaries of sections of the *Corpus Iuris*
- hypothetical problems with answers, and
- lectures on specific topics in the *Corpus Iuris*, delivered by the professors at Bologna to their students.

5.2.2 SOME IMPORTANT GLOSSATORS

- ***Irnerius***

Irnerius was generally recognised as the ''father of the glossators''.

- ***Vacarius***

Vacarius was also known as the Bolognese ''missionary'' because he spread the ''glossatorial gospel'' to England. He founded a law school at Oxford, and he compiled a work consisting of extracts from the *Codex* and the *Digest*. This work was designed to help the poor students who could not afford to purchase manuscripts of the *Digest* and the *Codex*.

Remember!

At that time, before the printing press was invented, all manuscripts and copies of manuscripts were handwritten. Copies of manuscripts were therefore difficult to get hold of, as they had to be ordered. This, of course, also made such copies very expensive.

- ***Accursius***

Accursius made the final contribution to the work of the school of glossators with his *Glossa Ordinaria*. The *Glossa Ordinaria* was a selection of the glosses previously made by various glossators. Where there were gaps, he filled them in. It was published with the text of the *Corpus Iuris Civilis*. So authoritative did it become that texts that were not glossed in the *Glossa Ordinaria* were rejected as having no authority. In some towns and universities in Italy it replaced and had the authority of Justinian law.

113 De offic.eius,cui mand.est iurisdict. 114

A printed copy of a page from the Glossa Ordinaria

5.2.3 AN ASSESSMENT OF THE GLOSSATORS

5.2.3.1 Importance of their work

The work of the glossators is important for the following reasons:

- They restored Roman law.
- They made a scientific study of Roman law.
- They were responsible for the spread of Roman law.

a Restoration of Roman law

If the glossators had not made a study of classical Roman law, which was found in the *Corpus Iuris Civilis*, Roman law might well have disappeared from the Western world altogether. It is important to bear in mind that by the 12th century the Roman law of the West was vulgarised Roman law contained in Germanic codifications and that this law was never adapted to the changing needs of the expanding towns and cities. The glossators carried out an efficient restoration of pure Roman law. This fundamental achievement of theirs ensured that Roman law could again be studied in Western Europe.

Important

Do you still remember what the most important codification in the Western Roman Empire was called and why it was important? Yes, it was the *Lex Romana Visigothorum* or *Breviarum Alarici*. (To refresh your memory, refer to study unit 4, section 4.5.2.)

b Scientific study of Roman law

The glossators started to study law on a scientific basis and this was the beginning of the ''golden age'' of jurisprudence. This ensured that the administration of justice was no longer in the hands of laymen, but became the responsibility of trained jurists.

c Spread of Roman law

The glossators and their pupils were responsible for the spread of Roman law, not only in Italy, but also to other parts of Europe such as Montpellier, Toulouse and Orléans in France. They undoubtedly played a valuable part in the early reception of Roman law in Western Europe.

5.2.3.2 Criticism of their work

Their work is open to certain valid criticisms.

- They disregarded contradictions in the text.
- They lacked systematisation.
- They lacked historical perspective.
- They disregarded the needs of practice.
- Accursius made some bad choices in the texts he selected for inclusion in the *Glossa Ordinaria*.

a Disregard for contradictions in the text

The glossators treated the *Corpus Iuris Civilis* as if Justinian were still on the throne! They believed that his word was law and that there were no contradictions in the *Corpus Iuris Civilis*. If contradictions were found, they tried to reconcile them, thereby distorting the original text.

b Lack of systematisation

In other words, they did not work through the *Corpus Iuris Civilis* systematically, but worked on texts at random and in no specific order.

c Lack of historical perspective

The glossators did not take into consideration the fact that the *Corpus Iuris Civilis* itself was the result of many centuries of growth. They paid no attention to the historical factors and to the customary laws which had developed since the fall of Rome.

d Disregard for the needs of practice

Because the work of the glossators had no historical perspective, it could not fulfil the needs of legal practice. The Roman law on which the glossators concentrated had not always been able to provide solutions to problems in contemporary family law and court procedures. Roman law had developed over time to make provision for new legal problems as they arose. By ignoring these developments, the glossators therefore also ignored the solutions to legal problems.

e Criticism of the Glossa Ordinaria

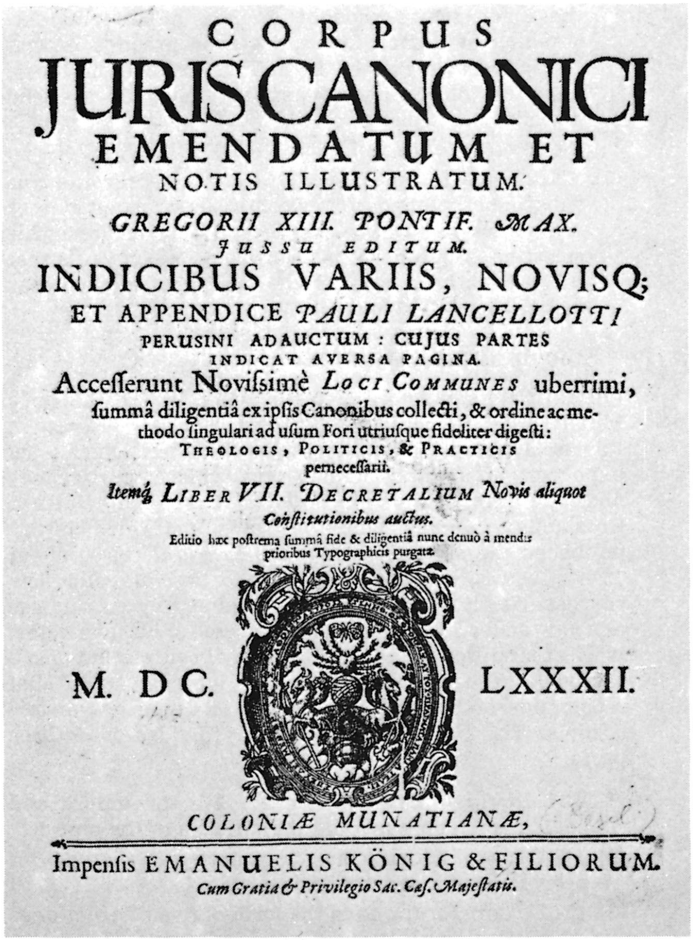
Accursius was criticised for having omitted important glosses completely or for displaying poor judgment in his selection for the *Glossa Ordinaria*.

5.2.4 THE GLOSSATORS AND CANON LAW

5.2.4.1 The *Decretum Gratiani*

We referred to the church law of the early Middle Ages in an earlier study unit. (To refresh your memory, refer to section 4.6 of study unit 4.) It was to be expected that the new interest in Roman law would include an interest in canon law which, as you know, is an important offshoot of Roman law. In the 12th century, Gratianus, a monk who was also a trained jurist, published the *Decretum Gratiani*, a new collection of canon-law sources and also a textbook on canon law. This *Decretum Gratiani* was given official recognition and used in the study of canon law at law schools.

5.2.4.2 The *Corpus Iuris Canonici*


CORPUS
JURIS CANONICI
EMENDATUM ET
NOTIS ILLUSTRATUM.
GREGORII XIII. PONTIF. MAX.
JUSSU EDITUM.
INDICIBUS VARIIS, NOVISQ;
ET APPENDICE PAULI LANCELLOTTI
PERUSINI ADAUCTUM : CUJUS PARTES
INDICAT AVERSA PAGINA.
Accesserunt Noviſsimè Loci Communes uberrimi,
ſummâ diligentiâ ex ipſis Canonibus collecti, & ordine ac methodo ſingulari ad uſum Fori utriuſque fideliter digeſti:
Theologis, Politicis, & Practicis
perneceſſarii.
Item& Liber VII. Decretalium Novis aliquot
Conſtitutionibus auctus.
Editio hæc poſtrema ſummâ fide & diligentiâ nunc denuò à mendis
prioribus Typographicis purgata.
M. D C. LXXXII.
COLONIÆ MUNATIANÆ,
Impenſis EMANUELIS KÖNIG & FILIORUM.
Cum Gratia & Privilegio Sac. Cæſ. Majeſtatis.

Title page of a 17th century edition of the Corpus Iuris Canonici

Other papal decrees and official codifications were later added to the *Decretum Gratiani*. This combination of canon-law sources became known as the *Corpus Iuris Canonici*. The *Corpus Iuris Canonici* was studied by jurists (who were called canonists) in the same way that the *Corpus Iuris Civilis* was studied by secular (or worldly) jurists from the 12th century onwards. As a result, from that time, two dynamic legal systems, namely Roman law and canon law, coexisted in Western Europe and were studied at the medieval law schools (ie, the law schools of the later Middle Ages). Both Roman and canon law formed part of the **learned law** (ie, the body of academic legal knowledge) and of the **European** *ius commune*, or common law. (You will learn more about the European *ius commune* in sec 5.5.)

5.2.4.3 Reception of canon law into secular law

The reception of canon law into secular law was initially very random (or unplanned). There were no rules governing this reception. Some of the canonists were trained by the glossators and they taught canon law in Bologna. From there the teaching of canon law spread to France. In the second half of the 12th century interest in the study of canon law became more marked, but it was only later that the *ultramontani* would lay down rules for the reception of canon law.

ACTVITY 5.1

Answer the following question to test whether you understand what you have learnt so far:

Why was the work done by the glossators of importance for legal development during the 12th century?

FEEDBACK 5.1

The glossators were the first scholars in the West to study law on a **scientific** basis. They ensured that the administration of justice was in the hands of **trained jurists**. The studies of the glossators led to the **spread of Roman law** to other parts of Europe and were valuable during the early reception of Roman law. The result was more than a **revival** of Roman law; the work of the glossators ensured its very **survival**. If it had not been for the glossators, Roman law might have disappeared from the Western world and we might not have known it today.

5.3 THE *ULTRAMONTANI*

The *ultramontani* or ''those from north of the Alps'' were a group of jurists who were situated at the French law school of **Orléans** during the 13th and 14th centuries. The *ultramontani* were more ''hands-on'' in their study of Roman law than the glossators and their efforts led to the creation of a practical legal system which it was possible to apply in the 14th-century courts in Italy. They were regarded as the forerunners of the postglossators or the commentators. (More about the postglossators or commentators later — see sec 5.4.)

5.3.1 THE TECHNIQUE OF THE *ULTRAMONTANI*

In our discussion of the technique of the *ultramontani*, we focus on their study method and the sources they used.

What was their study method?

The *ultramontani* did not follow the exegetical (interpretative) approach of the glossators, but adopted a **dialectical** approach to the study of the *Corpus Iuris Civilis*. This means that they regarded the *Corpus Iuris Civilis* as a source book for critical discussion and not as a rigid system of rules to be accepted unquestioningly.

Which sources did they use?

- *Corpus Iuris Civilis*
- town law (namely the laws applied by each individual town)
- canon law
- Germanic customary law

The *ultramontani* believed that the *Corpus Iuris Civilis* had to be viewed critically. Their goal was to **incorporate Roman law into contemporary practice**. Therefore, they investigated sources of law outside Roman law which were essential for practice, namely town law, canon law and Germanic customary law.

Although many of the law professors of the school of Orléans had studied in Bologna (in Italy), where the glossators were originally from, they had little respect for the *Glossa Ordinaria*. The glossators and the *ultramontani* saw each other as rivals. In fact the glossators were angered by the *Glossa Aurelianensis* (the glosses of the school of Orléans), which the *ultramontani* produced in the middle of the 13th century.

5.3.2 SOME IMPORTANT *ULTRAMONTANI*

The two most important *ultramontani* were **Revigny** and **Bellaperche**.

5.3.3 THE *ULTRAMONTANI* AND CANON LAW

The *ultramontani* were mostly clerics (ie officials of the church) and held doctorates in both canon law and Roman law. It is only to be expected, then, that canon law featured strongly at the school of Orléans.

5.3.3.1 Reception of canon law into secular law

The two leaders of the *ultramontani*, namely Revigny and Bellaperche, were the first to work out rules for the reception of canon law into secular law. According to them:

- Canon law and Roman law each had its **own sphere of application** (ie canon law applied to matters of the Roman Catholic Church, while Roman law applied to secular matters, ie nonreligious matters).
- Canon law, by virtue of its fairness, could be used to **temper the severity** of Roman law. See the example of how canon law tempered the severity of Roman law of contract as discussed in study unit 4, section 4.6.

5.3.3.2 Influence of canon law

From the middle of the 12th century onwards canon law had a strong influence in France. This influence was mainly felt in the French **law of procedure**. The canonical French law of procedure which developed during this period was later received into Dutch law and, as you know, Roman-Dutch law is the system that came to be applied in South Africa.

ACTVITY 5.2

Answer the following question to test whether you understand what you have learnt so far:

Why was the work done by the *ultramontani* of importance for legal development in the 13th century?

FEEDBACK 5.2

The *ultramontani* were the first scholars to give official recognition to canon law and to lay down rules for the reception of canon law into secular law. Canon law played an important role in tempering the severity of Roman law and, generally, in the development of the concept of justice. Canon law developed on the basis of certain principles that form part of the Catholic religion, such as *aequitas canonica* (the canon law principle of equity, not to be confused with the English law principle of the rule of equity), *bona fides* (good faith and honest intention), *conscientia* (to be led by one's conscience), *honestas* (honesty) and *misericordia* (mercy and compassion). These principles all played a part in tempering the strictness of Roman law, and in developing the concept of justice as we know it today.

5.4 THE POSTGLOSSATORS OR COMMENTATORS

It is clear from the above that the work done by the *ultramontani* foreshadowed a reaction against the glossators by other groups of jurists. One such group was the postglossators or commentators.

Did you know?

The prefixes ''pre'' and ''post'' are Latin and respectively mean ''before'' and ''after''. Therefore, a term such as ''precolonial period'' refers to the period **before the colonial period**. Similarly, the term ''postglossators'' refers to the group of jurists who studied the law **after the glossators** did. Take another look at the time-lines in study unit 1. Find the three groups of jurists, namely the glossators, the *ultramontani* and the postglossators on the relevant time-line. Did you notice the chronology of these three groups? Yes, the postglossators started studying Roman law after the glossators. But remember, by that time the *ultramontani*, who were regarded as a bridge between the glossators and the postglossators, had already established a school of law at Orléans. This means that the postglossators or commentators made use of the work of the glossators and the *ultramontani*.

The *ultramontani* may be seen as intermediaries between the glossators and the commentators. After the 12th century, the needs of practice became more important to legal scholars. This was because economic growth presented new challenges that could not always be solved through the application of pure Roman law. The commentators became more concerned with **practical aspects** of the law than with substantive Roman law as glossed in the *Glossa Ordinaria*.

5.4.1 THE TECHNIQUE OF THE POSTGLOSSATORS OR COMMENTATORS

When we discuss the technique of the postglossators or commentators, we will focus on their study method and the sources they used, in addition to providing an overview of the activities they engaged in.

What was their study method?

In a broad sense, the **scholastic** method of study entailed that each individual commentator not only gave his opinion on the text of the *Corpus Iuris Civilis*, but also referred to the views of other writers on the same subject. Then, in order to distinguish himself or set himself apart from the other writers, he would make finer distinctions and very often raise entirely new questions.

Like the *ultramontani*, the commentators did not confine themselves to explaining the actual provisions of Roman law. Their method was to **interpret** the glosses on the *Corpus Iuris Civilis*, as well as the text of the *Corpus Iuris Civilis* itself.

Naturally, conflict arose between Roman law and the rules of canon law, Germanic customary law and town law. The challenge of reconciling these contradictions was taken up by the commentators. In fact, over a period of time, they achieved a **synthesis** between Roman law, Germanic law, canon law and town law. Thus the method used by the commentators of interpreting Roman law, as glossed by the glossators, led to its being adapted to contemporary conditions. This led to the creation of medieval Italian law, which was later to exert a considerable influence on the shaping of modern civil law.

Which sources did they use?

- *Corpus Iuris Civilis* (as glossed by the glossators)
- *Glossa Ordinaria*
- canon law
- Germanic customary law
- town law

What was the scope of their activities?

Their work included the following:

- **Commentaries**: These were comments on the practical aspects of law based on portions of the *Corpus Iuris Civilis*. When they wrote their commentaries, in vulgar Latin, (Do you remember what ''vulgar Latin'' is?) It is not classical Latin, but rather a form of ''slang'' Latin, they adapted Roman law to suit the needs of their own times.

  However, these commentaries were never meant to be the basis for an academic science of law suitable for use in a university, but were designed to provide rules suited to the **needs of the community** of that time. The commentators acknowledged that the *Corpus Iuris Civilis* was binding on them. When interpreting the provisions of the *Corpus Iuris Civilis* they therefore sometimes distorted the original text to fit their own views.

- **Legal opinions**: The commentators also provided legal opinions on the practical problems experienced in the Italian cities.
- **Lectures**: In general, the lectures delivered by the commentators were on topics not covered by the *Corpus Iuris Civilis*.

5.4.2 SOME IMPORTANT COMMENTATORS

There were many commentators. This is not surprising, since the period in which they worked extended from approximately 1250 to 1650 (in other words, 400 years or four centuries). Furthermore, unlike the glossators who, with a few exceptions, were Italians, the commentators became part of a wider European movement. For the purposes of this module, it is sufficient to take note of the following post-glossators:

- ***Cinus***

Cinus was regarded as the greatest jurist in Italy since Accursius. He was a professor at various

universities and was the first Italian jurist who was influenced by the working methods of the *ultramontani*.

- ***Bartolus***

Bartolus was a pupil of Cinus's and is generally regarded as the **greatest medieval jurist**. His work was legendary — very different from that of the ordinary commentators. Bartolus, although more inclined to consult the text of the *Corpus Iuris Civilis* at first hand, was nevertheless reluctant to differ from the *Glossa Ordinaria*.

Bartolus's best known work is his commentary on the *Corpus Iuris Civilis*. He tried to make Roman law serve the practical needs of contemporary legal practice. Besides being a professor of law, Bartolus also served as an assessor in the city courts and as a legal consultant.

Bartolus
Reproduced with permission from De Rebus

Note the following

Do you know what an ''assessor'' is? An assessor is a legal term which refers to a person, usually a specialist in some field, who is asked to preside with a judge over a specific court case. Our courts still use assessors in certain cases. The assessor sits next to the judge while the court proceedings take place, and then gives his or her expert opinion on certain issues raised in court. The judge then takes this opinion into account when formulating a judgment.

Bartolus's influence was so great that it used to be said that ''no-one is a jurist unless he is a Bartolist'' (a jurist who copied the working method and propagated the opinions of Bartolus). The Bartolists

influenced legal development until the 17th century. In fact, echoes of Bartolus's views are still heard in private international law (today also known as conflict of laws) circles to this day.

- ***Baldus***

Baldus was a pupil of Bartolus. In addition to his commentaries on the *Corpus Iuris*, Baldus wrote commentaries on canon law.

5.4.3 AN ASSESSMENT OF THE COMMENTATORS

5.4.3.1 Importance of their work

The work of the commentators is important for the following reasons:

- They laid the foundations for the 17th century **school of natural law**. (More about natural law in study unit 9.)
- As mentioned previously, Bartolus laid the foundation for **modern private international law** (today also known as conflict of laws).
- Their contribution was considerable in the field of **private law**. For example, they rejected the strict Roman law rule that nobody may contract on behalf of another *(alteri stipulari nemo potest)*, which created difficulties in the business world.

Important

Why do you think the commentators contributed specifically to the field of private law? The reason is that the *Corpus Iuris Civilis*, which was the main source that was studied by the glossators, the *ultramontani* and the commentators, dealt with issues relating mainly to private law. These include family law, law of persons, contract, delict, property and succession. (You will come across these subjects throughout your LLB studies.)

- The commentators facilitated the reception of Roman law into the practical administration of justice, thereby creating a **practical legal system** that was received throughout Europe.
- Finally, the part played by the commentators is of particular significance to us in **South Africa** because the Roman law which they commented upon (although they may have misinterpreted various texts of the *Digest* — sometimes on purpose) was the Roman law which was later received into the Germanic customary law of the Netherlands and would later form part of Roman-Dutch law, which was brought to South Africa in 1652.

5.4.3.2 Criticism of their work

The work of the commentators has been criticised on the following accounts:

- They gave **undue weight to the majority opinion**. In other words, in the absence of scholarly consensus on a specific legal matter, the commentators preferred to side with the majority opinion, whether it was correct or not.
- They used **poor Latin**.
- They followed the *Glossa Ordinaria* to such an extent that they often ignored the original text, thus **losing historical perspective**.

5.4.4 THE COMMENTATORS AND CANON LAW

As you already know, the commentators not only concentrated on Roman law but also studied canon law and Germanic customary law. Their influence was not confined to Bologna in Italy. (Like the glossators, they were situated mainly in Bologna — but spread to most parts of Western Europe and played a major role in the creation of a European common law or *ius commune*, which consisted of

Roman law, canon law and Germanic customary law (see also the discussion in sec 5.5 below). The following commentators are worth mentioning in this regard:

- ***Andreae***

He was a professor of canon law at Bologna and undoubtedly the **leading canonist** of the Middle Ages. He was noted for his commentaries on the *Corpus Iuris Canonici*.

- ***Cinus, Bartolus and Baldus***

They were responsible for the further development of the rules of the *ultramontani* regarding the reception of canon law.

5.4.4.1 Reception of canon law into secular law

Cinus, Bartolus and Baldus developed the following rules for the application of canon law:

- Canon law and Roman law are **two separate legal systems** which should be kept apart.
- However, there are three instances in which canon law has to be applied instead of Roman law:
  - in **purely spiritual** matters
  - in matters concerning the **church**
  - in those cases where the application of Roman law would amount to **sin**

ACTVITY 5.3

Answer the following question to test whether you understand what you have learnt so far:

Why was the work done by the post-glossators or commentators of importance for legal development from the 14th century onwards?

FEEDBACK 5.3

The commentators laid the foundation for the 17th century **natural law school**. (In study unit 9 you will learn how important natural law was in the development of the concept of fundamental human rights.) The commentators also laid the foundation for **modern private international law** and contributed a lot to the field of **private law**. In addition, they assisted with the importation of Roman law into the **practical administration of justice**. In other words, they not only studied Roman law for scientific reasons, but also incorporated the rules of Roman law into the daily practice of law. In this way, they played an important role in the development of a **European *ius commune***.

ACTVITY 5.4

To test whether you understand what you have learnt so far regarding the medieval law schools, compare the glossators, the *ultramontani* and the commentators by completing the following table:

	Glossators	*Ultramontani*	Commentators
Where were they situated?		The French law school of Orléans.	
Important jurists			Cinus, Bartolus and Baldus
Technique by which they studied the *Corpus Iuris Civilis*			
Did they attempt to incorporate Roman law into contemporary practice?			
Criticism of their work			
Period in which they worked	The 12th and 13th centuries		

FEEDBACK 5.4

	Glossators	*Ultramontani*	Commentators
Where were they situated?	Originally in Bologna, Italy, and later in Montpellier, France	The French law school of Orléans	Originally in Bologna, Italy, and later all over Europe
Important jurists	Irnerius, Vacarius and Accursius	Revigny and Bellaperche	Cinus, Bartolus and Baldus
Technique by which they studied the *Corpus Iuris Civilis*	An exegetical method of study. They analysed the text of the *Corpus Iuris Civilis* and wrote explanatory notes (glosses) in the margin of the text.	A dialectical approach. They made a critical study of the *Corpus Iuris Civilis* and the glosses of the glossators.	A scholastic approach. They not only explained and criticised the *Corpus Iuris Civilis*, but each commentator also gave his own opinion on the text and referred to the views of other writers (jurists) in that regard.
Did they attempt to incorporate Roman law into contemporary practice?	No	Yes. They studied not only Roman law, but also other sources such as town law, canon law and Germanic customary law.	Yes. They attempted to reconcile Roman law with canon law, Germanic customary law and town law.

	Glossators	*Ultramontani*	Commentators
Criticism of their work	• Instead of viewing the texts critically, they distorted the text to avoid contradictions. • Not systematic. • Lacked historical perspective. • Did not meet the needs of legal practice. • Accursius was criticised for his selection of the glosses included in the *Glossa Ordinaria*.		• They gave undue weight to the majority opinion. • Poor Latin. • They did not always take historical development into account.
Period in which they worked	The 12th and 13th centuries	The 13th and 14th centuries	The 13th to the 17th centuries

ACTVITY 5.5

Test whether you understand what you have learnt so far regarding the approach of certain medieval law schools to canon law by answering the following question:

Write short notes on the approach to canon law of each of the following medieval groups of jurists:

(1) The glossators
(2) The *ultramontani*
(3) The commentators

FEEDBACK 5.5

Remember!

Make sure that you know what is meant by ''canon law'' before attempting to answer this question. If you do not remember, reread section 4.6 in study unit 4. Also make sure that you understand the distinction between canonists and secular jurists. Canonists are jurists who practised and researched church law. Secular jurists are jurists who practised and researched ''worldly'' law, which is law that is not of a religious nature, and in particular Roman law. In other words, canonists studied the *Corpus Iuris Canonici* in the same way that secular jurists studied the *Corpus Iuris Civilis*.

(1) The glossators

From the 12th century onwards, law students could study either Roman law or canon law. Most of the glossators were academics and taught at the medieval universities. They trained some of the students who studied canon law, thereby stimulating an interest in the study of canon law. This interest in canon law eventually led to the reception of canon law into secular law.

(2) The *ultramontani*

The *ultramontani* were mostly trained in canon law and in secular law. They were the first jurists to lay down rules for the reception of canon law into secular law. They based these rules on the understanding that canon law and Roman law should each apply in its own sphere. Thus, in religious matters or matters of the Church (which included family law) canon law had to be applied. They also laid down the rule that canon law, which was much fairer and less rigid than Roman law, should be used in certain cases to temper the strictness of Roman law.

(3) The commentators

The commentators studied not only Roman law but also other sources such as canon law, town law and Germanic customary law. They integrated these different legal systems and they were ultimately responsible for the creation of the European *ius commune*, which was made up of all these different legal systems.

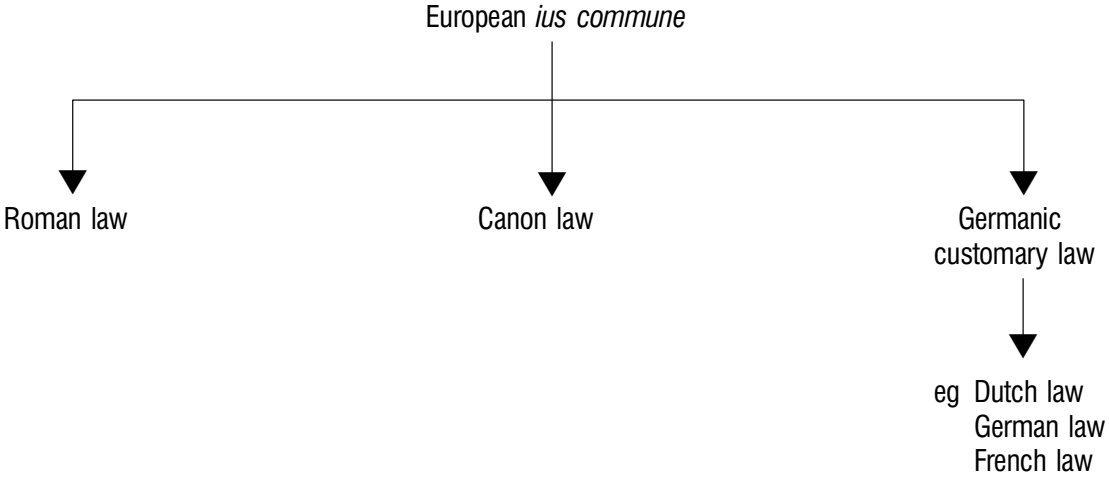
The commentators refined the rules for the reception of canon law into Roman law laid down by the *ultramontani*. They confirmed that canon law and Roman law were two different legal systems that had to be applied in different spheres. However, they stated that there were three exceptions to this rule. In other words, canon law could be applied instead of Roman law in three cases, namely in purely spiritual matters, in matters concerning the (Roman Catholic) church and in those cases where the application of Roman law would amount to sin.

5.5 CONCLUSION: THE EUROPEAN *IUS COMMUNE*

In the four centuries discussed in this study unit, (that is, from the 12th to the end of the 15th century), a common law was built up in Western Europe, based on Roman law, canon law and customary law. This common law, or European *ius commune*, came into being when **Roman law** and **canon law** were received into the **Germanic customary legal systems**. It could therefore be said that the common denominators in this *ius commune* were

- Roman law and
- canon law,

both of which had been adapted to meet the needs of individual countries. The legal systems of the majority of Western European countries are based on the European *ius commune*. In other words, the *ius commune* is the historical foundation of the legal systems of the majority of the countries of Western Europe.



All three medieval law schools discussed above played a role in the creation of the *ius commune*, but we must not forget that it was the **commentators** who facilitated the importation of Roman law into the practical administration of justice and that it was their influence, combined with the invention of printing,

which ensured the reception of Roman law into the legal systems of Germany, France and the Netherlands.

Did you know?

The printing press was invented around 1440 by a German by the name of Johannes Gutenberg. This invention made it possible to make copies of books or other written documents without having to write them out by hand. This made books more accessible to the general public and meant that books and literacy were no longer the exclusive domain of the Church and the clerics. The availability in print of the writings of scholars at the medieval law schools obviously helped with the spread of Roman law.

5.5.1 THE RELEVANCE OF THE EUROPEAN *IUS COMMUNE*

As you know, Roman-Dutch law forms an important part of the Western component of our legal system. It is not possible to separate the history and development of Roman-Dutch law from the history of Roman law in the rest of Western Europe, and more specifically from the history of the gradual assimilation of Roman law and canon law into Germanic customary law. The reason for this is that during the period under discussion (from the 12th century to the end of the 15th century) there was a **spirit of universalism** in Western Europe. There was constant interaction between the jurists from Western Europe, including England and Scotland). Although these jurists came from different countries, they all used Latin as the international medium of communication, thus transcending the language barriers. There were few substantial differences between the legal systems of the various countries. Roman-German law, Roman-French law and so on developed in much the same way as Roman-Dutch law.

Keep in mind!

When we refer to Western Europe, it is in the broadest sense. We include England and Scotland. Not only did students from these two countries go to the medieval law schools in Europe, but jurists from Europe also went to England. For example, you will remember that the glossator Vacarius founded the law school at Oxford. Gentilis, an Italian by birth and a humanist, became an advocate in England and later taught at Oxford. (We will tell you more about him and the humanists in the next study unit.)

Lawyers often have to seek solutions for new problems. Now, although we know that our legal system cannot really be compared with European legal systems, we do have a **Roman**-Dutch heritage. This makes it possible for our lawyers to draw on the wisdom of other lawyers who practise systems of law which also have their roots in Roman law. In other words, the laws of those countries in which the European *ius commune* applied, (eg France, Germany, the Netherlands and Scotland) are quite accessible to our lawyers, who are schooled in Roman-Dutch law.

In study unit 8 we go into further detail on the place of the European *ius commune* in the South African legal system and what the courts have to say about this.

Important

Do not confuse the European *ius commune* with English common law! Many students confuse these two terms. The European *ius commune* was indeed a common law, but it was the common law of Western Europe. In other words, it was the law commonly used by many Western

European countries. In contrast, the common law of England refers to the English legal system, or English customary law as it applied in England. The creation of English common law is discussed in study unit 6, section 6.5 below. Also reread the paragraph under the heading ''Remember!'' in Feedback 1.3 in study unit 1 for a discussion of the terms ''common law'', ''common-law systems'' and ''civil-law systems''.

5.5.2 ROMAN LAW AS AN ENDURING ELEMENT IN EUROPEAN LAW

The reception of Roman law, which began in the Italian city of Bologna in the 12th century, was a reception of the entire Roman legal system. It therefore included the reception of the **concepts, categories, principles and divisions** (ie a scientific reception), as well as the **substantive norms or rules** (ie a practical reception) of Roman law. (See sec 1.2 in study unit 1.) The renewed interest in and study of Roman law, which naturally led to its reception, spread beyond Western Europe.

However, the reception did not always include the reception of substantive rules of Roman law. As you will see in study unit 6, countries outside Western Europe, as discussed in study unit 6, often experienced only a scientific reception, which was not accompanied by a practical reception. It is only natural that this scientific reception was of a more enduring nature than the reception of the substantive rules of Roman law, since rules change more easily than the scientific structure of a legal system.

For example

According to Roman law, one of the requirements for *iniuria* (infringement on personality rights), was *animus iniuriandi* (meaning the **intention** to commit *iniuria*). However, in many European countries, and in South Africa as well in certain instances, this requirement has been changed. To prove *iniuria*, one only has to prove **negligence**. Proving negligence is easier than proving the intention to commit *iniuria*. (You do not have to memorise this example. You will learn more about *iniuria* and the difference between intent and negligence later on in your LLB studies.) This example illustrates how a (substantive) Roman-law rule has been changed in countries with a heritage of Roman law.

In contrast, the distinction between, for example, private law and public law remains in most countries, many of which do not use substantive Roman law at all. This is an example of how the scientific structure of Roman law has endured in many countries, and even in some countries that do not apply substantive Roman law.

In many of the countries where substantive Roman law was received, the rules are no longer in force, but the scientific system or structure remains in force. It is this scientific structure of Roman law which is an important factor in the harmonisation of the laws of Western Europe.

Important

''Harmonisation?'' you may ask. Yes, there is presently a drive to harmonise the private law of the European countries, and it is the Roman-law heritage, and specifically the heritage of the **scientific structure of Roman law**, which makes it possible to achieve harmony where there are different substantive legal rules applicable in different countries.

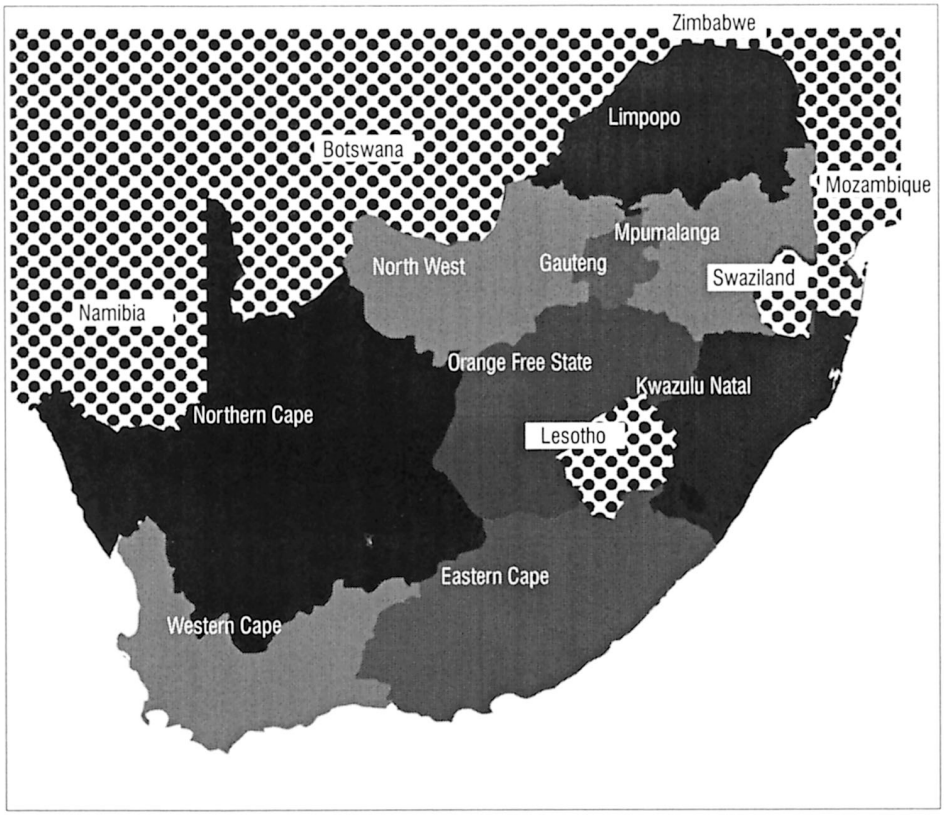
5.5.3 AN AFRICAN *IUS COMMUNE?*

Now think about the following: It is not only the European legal systems which share a common core, which are considering the harmonisation of their private law. Much closer to home, and much closer to

our legal system, are the legal systems of the South African Law Association. But what is this ''Law Association''? The term ''South African Law Association'' was first coined by Schreiner J in a decision of the Lesotho High Court (*Annah Lokudzinga Mathenjwa* 1970–1976 SLR 25). The term refers to the countries in Southern Africa whose legal systems are based on **Roman-Dutch law**, as influenced by **English law** and indigenous **African law**. These are countries such as Lesotho, Botswana, Swaziland, Zimbabwe and, of course, South Africa and Namibia.

The fact that there is a common core of this kind in the laws of these African countries was recently illustrated in the following *dictum* of a judge in the Botswana case of *Matumo v News Company (Botswana) t/a The Gazette* 1997 BLR 43 (IC) (you may refer to this as the *Matumo* case). The judge explained why he had used South African case law as authority:

> The reason why the court referred to the aforesaid South African cases is because they are based on the South African common law which is Roman-Dutch law, which is also the Botswana common law.



Southern Africa

A question which you should ask yourself is whether one can speak of an African *ius commune*, consisting of Roman-Dutch, English and indigenous African law? In Southern Africa, like Europe, there is a drive to unify, or to harmonise, the laws of the different countries. This is not limited to the laws of the countries belonging to the South African Law Association, but includes, for example, the countries belonging to the Southern African Development Community (or SADC). Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zimbabwe, Zambia, South Africa, the Democratic Republic of Congo, Namibia, Mauritius and the Seychelles are all member states of the SADC. In the SADC region the emphasis is on economic development and integration. It is important to remember that the countries of the SADC do not share the same legal heritage as the countries of the South African Law Association. However, this does not detract from the fact that there is much potential for the harmonisation or convergence of private law in Southern Africa.

ACTVITY 5.6

Answer the following questions to see whether you understand what you have learnt:

(1) Why is the European *ius commune* so important?
(2) Is it possible to speak of an ''African *ius commune''*?
(3) Write a paragraph on Roman law as an enduring element in European law.

FEEDBACK 5.6

(1) The European *ius commune* was the common law of (Western) Europe and consisted of Roman law and canon law as received into the Germanic customary legal systems. This means that the legal systems of many Western European countries have the same historical foundation. Therefore they share several similarities. The result is that a jurist or a lawyer in one of these Western European countries may consult the legal system of another country which formed part of the European *ius commune* to find a solution to a legal problem. The European *ius commune* also applied in the Netherlands, and it was the 16th-century legal system of the Netherlands, namely Roman-Dutch law, that was later introduced into South Africa. Therefore, the European *ius commune* is also relevant for a South African lawyer today, because he or she may look to the legal systems of Western Europe for a solution to a legal problem, if our law does not provide a solution.

Remember!

The European *ius commune* developed during the 15th century (the 1400s) and still exists today. For a discussion of the importance of the European *ius commune* in the development of Roman-Dutch law, see study unit 7, section 7.2.

(2) Although we cannot yet speak of an African *ius commune*, it is possible that such an African *ius commune* could develop in future. The reason is that there is a drive to unify and harmonise the laws of the different African countries. Although all the different countries in Africa do not share the same legal heritage, there are countries that do. These are the countries belonging to the South African Law Association. Their legal systems are all rooted in Roman-Dutch law and English law and have an indigenous law component.

(3) The reception of Roman law into the European legal systems included a reception of the concepts, categories, principles and divisions of Roman law (ie a scientific reception) as well as a reception of the substantive norms or rules of Roman law (ie a practical reception). Since rules themselves change more easily than the scientific structure of a legal system, it is only natural that the scientific reception of Roman law is of a more enduring nature than its practical reception. For example, a specific rule regarding family law may be amended time and again throughout the ages to accommodate changes in society, but the classification and organisation of a legal system do not easily change. This means that even though the different Western European legal systems might have changed their laws in some cases to such an extent that they no longer reflect Roman law, the different Western European legal systems are still bound by the similarity of their distinctly Roman structure and classification.

Test yourself

Answer the following self-assessment questions with reference to the material that you have studied in this study unit. Make sure that you answer these questions to the best of your ability.

- Give three reasons for the renewed interest in Roman law in the 12th century. (3)

- Discuss the points of criticism of the work of the glossators. (5)
- Compare the impact that the work done respectively by the glossators, the *ultramontani* and the postglossators had on practice. (6)
- Discuss the importance of canon law in the development of the South African legal system. (2)
- Explain what is meant by the ''European *ius commune*''. (1)
- Explain the relevance of the European *ius commune* for a South African jurist. (2)

Study unit 6

Legal development in the 16th, 17th and 18th centuries

Learning outcomes

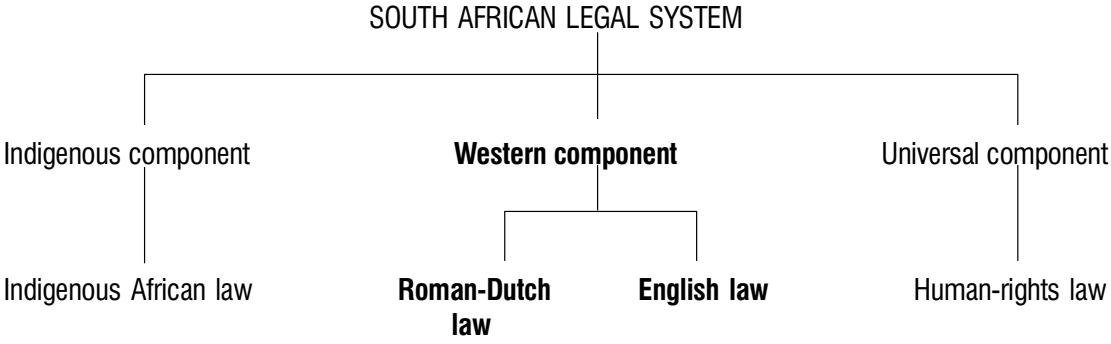
After having studied this study unit, you should be able to

- describe the degree of reception of Roman law in the different European countries
- explain why the humanists did not play an important part in the development of the European *ius commune*
- explain the role of different groups of jurists in the reception of Roman law in Western Europe

6.1 INTRODUCTION

In study unit 5 you learnt how the European *ius commune* developed. As you are no doubt aware, the legal systems of most of the Western European countries were influenced by Roman law and canon law, the result being the formation of a European *ius commune*. In study unit 6 we will describe the reception of **Roman law** in Western Europe from the 16th to the 18th centuries.

The diagram below is a graphic representation showing where the discussion in study unit 6 fits into the development of our legal system.

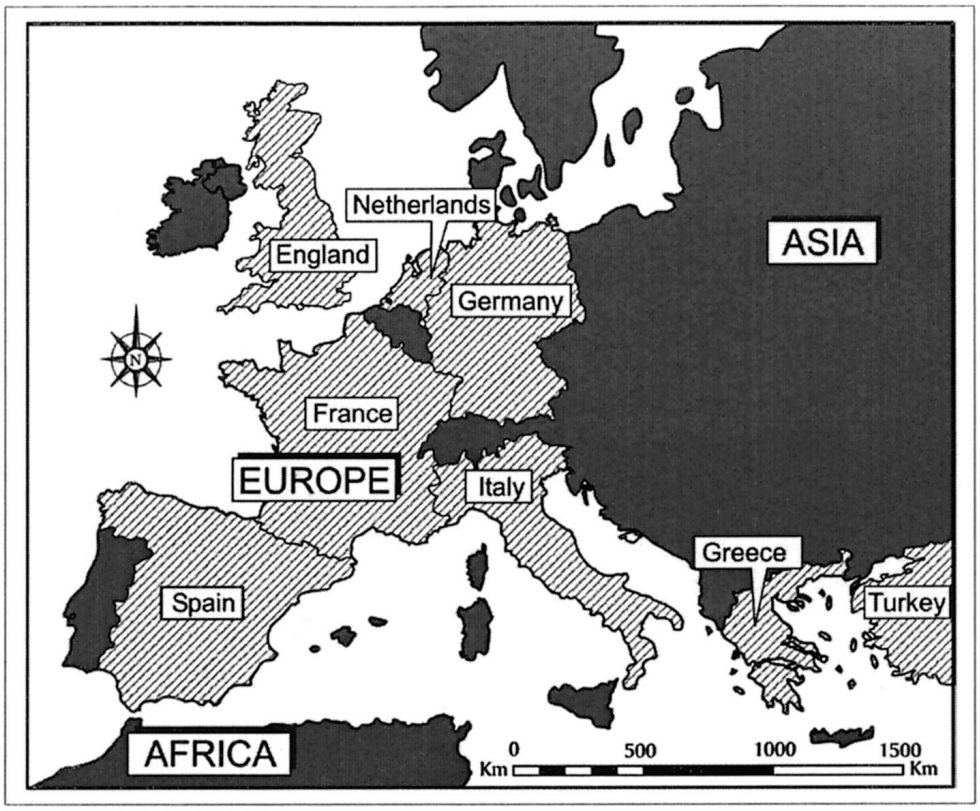


Important

Take another look at the time-line in study unit 1. Make sure that you understand where the 16th, 17th and 18th centuries fit in on the time-line before you continue with this study unit.

Remember that the term ''Western Europe'' is used in the broad sense of the word and includes **England** and **Scotland** (which were unified in 1707). England and Scotland are included not only to show how widely Roman law influenced the other legal systems of the world, but for another reason as well: The Cape was occupied by Britain in the 18th century and English law has influenced South African law in many respects. Large areas of our **mercantile law** as well as our **formal law**, that is the **law of evidence and procedure**, have been influenced by English law. It can therefore be said that the Western component of our law is also rooted in English law.

In order not to overwhelm you with a great mass of information, we will refer only to certain countries which played a leading role in legal development in Western Europe. Although **Italy** was the principal centre of legal scholarship in the Middle Ages, it largely faded into the background from the beginning of the 16th century onwards. Instead, the centre of legal scholarship shifted to **France** in the 16th century because of the great contributions of the French humanists to legal scholarship. (More about these jurists later!) After France, the Netherlands and finally **Germany** became the centre of legal scholarship. Because the **Netherlands** had a very specific place in the history of South African law, its legal history will be dealt with in more detail than that of the other countries.



A map of modern Europe

Important

Before you continue with this study unit, it is important that you know where the countries we will be discussing are situated. For this reason you should study the map of present-day Western Europe. Can you see that England and Scotland do not form part of the continent of Europe, but are actually an island off the west coast of Europe? This fact had an important impact on the development of the English legal system. You will learn more about this later on in this study unit.

6.2 FRANCE

When we speak of legal development in France, we must distinguish between the period before the 16th century and the period from the 16th century onwards when the humanists became a major influence.

6.2.1 RECEPTION OF ROMAN LAW BEFORE THE 16TH CENTURY

The reception of Roman law did not follow the same course in the South of France as it did in the North. Roman law was more extensively received in the South. The reasons for this will now be discussed.

6.2.1.1 Reception in the South

Although Roman law was more readily accepted in the South of France than in the North, this does not mean that the South did not have an established customary law of its own.

Some of the reasons why Roman law was so popular in the South of France should be familiar to you by now:

- Roman law had already made its influence felt in the South, in the early Frankish period. For example, the *Lex Romana Visigothorum* was promulgated in Toulouse in the South of France.
- The glossators founded the law school at Montpellier and, although the *ultramontani* first established themselves in Orléans (in the North of France), they also established branches at Montpellier and Toulouse. Of course, both these groups of jurists studied Roman law. (Revise study unit 5 if you do not remember who the glossators and the *ultramontani* were.)

6.2.1.2 Reception in the North

The reception of Roman law in the North was not as complete as it had been in the South and in Italy. The following were some of the reasons for the resistance to Roman law in the North of France:

- The city of Paris (situated in the North) was the seat of the pope and the French king and the centre from which they wielded their power. For different reasons they both saw the infiltration of Roman law as threatening. The pope feared an infringement of his authority and of canon law, while the king viewed the Holy Roman Empire as a threat to his power.
- The northern areas of France were very protective of their customary law. The teaching of Roman law was even forbidden at the University of Paris.

In spite of the resistance to Roman law and the importance of French customary law, Roman law still made its influence felt through the *leges Romanae barbarorum* which had been promulgated in that area as well as through the law school of Orléans.

Note the following

You may wonder why the school of Orléans, situated in the North, studied Roman law. It does seem odd that a law school situated almost in the heart of the region where customary law prevailed should be inclined towards Roman law. An important political reason for this is probably the fact that the conflict (caused by a power struggle) between the king and the pope was centred in Paris and that therefore the teaching of Roman law was forbidden at the Sorbonne University in Paris. With the focus on Paris, the way was left clear for Orléans to study Roman law. We need not tell you how important both Roman law and canon law were at the school of Orléans. (If you do not remember, read study unit 5 again!)

6.2.2 RECEPTION FROM THE 16TH CENTURY ONWARDS: THE FRENCH HUMANISTS

The humanists were a group of scholars who introduced a new working method, in reaction to the work of the commentators and the other medieval law schools. You must bear in mind that the work of the commentators stretched over a long period, namely from 1250 to approximately 1650. The fact that a new school of jurists, namely the humanists, who followed an entirely new method of research, had gained eminence did not mean that the work of the commentators abruptly came to an end.

Note the following

This applies to legal history in general. It is worth remembering that there is always an overlap between periods in history. In other words, a new period in the development of a legal system

does not replace an old tradition or period completely and instantly. There may be a time of transition between the old and the new period of history.

6.2.2.1 The technique of the humanists

As indicated, this new school of law was opposed to the attitude of the commentators and their entire method of teaching. They disliked the crude language of the Middle Ages, and they themselves used only elegant Latin (or classical Latin), which is why they were also called the ''elegant school''.

What was their study method?

The French humanists studied Roman law in the following ways:

- They tried to **reconstruct** the works of the classical Roman jurists.
- They aimed to **rediscover** Roman law as it was before Justinian codified it. In other words, they aimed to rediscover classical Roman law as it was during the classical period in Roman times. (Refer to study unit 3.)
- They wanted to apply a new method to the study of law, namely the **study of law as a system** (as an integrated whole). This method was in contrast to the methods of the medieval law schools, who studied the *Corpus Iuris* in fragments.

Which sources did they use?

- *Corpus Iuris Civilis*
- Roman-law sources dating from before the *Corpus Iuris Civilis*

The cry of the humanists was ''go back to the original sources''. This meant that the humanists studied the *Corpus Iuris Civilis* itself and even investigated Roman-law sources from before Justinian's time. In other words, they did not use the *Glossa Ordinaria* or the commentaries of the Middle Ages (the work of the *ultramontani* and the commentators).

6.2.2.2 Some important humanists

Note the following

It should be kept in mind that legal humanism was not limited to France. Gentilis was of Italian origin, for example. But there were also groups of humanists in Germany and in the Netherlands.

For the purposes of this module it is sufficient to take note of the following humanists:

- ***Cujacius***

Cujacius was a professor at various universities and an outstanding legal scholar. He distinguished himself particularly in the reconstruction of the old classical texts. He was very attached to his students and is believed to have lost a large amount of money through making loans to needy students.

- ***Donellus***

Donellus was a professor at the universities of Heidelberg (Germany) and Leyden (the Netherlands), and made a major contribution to the spread of Roman law in the Netherlands.

6.2.2.3 An assessment of the humanists

Importance of their work

The work of the humanists is important for the following reasons:

- They played an important role in the **spread of Roman law**.
- Their work in the field of pure Roman law was of a **very high standard**.
- Their work on the **systematisation** of legal material was of very great value: Their achievements in the field of the arrangement of the law and their knowledge of classical Roman law should not be underestimated.

Criticism of their work

It should be remembered, nevertheless, that the work of the humanists was of limited value in the development of modern law. The reasons were:

- The humanists did not take the needs of their time into account and consequently they had **little or no influence on practice**.
- They ignored developments over the centuries and attempted to replace the Roman law which had been modified to suit the needs of practice with the old classical Roman law. They had such a dislike for what they considered to be the ignorant medieval writers that they did not want to acknowledge any of their achievements and thus **ignored the whole course of development of the law**.

Important

The fact that the humanists ignored all the legal development that had taken place after the *Corpus Iuris Civilis* meant that they lacked historical perspective. Doesn't this remind you of another group of jurists about whom you learnt earlier? Yes, it should remind you of the glossators, who treated the *Corpus Iuris Civilis* as if Justinian were still on the throne! (Reread study unit 5, which discusses the criticism levelled against the glossators in this regard.)

6.2.2.4 The humanists and canon law

The same period that saw the rise of humanism also witnessed the growth of Protestantism. Protestantism was a new movement in the Christian religion and was a reaction against the power of the Roman Catholic Church over people's lives and minds. It is not surprising then that some humanists, such as Donellus, who were under the influence of Protestantism, rejected canon law, which was of course the law of the Roman Catholic Church.

- ***Donellus***

He was in favour of a definite **separation of canon law and secular law**, and he tried to limit the application of canon law.

- ***Duarenus***

In contrast, Duarenus was in favour of the **study of canon law** and this approach was followed in practice.

6.2.2.5 French national law

The work of the humanists does not represent French law of the 16th century. To get a complete picture of French national law one has to look at the work of the French national jurists. The French national law that we refer to here is customary law as adapted and streamlined by the adoption of Roman law. The

national jurists accomplished much in systematising French customary law and reducing it to writing. They paved the way for the eventual codification of French law.

The most important national jurists were **Molinaeus** (16th century), **Domat** (17th century) and **Pothier** (18th century). Pothier wrote a vast number of treatises on the civil law of his time. The most important of these was on the law of obligations. This work is still highly esteemed and frequently consulted, not only in France but throughout the Western world. Pothier's treatise on the law of obligations was one of the works translated into Dutch by the Dutch jurist Van der Linden (about whom you'll learn more in study unit 7).

6.2.3 THE CODIFICATION OF FRENCH LAW

In 1804 French civil law (private law) was codified by Napoleon.

Did you know?

Napoleon was an officer in the French army. He gained control of France and became the Emperor of France. His aim was to unite Europe under a liberal government and in order to do so he attempted to conquer the other European countries by force. His dream was eventually shattered when he was defeated by the British at the Battle of Waterloo.

At the height of his power, Emperor Napoleon proved to be an excellent civil administrator. Under Napoleon laws were codified, feudalism abolished, efficient government created and education, science, literature and the arts fostered. One of his greatest achievements was his supervision of the drafting of the *Code Napoleon* or the *Code Civil*. This Code incorporated some of the freedoms gained by the people of France during the French revolution of 1789, including religious tolerance and the abolition of slavery. The *Code Civil* still forms the basis of French civil law today.

The *Code Civil* had an enormous influence on the legal systems of many European countries, such as the Netherlands, Italy, Spain and Portugal. (If you want to refresh your memory on the meaning of the word ''code'', read study unit 1 again.)

ACTVITY 6.1

Answer the following short questions to see whether you understand what you have learnt so far.

(1) What is a codification?
(2) When was French civil law codified?
(3) What is the importance of the French *Code Civil*?

FEEDBACK 6.1

(1) The term codification refers to a comprehensive, written version of a legal system which has the force of legislation. In a codified legal system, the code is the main source of law. A code may be adapted through legislation and is obviously interpreted by the courts. If you do not remember what codification means, reread section 1.2 in study unit 1.
(2) In 1804.
(3) The *Code Civil* influenced the legal systems of many European countries, such as the Netherlands, Spain, Italy and Portugal.

6.3 GERMANY

Important

Before we continue, it is important that you distinguish between the terms ''Germanic'' and ''German''. ''Germanic'' is a collective term referring to the peoples or tribes who populated Western Europe at the time of the fall of the Western Roman Empire (AD 476). ''German'', however, refers to the present-day country of Germany, which is situated in Western Europe. The people who live in Germany are called Germans and the language they speak is German.

6.3.1 THE RECEPTION OF ROMAN LAW

The reception of Roman law in Germany was so complete that we speak of an *in complexu* reception. The following are some of the more important reasons for this reception:

- ***Variety in the law***

During the 11th century in Germany, there was great variety in the law. Every region had its own customary law and there were even different legal systems for the different classes. There was a need for a more general and better developed legal system — a need which native customary law could not satisfy, but which Roman law could.

- ***Roman Catholic Church***

Roman law infiltrated Germany because the Church was established everywhere and Roman law could establish itself through canon law. (Do you remember the relationship between Roman law and canon law? If not, read study units 4 and 5 again!)

- ***Universities***

Under the influence of the Italian universities, Roman law was also taught at German universities, from the 14th century onwards.

- ***Court of appeal***

In the 15th century, a general court of appeal was introduced in Germany. Because many of the jurists were schooled in Roman law, the application of Roman law in Germany became established.

As a result of the factors mentioned above, Roman law infiltrated the German legal system within two centuries and gained a dominant position. The reception in Germany was far more complete than in either France or the Netherlands. However, up to the 16th century we find hardly any literature of a high standard on Roman law.

6.3.2 LEGAL DEVELOPMENT DURING THE 16TH CENTURY

6.3.2.1 The German humanists

In general it may be said that the German legal literature of the 16th century followed the same approach to the study of law as that of the humanists. The German humanists did not reach the same heights as the French humanists, however. They differed from the French humanists in one important respect:

- The German humanists were not as far removed from actual practice and they therefore had a greater influence on practice than did the French humanists.

However, one should not disregard the influence of the humanists on German law. Because the German humanists preferred to study pure Roman law, the Roman law of Justinian became more influential in Germany than the Italian Roman law of the Middle Ages. In both Germany and France, humanism reached its peak in the 16th century and made little, if any, progress after that.

- ***Zasius***

Zasius was the first outstanding writer on Roman law in Germany and the founder of German legal humanism in the early 16th century. Interestingly, he is regarded as the forerunner of the **French** Humanist School.

Important

In the 17th century and the first half of the 18th century, the ''elegant'' approach of the French was adopted in the Netherlands, where men like Noodt, Schulting and Bynkershoek gained fame (more about this in study unit 7).

6.3.3 LEGAL DEVELOPMENT DURING THE 17TH AND 18TH CENTURIES

6.3.3.1 The *usus modernus pandectarum*

During the 17th and 18th centuries a new school of law emerged in Germany, namely the *usus modernus pandectarum*.

Did you know?

The term *usus modernus pandectarum* is Latin and literally means ''the modern usage of the Pandects''. ''Pandects'' is of course another name for the *Digest*, one of the four parts of the *Corpus Iuris Civilis*. In other words, the *usus modernus pandectarum* was a school of law that campaigned for the incorporation of the *Corpus Iuris Civilis* into everyday legal practice.

What was the working method of the school of usus modernus pandectarum?

- They followed a **theoretical-practical** line of thought. This means that they did not study law only in theory, but also as it applied in practice:
- They concerned themselves with Roman law only in so far as it was **still in use** and was **applicable**.
- They described Roman law as it **applied in practice**, subject to amendment and supplementation by their own laws and courts.

The usus modernus pandectarum and canon law

The *usus modernus pandectarum* rejected the commentators' rules regarding the application of canon law. The *usus modernus pandectarum* were of the opinion that

- canon law should have preference over Roman law, but that
- German customary law should have preference over both Roman law and canon law.

- ***Carpzovius II***

Carpzovius II was the leading proponent of the *usus modernus pandectarum*. He was possibly the most famous of the earlier German jurists. The aim of his work was to describe the prevailing law of his time as it was actually applied in practice. Carpzovius was the Bartolus of Germany and dominated German law for more than a century. He summarised and compiled the laws which had developed before his time, from both Roman and German sources, and this work has caused him to be regarded as the actual **founder of German national law**.

Note the following

The theoretical-practical approach is not the only approach found in the German legal literature of the 17th century. The development of **natural law** also influenced German legal history during this time. In terms of the doctrine of the law of nature, there is a higher, universal, unchangeable law to which all laws must conform. We will tell you more about this in study unit 9.

6.3.4 LEGAL DEVELOPMENT FROM THE 19TH CENTURY

The German jurisprudence developed by the writers of the 19th century was of such outstanding quality that it had a profound influence on other European countries, even countries where the law had already been codified.

6.3.4.1 The historical school

The beginning of the 19th century saw the rise of another school of law, namely the historical school, in reaction against the doctrine of the law of nature.

- In contrast to the doctrine of the law of nature, the historical school did **not recognise any permanent and unchangeable law**.
- They considered the law to be, in essence, both **changeable** and related to the **national spirit**.
- Along with German law, they also studied **Roman law**. However, Roman law was studied merely for its **scientific interest** and not with a view to its practical application.

Savigny was one of the leading figures of this school. He is regarded as one of the greatest jurists of all time and has produced a large number of works on German law.

6.3.4.2 Codification

Towards the end of the 19th century, the idea of codification came strongly to the fore and in 1900 a civil-law code the *Bürgerliches Gesetzbuch*, was introduced for the whole of the German Empire.

ACTVITY 6.2

Answer the following questions regarding the German law schools to test whether you understand what you have learnt so far.

(1) Briefly discuss the approach to the study of Roman law of the *usus modernus pandectarum*.

(2) Briefly explain the historical school's approach

(a) to law in general

(b) to Roman law.

FEEDBACK 6.2

(1) The *usus modernus pandectarum* studied Roman law, but only in so far as it was still in use and applicable. In other words, Roman-law principles that were no longer relevant to the needs of society were discarded. Instead, Roman law had to be adapted to suit the new demands of society. This was done mostly through legislation and the courts.

(2) (a) The historical school was established as a reaction against the doctrine of the law of nature.

Unlike those jurists who believed in the unchangeable higher principles of the law of nature, the historical school believed that law was not permanent, but changeable and related to the national spirit. In other words, the historical school believed that there was no universal system of law, but that the law developed to suit the needs of the nation.

(b) The historical school studied Roman law only from a scientific perspective and not with a view to applying it in practice. What do you think the reason for this was? If you bear in mind that the historical school viewed law as related to the national spirit, this meant that they saw Roman law as the law **of** the Roman people and **for** the Roman people, and German law as the law **of** the German people and **for** the German people. In other words, the historical school merely saw Roman law as an interesting historical legal system which could be studied for purely scientific and historical reasons, but never as a system to be utilised for the needs of their own society.

ACTVITY 6.3

Answer the following questions to determine whether you understand the dynamics of certain law schools (ie, jurists sharing the same study methods):

(1) Explain how the 16th-century French humanists approached the study of law.

(2) How did the approach of the German humanists differ from that of the French humanists?

FEEDBACK 6.3

(1) The 16th-century French humanists studied pure, classical Roman law. They disregarded the developments of the Middle Ages, such as the work done by the glossators and the commentators, and had no regard for the needs of practice.

(2) The German humanists, like the French humanists, also studied pure classical Roman law, but the German humanists approached classical Roman law from the point of view that it had to serve the needs of practice.

Note the following

There were also humanists in the Netherlands. You will learn about them in section 7.3.1.5 of study unit 7.

6.4 THE NETHERLANDS

Before we discuss the reception of Roman law in the Netherlands, we would like to draw your attention to two important facts. First, the Netherlands consisted of **different provinces**, and, secondly, the reception took place in **two phases**.

Seven provinces

Before the unification of the Netherlands in 1579, the Netherlands consisted of seven provinces, namely:

- Holland
- Zeeland
- Utrecht
- Gelderland

- the Ommelands
- Friesland
- Overijssel

Two phases of reception

The period of reception (not including the prereception or infiltration phase and the intellectual rediscovery of Roman law in the 12th century — see section 1.5 of study unit 1) ranged from the end of the 13th century to the end of the 16th century. This period can be divided into two phases, namely

- the **early reception** phase
- the phase in which **reception proper** took place

6.4.1 EARLY RECEPTION (APPROXIMATELY LATE 13TH CENTURY TO THE MIDDLE OF THE 15TH CENTURY)

At this time the ''ancient Netherlands'' or ''Low Countries'' came heavily under French influence. Therefore, the influence of French institutions in respect of the reception process must not be underestimated. The following factors helped with the spread of Roman law:

- The **ecclesiastical (church) judges** who were mostly trained at either Bologna or Orléans had a sound knowledge of Roman law. Their knowledge of Romano-canonical procedure played a role in the early reception of Roman law in the Netherlands.
- The **Dutch jurists** who were trained either at Bologna or Orléans helped the reception process along by using their Roman-law skills in the drafting of legal documents.
- The province of **Friesland** occupied a special place in the early reception process. Because there was no strong central government, the running of the community's affairs was left in the hands of the clergy, and the Church was able to dominate Frisian society. Because of the close relationship between Roman law and canon law, it is not surprising to find that canon law served as a vehicle for the reception of Roman law in Friesland.

6.4.2 RECEPTION PROPER (FROM THE SECOND HALF OF THE 15TH CENTURY UNTIL THE END OF THE 16TH CENTURY)

During this period political, economic and cultural factors were decisive in promoting the reception process.

6.4.2.1 Political factors

In the 15th century the territories of the Netherlands were under Burgundian rule. Under the Burgundians (ie, the inhabitants of Burgundy in eastern France), a policy of centralisation was introduced in the Netherlands. Centralisation is the elimination of all the diversity which existed as a result of the fact that there were many different provinces with different administrations and laws. The attempts at centralisation indirectly paved the way for the reception of Roman law. The main factors which contributed to the reception are described below.

a Legislation

In the 16th century, statutes were issued by the Burgundians which contained an **explicit reference to the application of the ''written'' law (Roman law)**, in all matters not covered by the statute itself. This was evidence that the Burgundians were endeavouring to introduce a uniform, centralised system of law through Roman law.

b Customary law: order and certainty

The Burgundians tried to eliminate the many contradictory provincial customs and bring order and

certainty to all the prevailing customary laws. To accomplish this, they gave instructions that the **provincial customs be put in writing** and submitted for confirmation. A clause had to be added which referred to **Roman law as the subsidiary law**.

This process strengthened customary law because high court judges did not set aside customs which had been written down and approved.

However, the process also entrenched Romanist principles, because, at the time of drafting, many Romanist principles were incorporated into customary law, creating an ''instant'' reception as it were.

c Courts

The Dutch courts promoted the reception of Roman law in the following ways:

- Various provincial high courts were created and the Grote Raad van Mechelen was constituted as a central court of appeal for the provinces. The jurists who sat on these high court benches were Romanist-oriented. They had little knowledge of the local customary law and thus tended to fall back on Roman-law principles in their judgments.
- Since the Netherlands was under French rule, French law applied in the Dutch courts. French law, as you know by now, was influenced by Roman law and canon law, and in this way Roman law and canon law exerted an influence on the developing law of the Netherlands.
- Even though the lower courts were bitterly opposed to Roman law, the judgments of the higher courts had a highly persuasive value for the lower courts.

Important

It is clear from the above that the courts of the Netherlands did not follow the rule of *stare decicis*. Do you know what this rule refers to? The rule of *stare decicis* simply means that lower courts are bound by the decisions of higher courts in similar cases and that a court is bound by its own previous decisions. You will learn more about this rule in study unit 8.

d Proof of customary law

The 17th century high courts further ensured the success of the reception proper by strictly enforcing the requirement that **customary law had to be proved by a group of witnesses**. Since the witnesses could not always satisfactorily prove the existence of a specific customary-law rule, judges frequently applied the more easily accessible Romanist commentaries instead.

6.4.2.2 Economic factors

There were various economic factors which led to the reception of Roman law, namely:

a Social change and a developing economy

In the early 16th century, the province of Holland, together with most of the other provinces of the Netherlands, was undergoing great social change. Its agricultural economy had given way to a **rapidly developing commercial economy**, with the emphasis on trade. This in turn gave rise to new, complex legal situations. The local law was not systematic or uniform enough to cope with the new demands and recourse was had to Roman law (the ''written law''). The commentaries of Bartolus and Baldus were used to help make good any deficiencies in the laws governing trading relationships.

b Legal advice

A general economic revival usually leads to the emergence of a powerful business community. The **rich**

merchant class often needed legal advice and it appears that the advocates they consulted relied heavily on Roman law as systematised by the humanists.

c Diversity in town law

Economic change meant that the towns in the Netherlands steadily grew in importance, since that was where trade usually took place. Each town council wanted greater autonomy for its own town and also wanted to keep the diversity of the laws applicable to different towns to a minimum. From the middle of the 15th century onwards, towns adopted a more systematic approach to the framing of their **local legislation** *(keuren)*. This clearly reflects the influence of Roman law. In our opinion the draftsmen of these new *keuren* must have been schooled in Roman law.

6.4.2.3 Cultural factors: the University of Louvain

The foundation of this University in the 15th century was made possible not only by the rich Duchy of Brabant (a duchy is the territory of a duke or duchess), but also by the Church. Of course the influence of the Church resulted in an emphasis on canon law. This naturally led to the strengthening of Roman law through canon law. (By now you should be aware that canon law was based on Roman law.) The factors described below impacted on the reception of Roman law.

a Faculty of Roman law and canon law

A faculty of canon law existed alongside the faculty of Roman law (civil law). Doctorates could be conferred in both branches of law, that is, canon law and Roman law.

b Influence of medieval universities

The University of Orléans and the Italian universities (all of which actively taught and propagated Roman law) exerted a considerable influence on the law school at Louvain.

c Glossa Ordinaria and Bartolus

The law lecturers at Louvain in the early days of the university followed the *Glossa Ordinaria* of Accursius as well as the works of Bartolus. As a result, a high standard of civil-law (Roman-law) teaching was quickly established.

d Former students of the University

Many of the former students of the University of Louvain took up positions in the high courts of the provinces. Others gained high office in the government and yet others became advisers to the wealthy town burgesses. These former students applied Roman law, which they had studied at the University of Louvain, in everyday practice.

e Professors at the University

The early professors at Louvain acted as propagandists in the furtherance of Roman law.

6.4.3 THE EXTENT OF THE RECEPTION IN THE NETHERLANDS

For our purposes, the northern provinces which became the Republiek der Vereenigde Nederlanden are the most important. Note the following:

- **Friesland** experienced a complete *(in complexu)* reception of Roman law.
- **Holland** and **Zeeland** experienced an extensive reception. The activities of the judges and the

influence of the merchant class of Leyden and other cities were probably the deciding factors. Holland was regarded as the most influential of the provinces in the field of legal development.

Ask yourself

Why do you think Holland is of special importance to a South African lawyer? Yes, the reason is that it was specifically the law of the province of **Holland**, namely **Roman-Dutch law**, which was brought to South Africa in 1652 and which is one of the main ingredients of the Western component of our law.

6.4.4 CODIFICATION IN THE NETHERLANDS

In the late 18th century it was decided to codify the law of the Netherlands. A commission, with Van der Linden (more about him in study unit 7) acting as secretary, was appointed to prepare a draft. Before the task was completed, Napoleon conquered the Netherlands and appointed his brother, Louis Bonaparte, as the Emperor of the Netherlands. In 1809, Louis Bonaparte introduced the *Code Napoleon (Code Civil)* into the Kingdom of Holland and adapted it for conditions there. More than a hundred years later, and even though the Netherlands was no longer under French rule, a civil code which was modelled on the *Code Civil*,was promulgated in 1938.

The result is that, today, the law of the Netherlands shows great similarity to the original French law. This does not mean, however, that there is no connection between the old Roman-Dutch law and the modern law of the Netherlands, since the Dutch Code differed in some ways from the French Code. Moreover, the private law of Western Europe in that period was indeed a ***ius commune***, so that there were many similarities between French, German and Dutch law. The background to the modern Code of the Netherlands is the same as the background to our own law, and the jurisprudence of the Netherlands, and indeed of the whole of Western Europe, is accordingly still of value to us.

Did you know?

Despite the codification of Dutch law, there is still an interest in the old Roman-Dutch law in the Netherlands. Indeed, Roman-Dutch law is taught as a subject at many universities in the Netherlands. What is more, modern works on the old Dutch law have been published in the Netherlands.

ACTVITY 6.4

Answer the following short questions to test whether you understand what you have learnt so far.

(1) (a) When was the law of the Netherlands first codified?
(b) Describe the importance of the *Code Civil* in the codification of Dutch law.

(2) Why, do you think, is the date of the codification of the law of the Netherlands important to a South African jurist?

(3) Why is the Province of Holland of special significance in South African legal history?

(4) Name two countries in Southern Africa, other than South Africa, in which Roman-Dutch law was received. Is it significant that these countries experienced a reception of Roman-Dutch law?

FEEDBACK 6.4

(1) (a) The law of the Netherlands was codified in 1809.
(b) The law of the Netherlands was based on the *Code Civil*, which was introduced by Louis

Bonaparte when he became emperor of the Kingdom of Holland. (Take another look at activity 6.1, where you answered a few questions on the codification of French law.)

(2) As you know by now, Roman-Dutch law was transplanted to South Africa in 1652 when Jan van Riebeeck first settled at the Cape. However, this Roman-Dutch law did not remain stagnant. As Roman-Dutch law developed in the Netherlands, these developments also affected the way the law was applied in South Africa. In fact, Roman-Dutch law continued developing until codification took place in the Netherlands in 1809. In study unit 8 you will learn that the Cape remained under Batavian control only until 1795, when the Cape was colonised by the British (except for the three-year interlude between 1803 and 1806 when the Cape temporarily reverted to Batavian control). This means that the Cape was no longer under the control of the Netherlands at the time of the codification of the law of the Netherlands. This does not mean that Roman-Dutch law did not continue to develop in the Netherlands until codification. What is important, is that the Civil Code of the Netherlands does not apply in South Africa.

(3) Firstly, the law of the province of Holland was the leading law in the Netherlands. The other six provinces of the Netherlands were strongly influenced by the law of Holland. Secondly, and probably more importantly, the law that was brought to South Africa was Roman-Dutch law. The Afrikaans term for Roman-Dutch law, namely ''*Romeins-**Hollandse***'' reg, clearly shows that it was the law of the province of Holland that was superimposed in South Africa.

(4) Lesotho, Botswana, Swaziland, Zimbabwe and Namibia. Do you remember why it is important that Roman-Dutch law forms the foundation of the legal systems of many other countries in Southern Africa? If not, reread section 5.5 of study unit 5, specifically the explanation of the African *ius commune*. We will return to this point in section 6.7 of study unit 6.

6.5 ENGLAND

We now turn our attention to the other main part of the Western component of South African law — English law. English common law forms the basis of the legal systems of many countries, such as the United States of America, Australia, New Zealand and Canada. These countries form part of the so called ''common-law family'' of legal systems.

However, English law also forms part of the legal systems of many **African countries**. Among these are Lesotho, Botswana, Swaziland, Zimbabwe, Zambia and Kenya.

Keep in mind!

The legal systems of these African countries have been influenced by other legal systems as well. Because of their mixed nature, the legal systems of these countries are classified as **mixed or hybrid legal systems**. You should know by now that South Africa also has a mixed or hybrid legal system.

English law, of course, forms an important part of **South African law**. The influence of English law dates from the early 19th century, when the Cape Colony came under British rule. It is therefore of great importance to a South African lawyer to know how the English legal system developed, what its main characteristics are and which areas of South African law it has influenced most.

6.5.1 A BRIEF OVERVIEW OF THE DEVELOPMENT OF ENGLISH COMMON LAW

There were three major influences on the development of English common law, namely:

- William the Conqueror
- a restricted reception of Roman law
- the three courts

6.5.1.1 William the Conqueror

In AD 1066, the **Norman king** William the Conqueror crossed the English Channel and embarked on the conquest of England. After the legendary battle of Hastings, he took full control of England.

At that stage, the people lived in small settlements, had their own local courts and applied local customary law, supplemented by a few royal statutes. **There was no unified legal system.**

William the Conqueror wanted to consolidate his power and to achieve this, he attempted to **unite England**. He established a feudal system (if you do not remember what feudalism is, refer to study unit 4) in England with a strong monarchy. William himself was the first king under this new monarchy.

Did you know?

A monarchy is a form of government where the head of the state is a king, queen, emperor or empress. The head of the state is called a ''monarch'' and has absolute power in governing the country.

An important step in creating a unified country is the development of a **uniform national legal system**. William set the process of creating a unified legal system in motion by establishing the King's Court or *Curia Regis*. This should be regarded as the starting point of the English legal system, which would later become known as the English common law.

6.5.1.2 A restricted reception of Roman law

Important

Look at the map at the beginning of study unit 6. Can you see that England consists of two islands? It does not physically form part of the continent of Europe. However, because it is situated so close to Europe, general references to Western Europe usually include England, Northern Ireland, the Republic of Ireland, Scotland and Wales.

Despite its geographical proximity to the European continent, the reception of Roman law in England was never as widespread as on the continent. In fact, the influence of Roman law in England before the 12th century was so limited that there is hardly any mention of its infiltration during this period.

Why was the reception of Roman law so limited in England?

The answer is that William the Conqueror started to develop a unified English legal system in the 11th century. This meant that English common law was already a **well-established legal system** by the time the renewed interest in, and study of, Roman law started in the 12th century in Europe. It is therefore not surprising that the English felt that they did not need to look at Roman law, since they had an established legal system of their own. In fact, many English jurists were strongly opposed to any Roman-law influence.

6.5.1.3 The three courts: development of English common law

It is important to understand that the English legal system developed casuistically, or on a case-to-case basis. This means that the courts did not apply a body of existing legal rules, they made the rules as they heard the cases. Therefore we say that English law **developed within the courts**. There were three

independent courts in England and each developed a different part of what is today called ''English common law''. These were the

- King's Court or *Curia Regis*
- Court of Chancery
- Court of Admiralty

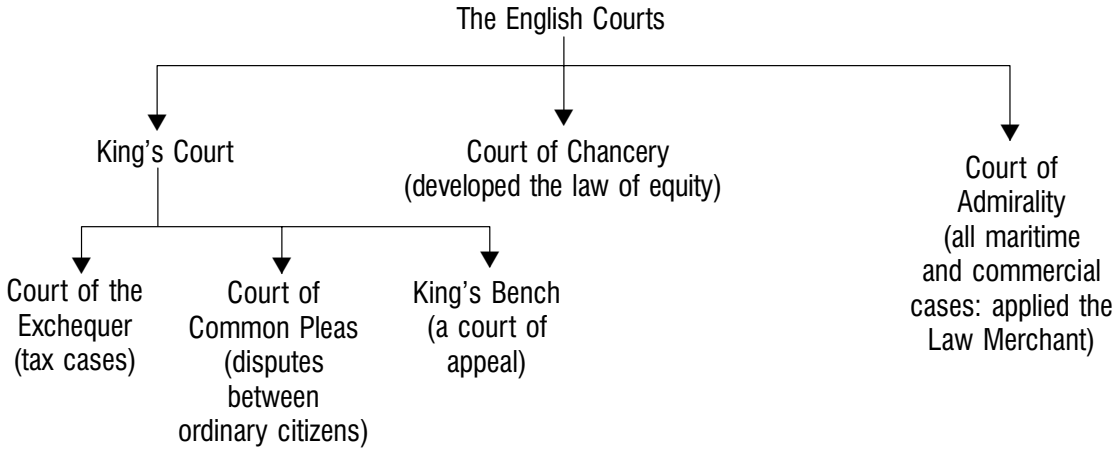
a The King's Court or Curia Regis

The King's Court, the oldest of the three courts, was established in the 11th century by William the Conqueror. This court generated the old common law. During that time the King's Court used to go ''on circuit'', meaning that the court would travel to local communities to hear cases. Local courts of the sheriffs, which applied local customary law, were also still in existence.

A split into three courts

During the 12th century the King's Court split into three courts. (Do not confuse these courts with the three main English courts!) These were the

- **Court of the Exchequer**, which heard fiscal matters, especially taxation cases
- **Court of Common Pleas**, which heard disputes between ordinary citizens
- **King's Bench**, which heard matters in which the crown had a direct interest, such as criminal cases. The King's Bench was also a court of appeal from the Court of the Exchequer and the Court of Common Pleas. The king himself presided over the King's Bench.



King assisted by locals: beginning of the jury system

From the 13th century onwards, the King's Court became centralised in Westminster. However, judges still went on circuit twice a year to hear local disputes. When hearing local cases, the courts also took local customary law and practices into consideration. In such cases the judges were assisted by local people who had a knowledge of this customary law. It is from this practice that the **jury system** developed.

Civil procedure: the ''writ system''

It is also important to know how the civil procedure worked in the King's Court, because it differed vastly from modern civil procedure and was based on a so-called ''writ system''.

Did you know?

When one person wanted to institute an action against another, he would apply for a writ from the king's chancellor. A writ was a written order in the king's name. Each writ represented an action (ie a claim or a demand). The writ was issued and was a royal order to the local sheriff ordering him to see to it that the defendant either **performed what was claimed** of him, or **appeared before the court on a certain date**. A multitude of different writs existed, each addressing a specific legal problem. All these writs were contained in a register of writs.

The writ system illustrates how the common law developed on a case-by-case basis. When a plaintiff had a legal problem that was not covered by an existing writ, a new writ would be issued to provide him with a remedy. However, the issuing of new writs was prohibited in terms of the Provisions of Oxford, promulgated in 1258.

Ask yourself

Doesn't the issuing of writs remind you of a similar phenomenon in the history of the development of Roman law? Think about the *praetor*. Yes, the *praetor* developed the law in the same way, namely by granting and refusing actions and by creating new actions for new legal problems. Reread study unit 3 if you are hazy about the functions of the *praetor* and the procedures followed by him.

Characteristics of the law of the King's Court

Traditional English common law, as developed by the King's Court, had four essential characteristics:

- It developed on a **casuistic basis**. This means that each case was heard on merit and a judge decided each case separately.
- The **law of procedure** played a central role. In each case the question was asked whether there was a remedy applicable to that specific case, and the right would then be derived from the remedy.
- **The rules of evidence were strictly applied**. This was necessary to prevent the jury from being swayed or influenced.
- Common law was **not very systematically** applied. There were very few scientific divisions between the different fields of law.

b The Court of Chancery

This court developed out of the practice among petitioners (plaintiffs) of seeking relief from the Lord Chancellor directly. The Lord Chancellor had to see to it that justice was done. He did this by ordering the defendant in each case to appear before him and to answer all the allegations made by the petitioner (plaintiff) in his petition. The Chancellor then gave his decision based on equity. In this way, another body of law developed in England alongside the common law, namely the **law of equity**.

In many ways the law of equity supplemented the rigid common law. Certain maxims (sayings) developed that described the nature of the relationship between the law of equity and the common law. These were:

- ''**Equity acts in *personam***'', which meant that the law of equity took the litigants' personal circumstances into account.
- ''**Equity follows the law**'', which meant that the parties could only rely on the law of equity if the common law answer to the specific case was unfair.

- ''**Equity prevails**'', which meant that, where the law of equity and common law provided different solutions to a legal question, the law of equity would have precedence.

These two legal systems, namely the traditional common law and the law of equity, existed side by side until the 19th century, when the Judicature Acts allowed any court to apply either of the two systems. These two legal systems later merged into one system, known as the **English common law**.

Ask yourself

The principle that one legal system was used to ''soften'' another legal system should not sound unfamiliar to you. Do you remember that the equitable principles of the *ius gentium* led to a more flexible and less stringent *ius civile*? Also, do you remember that canon law similarly served to temper the severity of Roman law? If not, reread section 3.5.2 in study unit 3 and section 4.6 in study unit 4.

c The Court of Admiralty

This third court developed during the 14th century. The presiding officer in this court was the admiral. Originally, the Court of Admiralty only heard matters relating to piracy, but later its jurisdiction was extended to all **maritime and commercial cases**.

The Court of Admiralty applied the **Law Merchant**. This was an international commercial law, consisting mainly of trade usages between international merchants which first developed in the northern Italian cities during the Middle Ages. The basis of the Law Merchant or *Lex Mercatoria* was Roman law. It can therefore not be said that English law was completely free from Roman-law influences. However, as mentioned earlier, most of the English jurists were opposed to Roman-law influence. We will briefly look at the reasons for this opposition.

6.5.2 RESISTANCE TO ROMAN-LAW INFLUENCES

6.5.2.1 Resistance by the legal profession

From the 12th century onwards, the renewed interest in Roman law on the European continent began to influence English law as well. The importation of Roman law as a subject of study was the result of the initiative of the Italian glossator, Vacarius (Do you remember him? If not, refer to section 5.2.2 in study unit 5!). He came to Oxford in 1143 to lecture in Roman law. Roman law was also offered at the University of Cambridge and students visited the European continent to broaden their knowledge of this subject.

However, despite the fact that there was a knowledge of Roman law, there was **little practical reception** of Roman law in the lower courts. People wishing to become legal practitioners in England did not attend a university, but were trained at the Inns of Court. Here legal practitioners instructed upcoming lawyers in legal practice. Roman law was taught at the universities, but not at the Inns of Court.

6.5.2.2 Resistance by the king

The English king did not want to acknowledge Roman law, because he was afraid that this would make him subject to the authority of the emperor of the Holy Roman Empire.

Ask yourself

Do you remember that in AD 800 the Frankish emperor, Charlemagne, was crowned emperor of

the Holy Roman Empire? The Holy Roman Empire was not attached to a specific country. In fact, in later years it extended over many countries, including parts of present-day Germany, Austria, Italy, Belgium and, until 1648, the Netherlands and Switzerland. It continued to exist until the 19th century. The last emperor of the Holy Roman Empire was Francis II, who ruled from 1792 until 1806. Therefore, when we say that the king of England felt threatened by the emperor of the Holy Roman Empire, we are not referring to Charlemagne in AD 800!

6.5.2.3 Resistance by the aristocracy

The aristocrats were opposed to Roman law as it gave absolute power to the monarch and they did not want the king to have absolute power. It is important to understand that the emperor of the Holy Roman Empire had **absolute power**, whereas the king of England governed with the **assistance of the aristocracy**. In other words, the English aristocracy, who had some say in ruling England, were opposed to Roman law, because this was the law applied by the Holy Roman Empire. The aristocracy were afraid that the influence of the Holy Roman Empire would give the king absolute power, and that they (the aristocracy) would lose their say in government.

6.5.3 THE INFLUENCE OF ROMAN LAW ON ENGLISH COMMON LAW

In spite of the practical and emotional opposition to Roman law, its unmistakable influence can be traced in works on the native law of England. The works of 12th and 13th century jurists like **Glanville** (12th century), a student of Vacarius, and **Bracton** (13th century), who was also strongly influenced by the glossators, are of particular importance here, as is the work of the English canonists, which by its very nature reveals characteristics of Roman law. Naturally, a strong Roman-law content is to be found in canon law and the ecclesiastical courts. The humanist movement also made its influence felt in England, particularly after **Gentilis** came to England in the 16th century. In the 18th century it was **Lord Mansfield** who, as chief justice, strongly relied on Roman-Dutch writers like De Groot, Huber and Bijnkershoek.

There is no doubt that Roman law did have some influence on English common law but it is debatable whether this influence was of a fundamental nature.

6.5.4 INFLUENTIAL EARLY ENGLISH LEGAL SCHOLARS

- ***Sir Edward Coke.*** Coke was strongly opposed to any Roman-law influences in English law. In the early part of the 17th century he published 18 volumes of law reports. Later, he published his *Institutes of the Lawes of England*. His work, and especially the *Institutes*, remains an invaluable source of the old English common law.
- ***Blackstone.*** Blackstone published his *Commentaries on the Laws of England* in four volumes in the mid-18th century. Leading modern authorities still refer to this work.

6.5.5 CHANGES AND LAW REFORMS IN THE 19TH CENTURY

- *Changes in society and the economy*

During the 19th century, England moved from feudalism to capitalism and democracy. The Industrial Revolution also brought about many changes in society and in the law. Labour issues, such as minimum wages, appropriate working conditions and the abolition of child labour, were regulated by law for the first time.

Did you know?

The Industrial Revolution refers to the period when agricultural societies changed to societies

which made use of power-driven machinery and technology. Different countries experienced the Industrial Revolution at different times. England was one of the first countries to experience an Industrial Revolution in the 18th and 19th centuries. This period also marked the invention of many items that we still use today, such as the steam train, the telephone, electricity and the light bulb. (Of course these items were not all invented in England.) Can you imagine what our lives would have been like without these inventions?

- ***Common Law Procedure Act*** of 1852. This Act abolished the old writ system and replaced it with a uniform court procedure.
- ***Judicature Acts*** of 1873 to 1875. These Acts reorganised the English court structure and merged the common law and the law of equity into a single legal system.
- ***Law reports and precedents.*** The system of law reports was reorganised in 1865 to accommodate the reorganised court structure. The law reports were divided into different series, for example Queen's or King's Bench (QB or KB), Chancery Division (Ch) and Appeal Cases (AC).

Law reports are essential to the application of a system of precedents or ***stare decisis***, which exists in England. This means that lower courts are bound by the decisions of higher courts in similar cases and that courts are also bound by their own decisions.

ACTVITY 6.5

Answer the following questions regarding the development of English law to test whether you understand what you have learnt so far:

(1) Name any two countries not on the continent of Africa whose legal systems have been influenced by English common law.

(2) Name any two African countries whose legal systems have been influenced by English common law.

(3) Briefly discuss the influence of William the Conqueror on the development of English common law.

(4) What was the ''writ system''?

(5) Is the following statement true or false?
Roman law had no influence on the development of English common law.

FEEDBACK 6.5

(1) The United States of America, Canada, Australia, New Zealand.

(2) Botswana, Kenya, Swaziland, Lesotho, Zimbabwe, Zambia and South Africa. Reread section 5.5 in study unit 5, specifically the explanation of the African *ius commune*.

(3) When William the Conqueror gained control of England, it consisted of small communities, each with its own leaders and courts, which applied its own local customary laws. There was no unified legal system. William set about changing all this. Firstly, he established a monarchy with himself as king. This meant that although each community still had its own leaders, all those leaders were subject to the king. The king made the law. Secondly, William attempted to establish a unified legal system. In other words, from that time, all the different English communities had to abide by a single set of rules that applied to everybody who fell under the English king. The King's Court was established to apply and develop this unified set of rules.

(4) The ''writ system'' was a system of civil procedure applied in English common law. When a person (A) wanted to institute an action against, or claim damages from, another person (B), A would apply for a writ from the king's chancellor. A writ was a written order from the king. This

royal order, addressed to the local sheriff, instructed him to see to it that the defendant either performed what was claimed of him, or appeared in court on a certain date.

Ask yourself

Did you know that, in South African law, the official who is responsible for serving a summons on a defendant, or who has to attach the assets of a person in terms of a warrant of execution, is also called a ''sheriff''? However, he does not act on royal orders, but on the instructions of an attorney.

(5) False. Roman law undoubtedly had an influence on the development of English common law, but its influence was limited.

6.6 SCOTLAND

Scotland experienced a **strong reception of Roman law**. Scotland was continually at war with England in the 13th and 14th centuries. This prompted the Scots to look for political allies in Europe. These alliances also had cultural implications: Scottish students travelled to the famous European universities which we discussed previously. There they were trained in Roman law and canon law by the great masters. When these students returned to Scotland, many of them obtained important posts in the Scottish legal administration. Because of the animosity between England and Scotland, these former students preferred to apply Roman law rather than English law and did not hesitate to apply the rules and principles of the ''learned'' Roman law whenever Scottish customary law proved deficient. In this way, a typically Scottish legal tradition, with a strong Roman-law basis, developed over the centuries.

In 1707 England and Scotland were unified. Although it was specifically provided that Scotland would retain its own legal system, the influence of English law on Scottish law gradually increased and Roman-law influences correspondingly decreased. Consequently, modern Scottish law does not show the strong Roman-law influence of previous centuries, although the influence is still readily evident.

6.7 OTHER COUNTRIES

The influence of Roman law was not confined to Europe. Directly or indirectly (through European-inspired codes), the influence of Roman law was felt throughout the world. Quebec (in Canada), Louisiana (in the USA), Japan, Egypt and most of the countries of South America were influenced by Roman law. In Africa, too, Roman law made its presence felt through Roman-Dutch law. Examples of countries in Southern Africa that were influenced by Roman-Dutch law are Lesotho, Botswana, Swaziland, South Africa, Zimbabwe and Namibia.

We have now given you a general outline of the reception of Roman law in Western Europe. In the next study unit you will learn about Roman-Dutch law specifically. This was the law which was eventually brought to South Africa in 1652 and which forms an important part of the Western component of our legal system.

ACTVITY 6.6

Apply your knowledge of the practical and scientific reception of Roman law to what you learnt in study unit 6 and try to answer the following question:

Which of the Western European countries discussed in study unit 6 experienced a **practical** and/or a **scientific reception** of Roman law? Give reasons for your answers:

Important

Do you remember what the difference is between a practical and a scientific reception? Reread the explanation of these two concepts given in section 1.5 of study unit 1, as well as the relevant passages in section 5.5 in study unit 5 before attempting to answer the following question.

FEEDBACK 6.6

Firstly, remember that the practical reception of Roman law refers to the reception of the actual rules of Roman law (ie substantive Roman law), whereas the scientific reception of Roman law refers to the reception of the concepts, categories, principles and divisions of Roman law (ie the structure of the Roman legal system).

After reading through this study unit, you had to ask yourself whether each of the countries experienced a reception of the **actual rules** of Roman law or a reception of the **structure** of Roman law or both.

The reception of Roman law which started in Bologna in Italy in the 12th century, (discussed in study units 5 and 6) was a reception of the entire Roman legal system. In other words, it included the reception of the **concepts, categories, principles and divisions** (the so-called scientific structure) of Roman law, as well as the **substantive norms or rules** (practical reception) of Roman law. Similarly, France, Germany and the Netherlands each experienced both a scientific and a practical reception.

Academics who taught at the European universities passed their knowledge of Roman law on to their students, who then applied these Roman-law principles when they practiced law. The academics who passed on their knowledge of Roman law to their students taught them not only the substantive norms and rules but also the concepts, divisions, principles and categories of Roman law.

ACTVITY 6.7

Complete the following table to test your knowledge of the jurists — and the schools of thought they represented — who had an influence on the legal systems of the different countries about which you have learnt in study unit 6:

Jurist	School of thought	Legal system influenced
Cujacius		
Blackstone		
Pothier		
Carpzovius II		
Savigny		
Zasius		

FEEDBACK 6.7

Jurist	School of thought	Legal system influenced
Cujacius	French humanist	French legal system
Blackstone		English legal system
Pothier	French national jurist	French legal system
Carpzovius II	*Usus modernus pandectum*	German legal system
Savigny	Historical school	German legal system
Zasius	German humanist	German legal system

A study hint

These are only a few of the jurists you came across in study unit 6. Do all the names confuse you? You may extend this table by including the names of all the other jurists. To make it easier for you to remember, organise them according to the legal system on which they had an impact.

Test yourself

Answer the following self-assessment questions with reference to the material you studied in study unit 6. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions.

- Briefly describe the extent of the reception of Roman law in each of the following countries or regions: the North of France, the South of France, Germany, the Netherlands, England and Scotland. (6)
- Why did the French humanists exert only a very limited influence on the development of the European *ius commune*? (2)
- Explain why England experienced a limited reception of Roman law. (4)

Study unit 7

Roman-Dutch law before codification

Learning outcomes

After having studied this study unit, you should be able to

- explain what is meant by the concept ''Roman-Dutch law''
- discuss the Appellate Division's view on the meaning of Roman-Dutch law
- describe what is meant by the ''golden age of Dutch jurisprudence''
- identify the sources of Roman-Dutch law and determine their importance

7.1 INTRODUCTION

In the previous study units you learnt about the earliest origins of the South African legal system. You traced the roots of both the African and the Western components of our law. With regard to the Western component, you studied the Greek legacy of philosophical thought, Roman law and canon law, as well as their reception into Germanic customary law. You also learnt about the development of a European *ius commune*, which, in its broadest sense, includes English law.

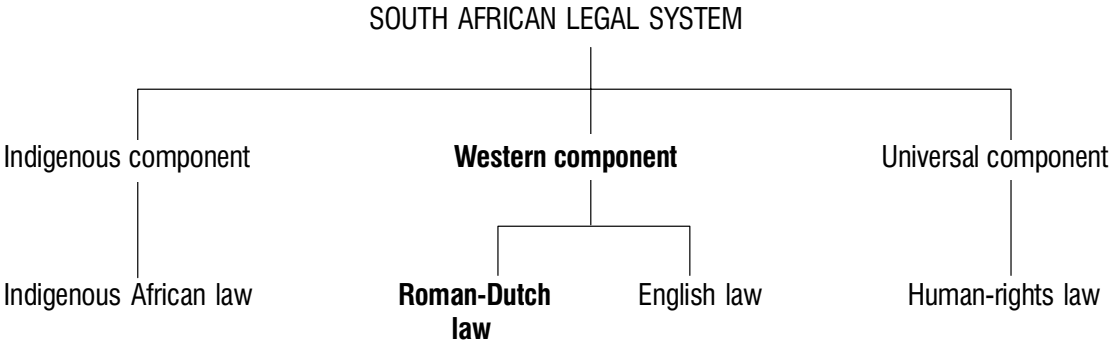
In study unit 6 you learnt how Roman-Dutch law evolved when Roman law was received into the customary law of the province of Holland (one of the seven provinces of the Netherlands).

Important

Keep in mind that it was not pure classical Roman law that was received in Holland, but Roman law as glossed by the glossators and commented upon by the commentators.

This Roman-Dutch law (Afrikaans: ''Romeins-Hollandse reg'') became the law of South Africa. As you may know, Jan van Riebeeck, an employee of the Dutch East India Company, established a refreshment station at the Cape in 1652. (This will be discussed in more detail in study unit 8.) In the light of the dominant position of the province of Holland in the Netherlands, it should not come as a surprise to you that the Dutch East India Company applied Roman-Dutch law in its colonies or that the administration of the Cape applied the law of Holland. This does not mean that Van Riebeek brought a volume on Roman-Dutch law along with him to the Cape. On the contrary, Roman-Dutch law became applicable in the Cape through **custom**. Just as Roman law was gradually accepted as law in the province of Holland, so the law of the province of Holland came to be accepted as the law of the Cape through custom. This law, which was later influenced by English law, eventually became the basic common law of South Africa.

In study unit 7 we look at the sources of Roman-Dutch law before codification in the Netherlands (reread section 6.4.5 in study unit 6 with regard to the codification of the law of the Netherlands). The diagram below is a graphic presentation of where the discussion in study unit 7 fits into the development of our legal system.



Emphasis will be placed on the so-called ''old writers'' or ''old authorities''. These are the jurists who wrote about the law of all seven provinces of the Netherlands. It is one of these jurists, Simon van Leeuwen, who first used the term ''Roman-Dutch law'', by coincidence, also in the year 1652. However, before we continue with this discussion, it is necessary to consider precisely what we mean by ''Roman-Dutch'' law.

7.2 WHAT IS ROMAN-DUTCH LAW?

The meaning of Roman-Dutch law may be interpreted in two ways: both a narrow interpretation and a broad interpretation are possible.

7.2.1 THE NARROW INTERPRETATION OF ROMAN-DUTCH LAW

In a narrow sense, Roman-Dutch law may be understood as the law of the province of Holland as it existed in the 17th and 18th centuries.

This means that it consists of

- Roman law received in the province of Holland, amended by
- customary law and legislation *(placaeten)* of Holland as they existed in the 17th and 18th centuries.

7.2.2 THE BROAD INTERPRETATION OF ROMAN-DUTCH LAW

In a broad sense ''Roman-Dutch law'' may be interpreted as including the law of all seven Dutch provinces as well as elements of the European *ius commune.*

Keep in mind!

In study unit 5, we explained the meaning of European common law or *ius commune*. You should remember that during the reception period, there was a spirit of universalism in Western Europe. Many issues in the prevailing law of the time were governed by Roman law and canon law. Thus, the jurists of Holland consulted far and wide in their search for authority. Italian, German and French writers were consulted by them and the courts were not unwilling to listen to Dutch advocates who based their arguments on decisions handed down in Italian and French courts.

Remember, too, that the province of Holland had a special place in the jurisprudence of the Netherlands. The law of the province of Holland was the leading law in the Netherlands and strongly influenced the law of the other six provinces (reread activity 6.4, question 3 in study unit 6).

Finally, do you remember the names of the other six provinces? They were Utrecht, Overijssel, Zeeland, Gelderland, Friesland and the Ommelands. Reread section 6.4 in study unit 6.

7.2.3 THE VIEW OF THE SOUTH AFRICAN APPELLATE DIVISION

Until 1988, there was a conflict of opinion — not only among academics, but also in the courts — on whether the narrow or the broad interpretation of Roman-Dutch law should be followed. Then the Supreme Court of Appeal settled this old dispute in *Du Plessis v Strauss* 1988 (2) SA 105 (A) (you may refer to this as the *Du Plessis* case) by deciding in favour of the **narrow interpretation**.

7.2.4 THE RELEVANCE OF THE *IUS COMMUNE* AND THE LAW OF THE OTHER DUTCH PROVINCES

But where does this leave us? Does that mean that the European *ius commune* or the law of the neighbouring Dutch provinces has no relevance for the student of legal history? The answer is definitely ''no''.

In the *Du Plessis* case the Appellate Division emphasised the historical context of the rules of Roman-Dutch law. When one reads the decision, it becomes clear that Roman-Dutch law is regarded as an important branch of the *ius commune* and that the writers of the other Dutch provinces played a role in the development of the law of Holland.

In short, the formal source of our common law is the law of the province of Holland as it existed in the 17th and 18th centuries. But this law cannot be seen in isolation because it is a product of a long historical development.

How does this work in practice?

First, we must distinguish between the search for authority for the law in general and the search for authority for specific legal rules. When we look at the **law in general terms**, we note that there is **unity** in the law of Western Europe (including the neighbouring Dutch provinces), but when we look at **specific rules**, we may find some **differences** in the various systems which belong to the European *ius commune*.

In practical terms this means that we will look at:

- **The common law of Western Europe (including the law of the other Dutch provinces) before codification** when authority is sought with regard to general principles, ideas and doctrines of Roman-Dutch law.
- **The law of the province of Holland** when authority is sought for specific rules of Roman-Dutch law. In such a case, a legal rule would be contained, for example, in a *placaet* (legislation) of the province of Holland or in the writings of the old writers on the law of Holland.

Finally, you should take note of the fact that today the courts still have the power to develop the common law. As we will explain in study unit 8, the Appellate Division does not hesitate to adapt Roman-Dutch legal rules which have fallen out of step with the needs of present-day South African society. Courts often look at legal developments in other civil-law legal systems. Recently, in *Linvestment CC v Hammersley* 2008 JDR 190 (SCA) (you may refer to it as the *Linvestment* case), the Supreme Court of Appeal re-evaluated a rule of Roman-Dutch law as stated by Voet:

> [T]his court has always possessed an inherent power to develop the common law [Roman-Dutch law] ... Thus, without abandoning our legal heritage, the courts can and should examine how developed legal systems cope with common problems. By appropriate application of the knowledge thus derived, a modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it.

The Court indicated that it ''would be wrong to adhere blindly to an inference drawn from the views of Voet expressed at the end of the 17th century ...'' and referred to the development of the Roman-Dutch rule in other European countries, Scotland and the State of Louisiana in the United States of America.

Remember, the common-law heritage of the European legal systems makes other European legal systems accessible to our lawyers, who have been schooled in Roman-Dutch law. This is because Roman-Dutch law is historically part of the European *ius commune*. Because of the spirit of universalism that has existed in Europe for the past five hundred years, Roman-Dutch law and the European *ius commune* have influenced one another. It is therefore easy for a South African lawyer, schooled in, among others, Roman-Dutch law, to consult the legal systems of the European *ius commune* in his or her search for a solution to a new legal problem.

ACTVITY 7.1

Answer the following questions to test whether you understand what you have learnt so far.

(1) Briefly distinguish between the narrow and the broad interpretation of Roman-Dutch law.

(2) (a) What was the view of the Supreme Court of Appeal in *Du Plessis v Strauss* regarding the interpretation of Roman-Dutch law?

(b) What is the Supreme Court of Appeal's view regarding the European *ius commune* and the law of the other Dutch provinces?

(3) What is meant by the ''European *ius commune''?*

(4) In practice, what is the relevance of the European *ius commune* for a South African jurist?

FEEDBACK 7.1

(1) There are two different interpretations of Roman-Dutch law.

The first interpretation defines Roman-Dutch law as the law of the province of Holland as it applied in the 17th and 18th centuries. This law was **Roman law** (civil law) as amended by **legislation** (called *placaeten*) and the **customary law** of the province of Holland. This interpretation is known as the narrow interpretation.

The second interpretation acknowledges the narrow interpretation as set out above, but includes the **Western European common law** (including the law of the other Dutch provinces). Because this interpretation includes broader influences in the construction of Roman-Dutch law, it is known as the broad interpretation.

(2) (a) In *Du Plessis v Strauss,* the Appellate Division decided in favour of the **narrow interpretation** of Roman-Dutch law.

(b) The Court pointed out that

- The law of Holland must be seen in its historical perspective.
- The law of Holland formed part of the European *ius commune.*
- The law of the other Dutch provinces played a role in the development of the law of Holland.

(3) The European *ius commune* refers to the common law of Western Europe. It is based on Roman law (civil law) and canon law as received into the Germanic customary legal systems of Western Europe.

Important

When you study these different interpretations of Roman-Dutch law, you should already be familiar with the different laws which impacted on Roman-Dutch law. You have already learnt about Roman law, canon law and the European *ius commune*. Do you see the relevance of all these different laws? And do you now see how each of them fits into the framework of South African law?

Narrow interpretation of Roman-Dutch law	Broad interpretation of Roman-Dutch Law
• Roman law • Customary law • Legislation} (As applied in the province of Holland in the 17th and 18th centuries)	• Roman law • Customary law • Legislation (As applied in the province of Holland in the 17th and 18th centuries) • European *ius commune* — Canon law — Roman law — Germanic customary law

Do you see that the narrow interpretation of Roman-Dutch law ignores the influence of canon law and Germanic customary law (the laws of the other Western European countries as well as the law of the other Dutch provinces)?

(4) It is possible that when you are in practice you will need to seek a solution to a new legal problem. For instance, a client may come to you with a legal problem to which there is no solution to date. In other words, the problem has never been addressed in the usual sources of our law, which are legislation, decisions of the courts, customary law or Roman-Dutch law in its narrow sense. In such a case, you may want to consult the European *ius commune*.

Remember!

The common-law heritage of the European legal systems makes other European legal systems accessible to our lawyers, who have been schooled in Roman-Dutch law. This is because Roman-Dutch law is **historically part of the European *ius commune***. Because of the spirit of universalism that has existed in Europe for the past five hundred years, Roman-Dutch law and the European *ius commune* have influenced one another. It is therefore easy for a South African lawyer, schooled in, among others, Roman-Dutch law, to consult the legal systems of the European *ius commune* in his or her search for a solution to a new legal problem.

7.3 THE SOURCES OF ROMAN-DUTCH LAW

Bearing the above in mind, let's take a closer look at the sources of Roman-Dutch law before codification. We shall discuss this topic under the following headings:

- the old writers (the most important source of Roman-Dutch law)
- statute law or legislation
- collections of court decisions
- collections of opinions
- custom

7.3.1 THE OLD WRITERS

Merely knowing the old writers and their work has little value if one does not consider them from the correct perspective, namely their significance in the founding of our law. Therefore, you must study the information about the works of the old writers together with an evaluation of **their authority in present-day legal practice**. There are various factors which help to determine the importance of an old writer. These include:

- the province in which the old writer worked
- the period in which he worked
- the type of work written by the author
- his influence on South African legal practice

Important

You should note that the following sections deal with the factors that determine the importance of the old writers. It is necessary that you understand these factors, because they will tell you which facts to concentrate on when you study the old writers.

a Which province did the writer represent?

The authoritative writers on Roman-Dutch law are firstly those authors who wrote on **the law of the province of Holland**. Writers who did not write specifically about the law of Holland are important in so far as they bear witness to the reception phenomenon in Western Europe and therefore to the Western European *ius commune* which was received into the Netherlands. Furthermore, we can obtain information on the law of Holland from writers on the law of Utrecht, Friesland and so on, where they compare the position of their own legal system with the position of the law of the province of Holland.

b The period in which the writer lived

Roman-Dutch law existed as an independent legal system in Holland for almost three centuries. However, the so-called ''golden age of Dutch jurisprudence'' took place in the 17th century. Therefore, an early 17th century writer like Hugo de Groot (Grotius) is evaluated differently from a late 18th century writer like Van der Keessel. This is so because the work of the earlier writers, like Grotius, was of a pioneering nature, while later writers, like Van der Keessel, had a developed system of law to work with, and were able to make use of the commentaries of some talented and highly competent earlier jurists.

Further, as you should be aware by now, Roman-Dutch law consists of the law of Holland of the 17th and 18th centuries. Therefore you would first consult the works of writers of this period.

Important

Please refer again to the time-lines provided in study unit 1. Make sure that you know where the 16th and 17th centuries fit into the chronological order of events.

c The type of work written by the author

This is an important factor which must not be overlooked. There were different categories of work, namely

- commentaries on Roman-Dutch law in its entirety
- commentaries on Roman law

- commentaries on existing commentaries
- treatises on aspects of Roman-Dutch law.

Some writers busied themselves with **commentaries on Roman-Dutch law** in its entirety. Examples of such works are

- the *Inleidinge* of Grotius
- Simon van Leeuwen's *Het Roomsch-Hollandsch Recht.*

Other writers were more interested in writing a **commentary on Roman law** (also known as the ''learned law''), pointing out the similarities and differences between the prevailing law, as applied in the courts of the day, and Roman law. These additions provide us with important insights into how Roman law merged with the prevailing Dutch law to form Roman-Dutch law. An example of such a work is the well-known encyclopaedic work of

- Johannes Voet, namely the *Commentarius ad Pandectas*.

A number of jurists occupied themselves by **adding to and improving on existing commentaries**. These are of a high standard and thus qualify as important sources of Roman-Dutch law. Examples of such works are the supplementary notes on the *Inleidinge* of Grotius written by

- Groenewegen and
- Schorer

The majority of jurists, however, wrote works on **aspects of Roman-Dutch private, public and procedural law**. Of course, the mere fact that a writer did not write on Roman-Dutch law in its entirety does not mean that his work was not important: a good work on one aspect of the law is worth more, after all, than an inferior commentary on the law in its entirety. An example is the work on public international law,

- *De Iure Belli ac Pacis,* by Grotius.

We gave you some examples of the different ways of categorising the works of the old writers. As you work through the rest of this study unit, you could expand this list by adding the works of the other writers to the relevant categories.

Keep in mind!

Although most Roman-Dutch writers fit into one of these categories, there are others whose work falls outside these categories, being collections of opinions, legal dictionaries and notes on court cases (of which Bijnkershoek's work *Observationes Tumultuariae* is probably the best-known).

d The influence of these writers on South African legal practice

Among all the influential Roman-Dutch authorities, **Johannes Voet** remains unsurpassed. A well-known saying of former years goes like this: ''With your Voet (''voet'' is the Afrikaans word for ''foot'') in your hand you can walk through the land.'' The reason for Voet's popularity is that, in his *Commentarius*, which was written in Latin, he covered a very wide field of the law and wrote authoritatively on it. To South African judges such as Lord de Villiers, Sir John Kotzé, Sir Johannes Wessels and others, he personified the ''golden age'' of Dutch jurisprudence. His work illustrates the greatest virtues of the Roman-Dutch legal system.

Percival Gane's very fine English translation of the *Commentarius* was completed in the 1950s and

incorporates extensive notes by the translator. This ensured Voet's continued popularity as a source of reference.

Other popular sources of reference are the works of **Grotius, Leeuwen, Van der Keessel, Groenewegen** and **Bijnkershoek.**

Ask yourself

Why did Percival Gane's translation of the *Commentarius* add to its popularity? The reason is that the English translation is much more accessible to modern jurists who have little knowledge of Latin.

Similarly, in some instances, the influence a certain author had on South African legal practice was not always due to the quality of his work alone, but rather to **practical considerations**, such as the availability and accessibility of his work. For example, an important consideration in choosing **Van der Linden**'s *Koopmans Handboek* as the official ''code'' of the old *Zuid-Afrikaansche Republiek* (the Transvaal), was simply the fact that it was written in Dutch, and not in Latin or English. There were also numerous other English and (to a lesser extent) Afrikaans translations of the original Latin and Dutch works of the ''old authorities''. Although not all these translations are of a high standard, they nevertheless contributed in no small measure to the accessibility of these works, thus increasing their influence. The most recent (2007) was the translation of **Paulus Voet**'s *De Statutis* by Edwards.

We will now discuss only a few of the most important old writers of the 17th and 18th centuries. This is not to say that these were the only important old writers. On the contrary, there were many well-known old writers in both the southern and the northern Netherlands, even before the 17th century. For the purposes of this module, however, it is sufficient if you study only those mentioned below.

Important study tip

Note that it is not necessary to memorise the dates of birth and death of the writers who are discussed below. It is sufficient to remember the century in which each writer produced most of his work. However, keep in mind that there are some writers, like Voet, whose work spanned two centuries. Furthermore, it is not necessary to memorise the full titles of the works of the writers. You need only remember the short title given in brackets.

7.3.1.1 Prominent 17th-century writers on the law of Holland

The most important jurists of this period were:

- Grotius
- Groenewegen
- Leeuwen
- Voet

a Hugo de Groot (Grotius) (1583–1645)

Hugo de Groot
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Hugo de Groot is generally regarded as the greatest of the Dutch jurists and indeed one of the most outstanding jurists of all time.

Grotius was not only a jurist but also a theologian, a classicist (ie someone who studies the classical cultures, such as the ancient Greek and Roman civilisations), a historian and a poet. His greatest achievements, however, were as a jurist. His two best-known works are the

— *Inleidinge tot de Hollandsche Rechtsgeleerdheid (Inleidinge)* and the
— *De Jure Belli ac Pacis, Libri Tres (De Jure Belli ac Pacis)*.

Inleidinge tot de Hollandsche Rechtsgeleerdheid (Inleidinge)

The *Inleidinge* was written by Grotius while he was imprisoned in Loevenstein and had few books at his disposal. Consequently he often had to rely on his memory. As a result, there are inevitably certain shortcomings in this work.

- *Notes by Groenewegen and Schorer*

The notes by Groenewegen, later followed by those of Schorer, remedied many of these shortcomings.

The *Inleidinge* circulated for some years in manuscript form and first appeared in print in 1631. Innumerable editions have appeared, some as recently as in the 20th century.

- *First treatise on Roman-Dutch law*

The *Inleidinge* was the first work of its kind in the Netherlands. It was a treatise about the law of Holland and was written in Dutch. As his starting point, Grotius took Roman law as it was applied in Holland, with the addition of indigenous Dutch law. The *Inleidinge* is therefore the first treatise on Roman-Dutch law, although the title does not say this. Grotius was the first person to see the law of Holland as an independent system and to describe it as such. It is because Grotius deliberately dealt with the law of his fatherland, Holland, that his *Inleidinge* can justly be regarded as the **first conscious description** of Roman-Dutch law.

- *Influence*

Grotius has at times been criticised for having attached too much weight to local custom and legislation. However, the influence of the *Inleidinge* on the law of the Netherlands in the 17th and 18th centuries can hardly be overestimated. It served as the foundation for many treatises and also as a basis for lectures. Not a single subsequent writer on the law of the Netherlands failed to make use of it. The *Inleidinge*, together with the literature which developed around it, takes pride of place in Roman-Dutch legal literature.

- *Translated into Latin by Van der Linden*

Grotius himself realised that to publish scholarly works in Dutch would have the distinct drawback that they would not make much of an impact outside a Dutch-speaking area. He therefore attempted to persuade his son to translate the *Inleidinge* into Latin, the universal language of scholars and jurists at that time. However, no progress was made and it was not until the 19th century that Johannes van der Linden completed a Latin translation. The first English translation of the *Inleidinge* appeared only in 1845.

De Iure Belli ac Pacis

The *Inleidinge* is Grotius's most important work on Roman-Dutch law, but the book that made his name as one of the world's greatest jurists was *De Jure Belli ac Pacis*, which appeared in Paris in 1625. This work was the first comprehensive treatise ever published on **public international law** (law of nations). It deals not merely with international law but also with the **law of nature**, and **legal philosophy**. It has great significance for us because it gives us a better understanding of the principles set out in the *Inleidinge*. Today, nearly 400 hundred years later, *De Jure Belli ac Pacis* is still regarded as a classic work in the field of public international law and Grotius is rightly considered the father of public international law in the Western world.

b Simon van Groenewegen (1613–1652)

Simon van Groenewegen received his training at the University of Leyden, where he practised for a while as an advocate. He died in 1652 at the early age of 39. The two important works that will be discussed here are:

— Notes on Grotius's *Inleidinge*
— *Tractatus de Legibus Abrogatis*

Notes on Grotius' Inleidinge

We referred earlier to the notes which Groenewegen added to the *Inleidinge* of Grotius. Grotius wrote the *Inleidinge* under difficult circumstances (do you remember why?) and accordingly he quoted hardly any authorities in support of his statements. Groenewegen remedied this defect by supplying the necessary notes to the *Inleidinge*. By far the majority of Groenewegen's notes are of this type. Here and there, however, he found it necessary to add something, either to supplement or to amend the text.

Tractatus de Legibus Abrogatis (Tractatus)

The *Tractatus de Legibus Abrogatis (Tractatus)* was Groenewegen's major work. It is an indispensable and unsurpassable authority on the Roman-Dutch law of the 17th century.

- *It indicated where the Corpus Iuris Civilis was still applicable*

In this comprehensive work, he took the *Institutes*, the *Digest*, the *Codex*, the *Novellae* and the *Libri Feudorum*, text by text, and showed which propositions were **still valid** and which had fallen into **disuse**. Where the existing law differed from Roman law, he showed precisely where the difference lay. Thus the writings of Groenewegen, like those of Grotius, were a testimony to the recently completed reception phenomenon. Each book and title of the *Corpus Iuris Civilis* was consulted and an assessment was made of the degree of reception of Roman law into the native customary law of Holland.

- *Authorities used*

As authorities he quoted writers of the Middle Ages on Roman law, including French, German, Spanish, Italian or Dutch authors. A special place was naturally assigned to Grotius, for whom Groenewegen had the greatest respect. All the existing legal literature of the Netherlands was carefully cited in the *Tractatus*. Despite his great respect for Grotius, Groenewegen sometimes disagreed with him, and in most cases preference should be given to Groenewegen's version. Groenewegen fully deserved the esteem of his contemporaries, who regarded him as a major authority on the law of Holland.

The *Tractatus* is a work which has not received the recognition it deserves in South Africa. An English translation of the work, together with a transcription of the Latin text, is available. It is hoped that the greater accessibility of the work will encourage its use.

c Simon van Leeuwen (1626–1682)

Simon van Leeuwen
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Simon van Leeuwen graduated in law at Leyden in 1649, established himself as an advocate first at The Hague and then at Leyden and, shortly before his death, became deputy registrar of the Supreme Court. His most important works (of which we discuss only the latter) are the

- *Censura Forensis* and
- *Het Roomsch-Hollandsche Recht.*

Het Rooms-Hollandsche Recht

- *Overview of Roman-Dutch law*

Het Roomsch-Hollandsche Recht provides a thorough review of Roman-Dutch law, and, in conjunction with the **notes by Decker**, is a useful reference work. The work should not, however, be overrated; although broad in concept, it is sometimes very superficial and without Decker's notes it loses much of its value.

- *Popularity in South Africa*

Leeuwen's popularity in South Africa can probably be attributed to the fact that he wrote in **Dutch** and not in Latin, which has made his work more readily accessible. Despite their shortcomings, Van Leeuwen's works nonetheless form an indispensable part of the literature on Roman-Dutch law.

- *First to use the term ''Roman-Dutch law''*

He was the first writer to refer to the existing Dutch law as Roman-Dutch law. The term ''Roman-Dutch law'' is therefore attributable to him.

d Johannes Voet (1647–1713)

Johannes Voet
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Of all the writers on Roman-Dutch law, Johannes Voet is certainly the best known in South Africa. Moreover, he overshadows his father, **Paulus Voet**, a professor of law, to such an extent that in current practice he is spoken of as Voet and it is not considered necessary to use his first name to distinguish him from his father. He was a professor of civil law at Leyden University.

Voet's best-known works (of which we discuss only the latter) are the

— *Compendium Iuris* and
— *Commentarius ad Pandectas (Commentarius)*.

Commentarius ad Pandectas (Commentarius)

All his other works are entirely overshadowed by his greatest work, the comprehensive *Commentarius ad Pandectas*.

• *Commentary on the Digest*

In this commentary on the *Pandects* (another name for Justinian's *Digest*), Voet deals with Roman law to which he adds the existing law of his time. The work cannot be regarded purely as a treatise on either Roman law or the *Digest*. Voet continually reminds us how important it is to carefully **study both the theory and the practice of the law**.

• *Humanistic approach to Roman law*

Voet's approach to Roman law was **humanistic** (if you do not remember what the humanistic study method is, reread section 6.2.2 in study unit 6) but he incorporated the law of his time into Roman law. In both spheres of law his knowledge was excellent. Like his predecessors, he drew on many and varied authorities. He was evidently familiar with everything ever written in the Netherlands on the law of the Netherlands. This makes Voet's commentary an almost infallible guide to the legal literature of the Netherlands of his time.

He had a good understanding and a wide knowledge of the background to Roman-Dutch law, and although he was a humanist he did not, like most other humanists, regard as inferior anything that was not purely Roman. He paid due regard to the achievements of the Middle Ages, since it was the elaborations and restatements of Roman law by the **medieval writers** that had shaped the law that was valid in practice. Like some of his 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 has ever done, before or after him.

Take note

Do you remember who the Bartolists were? They were the followers of Bartolus, a commentator, who is regarded as the greatest of the medieval juristists. Refresh your memory by rereading section 5.4.2 in study unit 5.

• *Comprehensive review of Roman-Dutch law*

His illustrious reputation was due, no doubt, mainly to the fact that he provided a **comprehensive review of the whole field of Roman-Dutch law**. Even minor problems were addressed by Voet. Moreover, his writing is usually easy to understand, since he states his propositions clearly and is very logical in his reasoning.

- *Influence in Europe and South Africa*

Voet's influence on the writers who followed him, and especially on South African practice, can hardly be overestimated. His influence and fame were not restricted to his homeland but extended **throughout Europe**. His works were read everywhere. Copies of his great Commentary were still being printed in Italy during the 19th century. In Germany and France his Commentary was very well known.

- *Translation into English by Sir Percival Gane*

Voet's Commentary has retained its prominent place among the authorities on Roman-Dutch law, in Holland as well as in South Africa. Voet will certainly never pass into oblivion in South Africa. The English translation (with annotations) of the Commentary by **Sir Percival Gane** was published in the 1950s and has contributed to Voet's popularity in South Africa today.

7.3.1.2 A prominent 17th-century writer on the law of Friesland

The most important jurist of this period was:

- ***Ulrich Huber (1636–1694)***

Huber was a professor of law at the University of Franeker and also a member of the Provincial Court of Friesland. His most famous work was the *Praelectiones Juris Civilis*.

Praelectiones Juris Civilis (Praelectiones)

This work on Roman law was based on the lectures he gave to his students on the *Corpus Iuris Civilis*. Huber enjoyed a considerable reputation as a lecturer, and many of his students came from England, Scotland and Germany as well as Friesland and nearby Holland. One section of this work is called the ***De Conflictu Legum*** and is a commentary based on the *Digest*. As the title suggests, it deals with the **conflict of laws**. Much of Huber's work in the field of the conflict of laws is still worth consulting.

7.3.1.3 Prominent 17th-century writers on the law of Utrecht

The most important jurists of this period were:

- Matthaeus II and
- Paulus Voet.

a Antonius Matthaeus II (1601–1654)

Antonius Matthaeus II was born and trained in Germany and became a professor of law in the Netherlands. He became famous throughout Europe for his work on **criminal law**, known as the ***De Criminibus***, which is still consulted today. This work was translated into English in the 1980s. He also wrote important works on private law.

b Paulus Voet (1619–1677)

He was the father of the famous Johannes Voet. Paulus was a professor of law. One of his best-known works is the ***De Statutis***, an important work on private international law (conflict of laws). The English translation of this work was published in 2007.

7.3.1.4 Prominent 18th-century writers on the law of the Netherlands

The most important jurists of this period were:

- Voet
- Bijnkershoek
- Van der Keessel
- Van der Linden

a Johannes Voet (1647–1713)

Note the following

Why is Voet mentioned again? Wasn't he mentioned earlier as an important 17th-century writer on the law of Holland? **Remember that he wrote in both the 17th and the 18th centuries**. Roman-Dutch law produced most of its great masters in the 17th century. As the 18th century dawned, Voet and Bijnkershoek took the place of honour. They completely overshadowed both their contemporaries and their successors, only a few of whom (such as Van der Keessel) came anywhere near the standard set by Voet and Bijnkershoek.

b Cornelis van Bijnkershoek (1673–1743)

Cornelis van Bijnkershoek
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Bijnkershoek graduated as a doctor of jurisprudence and established himself as an advocate at The Hague. He later became a member of the *Hooge Raad van Holland en Zeeland* (the Supreme Council), of which he was president until his death.

As an advocate and judge he dealt with the existing law of his time every day. As a student, even after his formal education had ended, he devoted himself to the study of Roman law and public international law. His favourite pursuit was the study and practice of Roman law. His method was humanistic. Alongside Schulting, he is probably the most famous member of the Dutch **humanist** school.

His two most important works are:

— *Quaestiones Iuris Publici (Quaestiones)*
— *Observationes Tumultuariae (Observationes)*

Quaestiones Iuris Publici (Quaestiones)

This work, which deals with **public international law**, earned him an international reputation. Even today it is regarded as one of the classics in this field, together with Grotius's famous *De Jure Belli ac Pacis*.

Observationes Tumultuariae (Observationes)

Right from the beginning of his career as an advocate, Bijnkershoek devoted considerable time to collecting data on the prevailing law. This collection was made for his own use and its publication was forbidden in his will. More than two centuries after his death, Bijnkershoek's *Observationes* was published for the first time, in four parts. Part I appeared in 1926 and Part IV only in 1962.

- *Decisions by the Supreme Council*

Among his work was a collection of **decisions handed down by the Supreme Council** during his term of office, the so-called *Observationes Tumultuariae (Observationes)*. This work is a very important source of law, because reasons were not given for the judgments handed down in the courts of his day. Here, then, was a source of the very highest authority showing **how the courts arrived at their decisions**. Because the *Observationes* was first published only in the 20th century, it had no influence on the **development** of Roman-Dutch law in the Netherlands. Remember that the development of Roman-Dutch law in the Netherlands came to an end in the 19th century when codification took place.

- *Important authority on Roman-Dutch law today*

After his death, Bijnkershoek's *Observationes* were inherited by his son-in-law, Willem Pauw, who was also a member of the Supreme Council. He followed the example of his father-in-law and their complete joint collection covers over 5 000 decisions of the Supreme Council over a period of 84 years. This is the most important collection of decisions made at a time when Roman-Dutch law was still the prevailing law of the Netherlands. As an authority on Roman-Dutch law it is of immense value to us.

c Dionysius van der Keessel (1738–1816)

Dionysius van der Keessel
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Van der Keessel was unquestionably the most outstanding Dutch jurist of the late 18th century. He became a professor at Leyden, where he lectured on Roman-Dutch law, basing his lectures on the *Inleidinge* of Grotius. His most important published work is his *Theses Selectae Juris Hollandici et Zeelandici* (*Theses Selectae*), which has been translated into English.

Theses Selectae Juris Hollandici et Zeelandici (Theses Selectae)

This work was based on the *Inleidinge* of Grotius, by means of which Van der Keessel attempted to provide a true picture of the law of his time. The work also contains abundant references to earlier writers and decisions. This work must be distinguished from the supplementary notes on Grotius's *Inleidinge* written by Groenewegen and Schrorer (reread sections 7.3.1.1a and b).

It is of particular interest to us because it was the **last outstanding work in the field of Roman-Dutch law before South Africa was separated from the Netherlands**, and for this reason it has always enjoyed great authority in South Africa. The *Theses Selectae* probably evolved from Van der Keessel's lectures on the *Inleidinge*. In this work he dealt with those aspects of the *Inleidinge* which had changed since its publication, or in respect of which there was no agreement.

However, although actual lectures on Grotius's *Inleidinge* were never published, there are several manuscripts of the lectures at various universities. The collection of lectures comprises five volumes. (It is entitled *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*. (You are not expected to memorise this title!)

d Johannes van der Linden (1756–1835)

Van der Linden practised as an advocate for more than 50 years. Towards the end of his life he became a judge in Amsterdam. He was a prolific writer, particularly on the law of procedure, but his works are of little importance to us today. His best-known work was the:

Rechtsgeleerd, Practicaal en Koopmans Handboek (Koopmans Handboek)

The *Koopmans Handboek* is hardly more than an elementary guide. Its greatest significance is that it **was the last treatise on Roman-Dutch law as it existed in Holland before the codification of the law of the Netherlands**. In South Africa it has unfortunately been given more recognition than it deserves. (The importance of the *Koopmans Handboek* as an authority in the *Zuid-Afrikaansche Republiek* is discussed in study unit 8.)

However, Van der Linden does deserve praise for an addition to Voet's *Commentarius*. He also translated a number of treatises by the great French jurist Pothier, the best known of which is that on the law of obligations.

ACTVITY 7.2

Answer the following short questions to test whether you understand what you have learnt with regard to the Roman-Dutch law writers:

(1) Who wrote an important work on criminal law?
(2) Which writer on the law of Friesland is known for his important work on the conflict of laws?
(3) Who wrote a pioneering work while imprisoned at Loevenstein?
(4) Who are the well-known father and son who wrote authoritative works on the law of the Netherlands?
(5) Which writer wrote the last important work on Roman-Dutch law before South Africa was severed from the Netherlands? What was the work called on which these lectures were based?
(6) Which of the following statements with regard to the works written by the old writers of the 18th century is correct?

(a) Voet wrote the *Commentarius ad Pandectas* in which he indicated which propositions in the *Corpus Iuris Civilis* were no longer in use.

(b) Groenewegen wrote an important work, *Tractatus de Legibus Abrogatis,* in which he indicated where the *Corpus Iuris Civilis* was still applicable.

(c) Bijnkershoek's *Observationes Tumultuariae* influenced the development of Roman-Dutch law because it showed how the courts arrived at their decisions.

(d) Van der Keessel based his lectures at the University of Leyden on Grotius's *Inleidinge*.

FEEDBACK 7.2

(1) Antonius Matthaeus II

(2) Ulrich Huber

(3) Grotius

(4) Paulus Voet wrote on the law of Utrecht. His son, Johannes Voet, wrote on the law of Holland.

(5) Dionysius van der Keessel. He based his lectures to his students on the *Inleidinge* of Grotius, and these lectures were later combined in a work called *Theses Selectae*.

(6) In this multiple-choice question it is important to focus on two aspects. The first is the time frame, as you should know by now. The question concerns old writers who wrote during the 18th century. The second important aspect to which you must pay attention is the works written by these old writers. In addition to knowing which works were written by which author, you will be expected to know the content of their works.

In the first statement, (a), the time frame is **correct**. Voet lived and wrote in both the 17th and the 18th centuries. Further, he was the author of the *Commentarius ad Pandectas*. However, the statement is **not correct** because his work focused on the *Pandects* or *Digest* only (and not on the *Corpus Iuris Civilis* as a whole) and was so comprehensive that it is regarded as a guide to the legal literature of the Netherlands of the time. Read section 7.3.1.1d in this regard.

In statement (b) the time frame is **incorrect.** Groenewegen was a 17th-century old writer. The rest of the statement regarding the *Tractatus de Legibus Abrogatis* is correct. Read section 7.3.1.1b.

In statement (c) the time frame is correct. It is true that Bijnkershoek worked in the 18th century. It is also true that he wrote the *Observationes Tumultuariae*. Nevertheless, statement (c) is **not correct**. Do you know why? The reason why the statement is incorrect is that the work had no influence on the **development** of Roman-Dutch law in the Netherlands. The *Observationes* was published only in the 20th century and the development of Roman-Dutch law in the Netherlands came to an end in the 19th century when codification took place. However, this does not mean that this work by Bijnkershoek is not regarded as a good authority on Roman-Dutch law by South African courts today. Bijnkershoek is discussed in section 7.3.1.4b.

The last statement (d) is **correct.** Van der Keessel lived and worked in the 18th and the 19th centuries but did the greater part of his work in the 18th century and is thus classified in the study guide as an 18th-century old writer. He based his lectures on the *Inleidinge,* which was written by Grotius in the 17th century. In this regard refer to sections 7.3.1.1a and 7.3.1.4c.

7.3.1.5 The Dutch humanist school

Although the jurists from the northern parts of the Netherlands were influenced by the humanists virtually from the beginning, most of the writers mentioned so far devoted their attention mainly to the **existing law**. When they wrote on Roman law from a humanist perspective, they did not fail to refer to the existing law as well, even if these references merely took the form of short additions. The Dutch humanists who were outstanding Romanists include the following:

- Matthaeus II
- Huber
- Johannes Voet
- Bijnkershoek

However, there were also Dutch humanists who were **exclusive Romanists** and their work contains no significant insights into the existing law of their time. They were, in fact, the successors to the old French humanist school. The best known of this group were:

- Noodt
- Schulting

ACTVITY 7.3

Combine your knowledge of study unit 6 with what you have just learnt and answer the following question:

Explain how the Dutch humanists approached the study of law. How did their approach differ from that of the 16th-century French humanists? Name one Dutch humanist.

FEEDBACK 7.3

The French humanists were discussed in section 6.2.2 of study unit 6.

In this question, you were expected to compare the working methods of two different schools of law.

Regarding the **Dutch humanists**, your explanation should have included the following:

- The Dutch humanists wrote about Roman law in a humanistic way. In other words, they studied classical Roman law and were critical of the Roman law of the Middle Ages (ie, Roman law as glossed by the glossators and commented upon by the commentators).
- However, in addition to studying classical Roman law, the Dutch humanists always referred to existing law and took into consideration the law of their own time.
- In this way, they took historical developments into account.
- You could have added that the writings of Noodt and Schulting were true to the humanistic tradition and that their approach was thus closer to that of the French humanists. Bear in mind that Noodt and Schulting were both exclusive Romanists who followed in the footsteps of the 16th century French humanists. This means that their approach to Roman law was the same as that of the French humanists and not the Dutch humanists.

Regarding the **French humanists**, your explanation should have included the following:

The French humanists

- studied only pure Roman law and not the Roman law of the Middle Ages.
- did not discuss the law of their time.
- did not take into account the development of Roman law over the previous 1 000 years, and thus ignored historical development.

You could have mentioned any one of the following jurists as an **example of a Dutch humanist**:

- Noodt, Schulting, Johannes Voet, Huber, Matthaeus II, or Bijnkershoek.

Ask yourself

Which of these two schools, namely the French and the Dutch humanist schools, do you think had a greater impact on the day-to-day legal practice of their own time? Yes, of course, the school of the Dutch humanists. (This applies to the German humanists as well — see section

6.3.2.1 of study unit 6.) What does this teach you about the study of history? It teaches you that there are many ways in which you can study history. You can study history purely as history, or you can relate it to the present day. So, for example, you may find that every report of the South African Law Reform Commission starts with a historical survey of the matter under investigation. In contrast, important international conferences which deal with purely historical subjects, like slavery in Roman law, are still regularly held.

ACTVITY 7.4

Apply your knowledge of the old Roman-Dutch writers by completing the following table.

Jurist	Century	Province	Most important work(s)	Importance of writer
				Collection of decisions of Supreme Council of Holland (includes reasons for decisions)
		Friesland		
Hugo de Groot				
			Koopmans Handboek	

FEEDBACK 7.4

Jurist	Century	Province	Most important work(s)	Importance of writer
Bijnkershoek	18th century	Holland	*Observationes Tumultuariae*	Collection of decisions of Supreme Council of Holland (includes reasons for decisions).
Huber	17th century	Friesland	*De Conflictu Legum* — a section of his *Praelectiones*	Work on conflict of laws still used today.
Hugo de Groot	17th century	Holland	• *Inleidinge* • *De Iure Belli ac Pacis*	• First to treat Roman-Dutch law as a composite whole • Father of public international law
Van der Linden	18th century	Holland	*Koopmans Handboek*	• Last work on Roman-Dutch law before codification • Used as authority in ZAR

Study hint

Note how easy it is to draw up a table showing the important facts about the old jurists. There are ten jurists in all. It is not difficult to complete this table by adding the names of the other authors who were left out of the activity. You could also group together the jurists who were from the same province and then group the jurists of each province according to the century in which they worked. That should assist you in studying this part of the work as it gives you a concise overview at a glance.

7.3.2 STATUTE LAW (LEGISLATION)

There is some controversy regarding the value of the statute law of the Netherlands as a source of South African law. This will be discussed in more detail in section 8.2.2.1 of study unit 8.

7.3.3 COLLECTIONS OF COURT DECISIONS

There were many collections of the decisions which came from the three superior courts, namely the

- *Grote Raad van Mechelen,*
- *Hof van Holland, Zeeland en West-Friesland* and the
- *Hooge Raad van Holland en Zeeland* (the Supreme Council, which was a court of appeal for the *Hof van Holland, Zeeland en West-Friesland*).

In their own time the courts were not bound by previous decisions because the principle of *stare decisis* was not applied in the 17th and 18th century Dutch courts. In other words, these decisions merely had **persuasive value** for subsequent Dutch courts. Many of these collections of decisions have, at one time or another, been referred to in judgments of the South African courts.

Take note

By now you should know what the principle of *stare decisis* entails. If you do not remember what it is, refresh your memory by going back to section 6.5.5 in study unit 6.

Several collections of decisions were published, but for the purposes of this module it is sufficient to remember only the example of **Bijnkershoek's** *Observationes*.

7.3.4 COLLECTIONS OF OPINIONS

Even during the classical period of Roman law (refer to study unit 3), the opinions of jurists played an important role in the development of the law. Outstanding jurists of that time were consulted not only by private persons, but also by magistrates and judges.

Take note

The practice of consulting jurists is still applicable today. Advocates, attorneys and legal advisers are often requested to deliver a legal opinion on a certain legal question. Furthermore, do you remember that ''modern writers'' is one of the sources of our law? This means that our courts often consult the writings of academics and other jurists when delivering a judgment.

The collections of opinions of Roman-Dutch jurists were never binding on the courts but they enjoyed great **persuasive authority** and, as in Roman law, played an important part in the development of the law.

The practice of collecting opinions was already popular in the Middle Ages. For example, the opinions of Bartolus formed an important part of the legal literature of the era. The practice also existed in the Netherlands and the collections of opinions serve as a good authority on the law of the time, because they provide opinions on the law as it was actually viewed by the people who practised it.

During the 18th century, a register appeared of the most important collections of opinions and decisions, known as **Nassau la Leck's Register** (The full title of this register is: Nassau la Leck's *Algemeen Beredeneerd Register op alle de Voornaamste Rechtsgeleerde Advysen, Consultatien, Advertissementen, Decisien, Observatien en Sententien*. Fortunately, you do not need to know the full title!) The Register can be consulted with regard to the collections, and is mostly of a high standard.

7.3.5 CUSTOM

When we discussed the nature of Roman-Dutch law above, we noted that it was through custom that Roman law found its way into Holland. Indeed, before this, custom had been the most important source of the native law of the Netherlands. Much of this law remained unwritten until, as we have seen, the customs were reduced to writing and approved. (Reread section 6.4.2.1 of study unit 6 if you do not remember.) Nevertheless, custom still continued to be a source of law in the Netherlands. In fact, custom is still a source of law in our country today, although in a very restricted fashion.

In the next study unit we will take a look at Roman-Dutch law in South Africa.

ACTVITY 7.5

Answer the following questions to test whether you understand what you have learnt in this study unit.

(1) Why is it important to know about the ''old writers''?
(2) What are the sources of Roman-Dutch law?

FEEDBACK 7.5

(1) By now you may be quite bored with hearing the same old refrain: ''Roman-Dutch law is an important source of South African law and forms one of the pillars upon which our legal system rests.'' ''So what?'' you may well ask. The answer is that the old writers are the scholars who assimilated Roman law into the customary laws of Holland and the other provinces of the Netherlands. In other words, they wrote about Roman-Dutch law. Some, like Bijnkershoek, demonstrated how Roman law was applied in practice. In short, if you have to do research on what Roman-Dutch law said about a specific legal problem, you will need to look at what the old writers have written about that law. We are very fortunate in being able to read what Roman-Dutch scholars of that time had to say about the application and development of the law, something which is not possible with indigenous African law.

Note the following

Indigenous African law is, as you know by now, part of a preliterate tradition, and we are not able to read what the African experts of years gone by had to say about that law. Remember the old saying which equates an old man in Africa to a library! Reread study unit 2 to refresh your memory.

(2)
- the old writers
- statute law (legislation)
- collections of court decisions
- collections of opinions
- custom

Test yourself

Answer the following self-assessment questions with reference to the material that you have studied in study unit 7. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions.

- Distinguish between the narrow and broad meanings of the term ''Roman-Dutch law''. (4)
- Is the *ius commune* of any relevance in South Africa today? (3)
- Name the most important works of the following jurists: (6)

  (a) Hugo de Groot
  (b) Simon van Groenewegen
  (c) Simon van Leeuwen
  (d) Johannes Voet
  (e) Antonius Matthaeus II
  (f) Cornelis Van Bijnkershoek

Study unit 8

The development of the South-African legal system before the 1990s

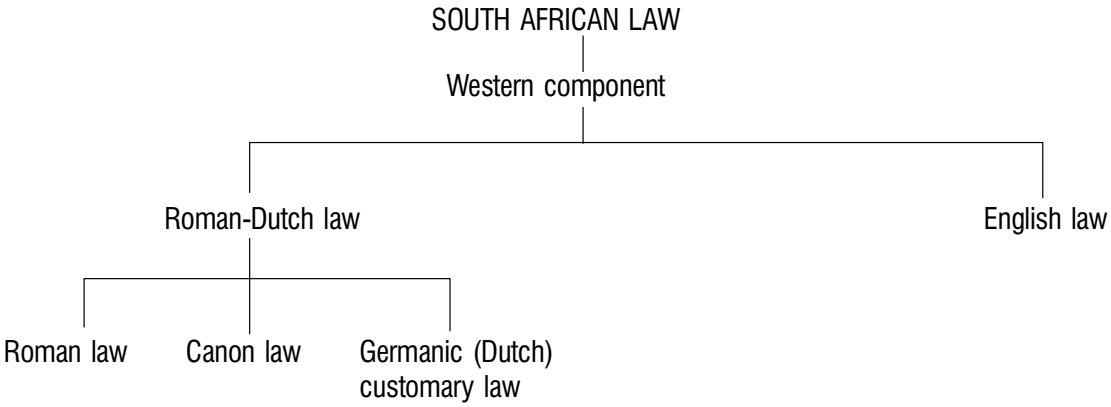
Learning outcomes

After having studied this study unit, you should be able to

- identify the components of the South African legal system prior to the promulgation of the Constitution
- explain how Roman-Dutch law came to apply at the Cape
- identify the sources of law at the Cape during Batavian rule
- explain how English law was received into South African law
- describe the role of the Appellate Division in the development of a unified law for South Africa

8.1 INTRODUCTION

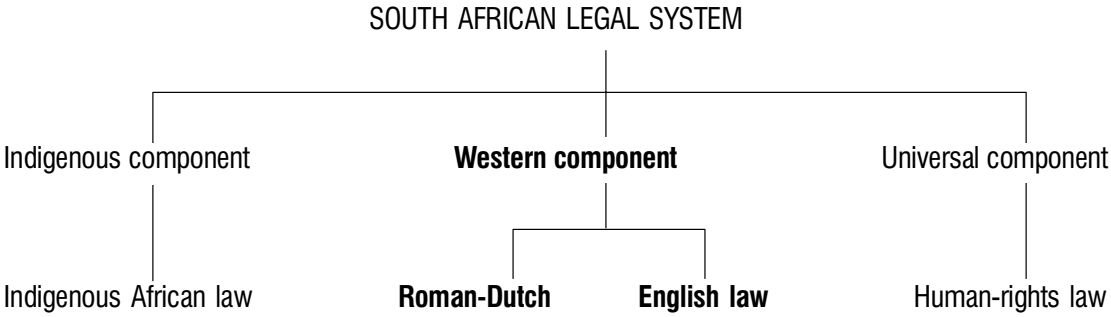
In the previous study units you learnt how **Roman-Dutch law** developed in the province of Holland and what the relationship was between Roman-Dutch law and the European *ius commune*. You also learnt how the **English common law** developed and to what extent Roman law influenced the law of England. In study unit 8 you will learn how Roman-Dutch law and English law came to **apply in South Africa**. You will learn how these systems of law were merged and developed to become a single system of South African law.



Yes, this diagram represents only the Western component of the law. But we have not forgotten about the African component! However, during this period (1652 to the 1990s) in the development of the South African legal system (ie before the interim Constitution), legal administrators and academics busied themselves mainly with Roman-Dutch and English law. You should remember that indigenous law held an inferior position in South Africa until it was recognised in the Constitution as a part of South African law. It is only now that we can truly speak of a single South African legal system.

This study unit covers a period in the history of South African law which has already been discussed in study unit 2. However, this time our discussion is not from an indigenous African perspective, but from a **Western perspective**. In other words, in study unit 8 we look at how events at the Cape, and later in the other surrounding regions, influenced the development of the Western component of our law. (Before continuing with study unit 8, we recommend that you read study unit 2 again. Remember that

the events described in both study units 2 and 8 occurred at the same time. However, we are looking at these events from two different perspectives.) Let us now take a look at a graphic representation of where the discussion in study unit 8 fits into the development of our legal system as a whole:



Human-rights lawWe will discuss the events that played a role in the development of South African law in chronological order. This means that we will start with the imposition of Roman-Dutch law (in 1652) and then deal with the reception of English law (from 1827 onwards).

Important

Make sure that you understand where the dates mentioned in study unit 8 fit into the chronological order of events. Consult the time-lines in study unit 1 if you have problems with the dates.

8.2 ROMAN-DUTCH LAW (1652–1795)

In order to gain a thorough understanding of how Roman-Dutch law was brought to South Africa, it is necessary to consider the relationship between the Cape of Good Hope and the Netherlands.

Did you know?

By the 17th century, trade between Europe and the East (including trade with the areas today known as India and China) was well established. Keep in mind, however, that this trade usually entailed travelling between Europe and these Eastern countries, either on foot using pack animals such as camels or horses, or by sea. Sea voyages were undertaken in sailing ships and were dangerous and lengthy. At that time, one of the most popular sea routes for traders was around the Cape of Good Hope. Because these voyages could take months, there was a need for a half-way station where ships could be repaired, fresh food and water could be taken on board and the sailors could rest before continuing on their journey. It is for this reason that the Netherlands decided to establish a refreshment station at the Cape of Good Hope, which was almost half way between Europe and the East. Therefore, the first Europeans who came to the Cape in 1652 had the task of establishing a refreshment station for ships on the trade route to and from the East. In other words, they came to the Cape with the intention of establishing a refreshment station, and not of colonising the Cape.

There were various authorities that played a role in the administration of the Cape. They were:

- the States-General
- the Dutch East India Company (VOC) and *Here XVII*
- the Governor-General-in-Council at Batavia
- the Governor-General-in-Council at the Cape

a The States-General

The States-General formed part of the **government of the United Netherlands** and was responsible for overseeing its overseas settlements or colonies. It had supreme authority over all the authorities discussed below.

b The VOC and Here XVII

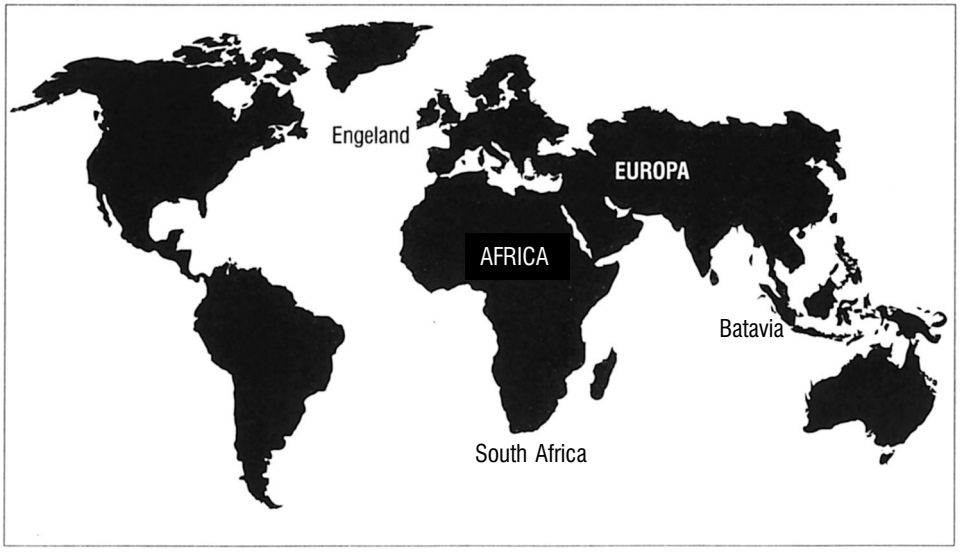
The States-General delegated its authority to manage the overseas settlements or colonies of the United Netherlands to the Dutch East India Company. The Dutch East India Company, or *Vereenigde Oost-Indische Compagnie* (VOC), was an independent **trading company**. In other words, the VOC was not an organ of state, but a company run with the aim of making a profit. The governing body (or directorate) of the VOC was the *Here XVII*, a group of seventeen Dutch gentlemen. The VOC was given sovereign power in the territories under its control.

Did you know?

The term ''Here XVII'' is Dutch and may be explained as followed. The word ''Here'' is the Dutch word for gentlemen, while ''XVII'' is the number 17 expressed in Roman numerals. In other words, the term ''Here XVII'' simply refers to the seventeen gentlemen who made up the directorate of the VOC.

c Governor-General-in-Council at Batavia

The headquarters of the VOC were at Batavia (today known as Indonesia). The Governor-General-in-Council was the authority in charge of the headquarters. The overseas possessions of the VOC (of which the Cape was one) were under the jurisdiction and administration of the Governor-General-in-Council at Batavia. The Governor-General-in-Council at Batavia was directly responsible to the VOC.



A basic map of the world

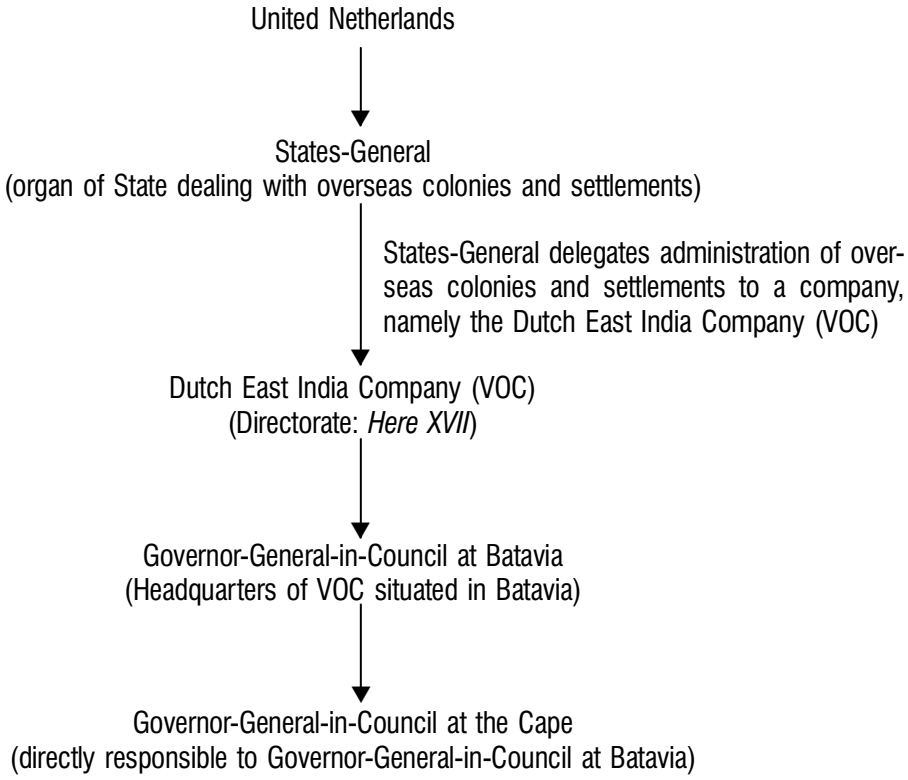
d The Governor-General-in-Council at the Cape

The Governor-General-in-Council at the Cape (or simply the Governor) was directly responsible to the Governor-General-in-Council at Batavia.

During the first few years of the settlement at the Cape, the question of government and subjects did not arise, because all the people who came to the Cape were servants of the Company (the VOC). The

only relationship that existed was that of employer and employee. It was only after the admission of the first free burghers (former employees who were freed from their contractual obligations to the VOC) that the VOC started fulfilling a dual function, namely that of an employer as well as that of a government.

In summary, then, the hierarchy of the different groups that had authority over the Cape can be illustrated as follows:



The Cape government was therefore under the authority of the government in Batavia, which was where the headquarters of the VOC was situated. The government in Batavia was under the direct authority of the *Here XVII*, the directorate of the VOC. The VOC was a trading company whose business it was to see to the administration of the colonies and settlements of the Netherlands.

ACTVITY 8.1

Answer the following questions with regard to the Dutch management of the Cape during the period 1652 to 1795 to test whether you understand what you have learnt so far:

(1) Which organ of state of the United Netherlands was responsible for the administration of its overseas colonies and settlements?
(2) To whom did the abovementioned organ of state delegate the actual task of administration?
(3) Who was the *Here XVII*?
(4) Why was the person in charge of the Batavian office, the Governor-General-in-Council at Batavia, important in the administration of the Cape of Good Hope?
(5) At the Cape, who was in charge of the administration of the settlement?

FEEDBACK 8.1

(1) The States-General.
(2) The States-General delegated the actual task of administering the overseas colonies and settlements of the United Netherlands to a trading company called the Vereenigde Oost-Indische Compagnie (VOC).
(3) The *Here XVII* was the directorate of the VOC.
(4) The Cape of Good Hope fell under the jurisdiction of the Dutch authority in Batavia.
(5) The Governor-General-in-Council at the Cape.

8.2.1 ADMINISTRATION OF JUSTICE

Before we take a look at the formal sources of law which were applied at the Cape during this period, we first need to tell you something about the practical aspects regarding the administration of justice in the early days of the settlement.

- *Governor in charge of law and order*

Originally, the Governor of the Cape was in charge of law and order. There was only **one ''court**'', which was more like the broad council of a ship than a court of law. The Governor relied on a document *(artycelbrief)* which set out the rules and regulations governing the service of those employees of the VOC who were engaged in overseas duties. In other words, the *artycelbrief* was what would today be called a document regulating conditions of employment. There can be little doubt that this was the prime source of law during Van Riebeeck's time.

- *Raad van Justitie*

In 1685 a court, called the *Raad van Justitie*, was established. At first the Governor of the Cape was the chairman of this court, but later on the Governor's second-in-command took over the function of chairman. However, this did not mean that the Governor was removed from the judicial scene. As chief executive at the Cape, he had the **final say in all matters affecting administration, including legal matters**. All the sentences of the *Raad van Justitie* had to be confirmed by him and appeals were submitted to the Governor-General-in-Council at Batavia and also, theoretically, to the States-General in the Netherlands.

Note the following

An important point to remember is that until the end of the 17th century, the Raad van Justitie was composed of laymen and not of lawyers. It was only in the latter days of VOC rule at the Cape that qualified lawyers started serving as judges and practising at the bar.

- *Fiscal*

Closely linked to the Governor's supervision of judicial matters was the hated Fiscal. The Fiscal was responsible only to the *Here XVII* in Holland and was thus in no way an officer of the *Raad van Justitie*. It was he who instituted **prosecutions** and, because he took a share of all fines levied, it is not surprising that the office of Fiscal was abused. In later years, both Dutch and British governors used the Fiscal to implement their particular policies.

In summary it may thus be said that, in comparison with the conditions prevailing in the Netherlands, the administration of justice at the Cape during the 18th century was **primitive** and **badly ordered**.

Ask yourself

Can you think of reasons to substantiate the statement that the administration of justice at the Cape was primitive and badly ordered up to the 18th century? If not, have a look at the answer to question 1 in activity 8.2.

8.2.2 THE SOURCES OF LAW

The formal sources of law during the period of Batavian rule (1652–1795) were:

- legislation
- the old writers on Roman-Dutch law
- judicial (or court) decisions
- custom

8.2.2.1 Legislation

a Agencies which had legislative power

There were four agencies which had the power to issue legislation (*placaeten*) for the Cape during this period. They were the

- States-General
- *Here XVII*
- Governor-General-in-Council at Batavia
- Governor-General-in-Council at the Cape

- *The States-General*

As the highest authority over the foreign colonies, the States-General also had authority over the settlement at the Cape. However, the States-General did not introduce much legislation affecting the Cape.

- *The Here XVII*

As the directorate of the VOC, the *Here XVII* had legislative authority over the Cape.

- *The Governor-General-in-Council at Batavia*

Legislation *(placaeten)* issued by the Batavian authority that were not expressly restricted to Batavia **applied in all the overseas possessions of the VOC**, including the Cape. Long before 1652, numerous *placaeten* had already been issued by the Governor-General of Batavia.

- *The Governor-General-in-Council at the Cape*

Over the years, a very large number of *placaeten* were issued at the Cape. A commission was appointed in 1862 to investigate the necessity for these *placaeten*. Nine *placaeten* were retained and the rest were rejected. This rejection of a mass of local legislation is to be regretted as much of the rejected legislation contained important provisions. One of the most important local *placaeten* which was retained is the one which introduced the system regulating the registration of title over immovable property.

Did you know?

The current system for the registration of title over immovable property is a very complicated one. When one buys a house or other immovable property, it has to be registered in one's name at the Deeds Registry. The person who submits the necessary documents to the Registrar of Deeds is called a conveyancer. A conveyancer is an attorney who specialises in the registration of immovable property. If you study conveyancing you will learn more about the above-mentioned *placaet*.

b The States of Holland

Many people are under the impression that the province of Holland had legislative authority over the Cape. This is incorrect. The States of Holland (ie the governing body of the province of Holland) had **no authority to issue placaeten** (legislation) that would be operative at the Cape. Here it is necessary to draw a clear distinction between the *placaeten* of Holland that were issued before 1652 and those that were issued after 1652.

- *Placaeten issued before 1652*

Placaeten issued before 1652 **are part of our law** if they were not of a purely local nature (such as fiscal measures). Can you guess the reason for this? Yes, Roman-Dutch law as it was applied in Holland at the time was transferred to the Cape in 1652 when the Dutch first came to South Africa.

- *Placaeten issued after 1652*

However, *placaeten* issued after 1652 **could not affect the law at the Cape**. The reason for this was that it was the States-General (the central organ of the seven provinces of the Netherlands) which managed the overseas colonies, and not the States of Holland. Therefore, only the States-General, or somebody to whom this body had delegated its authority (such as the VOC), had legislative authority with regard to the Cape; and this authority was never delegated to the States of Holland.

- *Exceptions*

It was possible for the *placaeten* of Holland, issued after 1652, to become operative here in an indirect manner if they were **promulgated expressly** by the Governor-General-in-Council at the Cape. In addition to this, a *placaet* of Holland could also have been **incorporated through custom**, and for this reason even today it might be important to find out whether a certain *placaet* was applied in the courts at that time.

8.2.2.2 The old writers on Roman-Dutch law

It appears from the reports in the Cape Archives that the old writers of the province of Holland were quoted by the courts and that reference was also made to writers of the other provinces of the United Netherlands. (Refresh your memory regarding the Roman-Dutch law writers by rereading study unit 7.)

8.2.2.3 Judicial decisions

You should keep in mind that the Dutch courts did not follow the *stare decisis* rule. This meant that earlier decisions were not binding in subsequent cases but merely had a persuasive influence. We can therefore accept that the collections of judgments, whether they were Frisian, Dutch or from the Cape, had **no binding authority** on the 18th-century Cape courts.

8.2.2.4 Custom

We have already mentioned custom as a source of Roman-Dutch law (refer to section 7.3.5 in study unit 7). From the earliest days of the settlement in 1652, certain customs that promoted sound agricultural practice were observed among the Cape farmers. These customs eventually acquired binding force in legislation. The *Kaapse Placaetboek* provides examples of customs and traditions which were confirmed in legislation.

ACTVITY 8.2

Answer the following short questions to see whether you understand what you have learnt so far:

(1) Briefly discuss whether the administration of justice at the Cape during the early years was sophisticated or not. Give reasons for your answer.

(2) What was the purpose of the Fiscal? Why can the Fiscal be said to have abused his position?

(3) Name the formal sources of the law during the period of Batavian rule from 1652 to 1795.

(4) Name two ways in which *placaeten* issued by the States of Holland after 1652 could become indirectly applicable at the Cape.

FEEDBACK 8.2

(1) The administration of justice at the Cape during the early years was primitive. The main reason is that the Dutch government did not see the Cape of Good Hope as a colony, but rather as a mere refreshment station. The Dutch people who worked at the Cape during that time were viewed as employees of the VOC. As a result, most legal disputes that arose were handled with reference to the *artycelbrief* that set out the conditions of employment. There was also only one ''court'' at that time. Furthermore, the officials who were tasked with the punishment of criminals and the solving of other legal disputes were not trained lawyers.

(2) The Fiscal was the official responsible for prosecuting criminals. He reported directly to the Here XVII and was therefore not under the authority of the Governor-General-in-Council at the Cape. In other words, he had ample opportunity to abuse his position, since his superiors were in the Netherlands and were not within easy reach. Furthermore, he received a percentage of every fine that he issued. This resulted in the Fiscal sometimes issuing unnecessary fines in order to collect more money.

(3)
- legislation
- the old writers on Roman-Dutch law
- judicial (or court) decisions
- custom

(4) Although theoretically *placaeten* of the States of Holland issued after 1652 in the Netherlands were not applicable at the Cape, there are two ways in which such *placaeten* could become indirectly applicable. These are:

- Where the Governor-General-in-Council at the Cape promulgated such a *placaet* at the Cape. (In other words, if the Governor issued a *placaet* that was originally issued for the Netherlands, and expressly stated that the *placaet* would apply at the Cape as well.)
- Where the *placaet* became law through custom.

8.3 THE PERIOD FROM 1795 TO 1827

Take note

Dutch (Batavian) rule at the Cape came to an end in 1795, when the British took control of the Cape. British rule was, however, short lived and lasted only eight years. In 1803 the British withdrew from the Cape. The period between 1795 and 1803 is known as the period of the **First British Occupation** of the Cape. When the British left in 1803, the Dutch again took control of the Cape. Three years later, however, the British were back and took control of the Cape in 1806 for the second time. This is known as the **Second British Occupation of the Cape**. This Occupation would last until 1961, when South Africa finally became independent from Britain and the Republic of South Africa was established.

This section covers the period from the **First British Occupation of the Cape** in 1795, until the **first Charter of Justice** was promulgated in 1827 by the then Governor of the Cape, Lord Charles Somerset. (The first Charter of Justice came into effect in 1828.) During the First British Occupation, the authorities maintained the system of justice which had already been established during the period of Batavian (Dutch) rule at the Cape. There was a **high court** with a staff of part-time judges who were not always trained jurists and, worse still, were dependent on the Governor as the final authority in both civil and criminal matters. Legal reforms which were introduced during the brief period of Batavian rule (1803–1806) did not come to anything.

8.3.1 THE SECOND BRITISH OCCUPATION (1806): EARLY CHANGES IN THE ADMINISTRATION OF JUSTICE

Before the arrival of the British settlers in 1820, the British government appeared to be administering the Colony as an outpost of the British Empire, seemingly without any intention of anglicising it, that is, without trying to make it English in its outlook. In terms of the Articles of Capitulation, burgher rights and privileges, which included Roman-Dutch law, were preserved. However, despite this determination, changes were brought about in the administration of justice at quite an early stage. These changes included the following:

- A **court of criminal appeal** was instituted. (This was of course necessary, since procedures implemented under Dutch rule, including that of appeals to the authorities in Batavia, no longer existed.)
- **Circuit courts** were introduced.
- The courts which had been closed to the general public were **opened to everybody**.
- Changes to **criminal procedure** were made.

Did you know?

The British settlers who came to South Africa in 1820 were civilians who left Britain and came to the Cape in search of a better life. Although a steady stream of British immigrants had been

arriving at the Cape ever since the First British Occupation (1795), the 1820 settlers were the first group to settle in South Africa with the assistance and approval of the British government. However, remember that the indigenous African people, the Dutch and the British were not the only nationalities represented in South Africa at that time. People came from all over Europe and the rest of the world to live in South Africa. For example, the French Huguenots came to South Africa in 1689 to escape from religious prosecution. There were also people from Germany, Scotland, Ireland and Russia, among others, who left Europe and came to live in South Africa. Furthermore, you should bear in mind that many Muslims from India, Ceylon and Indonesia (see s 2.2.1 in study unit 2 for a more complete list) also lived here at that time.

8.3.2 EARLY RECEPTION OF ENGLISH INSTITUTIONS AND LAW

After the first British settlers came to the Cape in 1820, the British government started changing its attitude to the Colony and its approach to legal practice there. Proclamations by Lord Charles Somerset (the then governor of the Cape) contain evidence of a policy of anglicisation and of English legal rules penetrating the system.

The British government appointed a commission to enquire into the affairs of the Colony, including the existing legal system. This commission made recommendations on changes they thought necessary. Acting on the recommendations of this commission, the first Charter of Justice was issued for the Cape Colony.

8.4 THE RECEPTION OF ENGLISH LAW AT THE CAPE (1828–1910)

The first Charter of Justice introduced the beginning of an era which was extensively influenced by the English. It came into effect in 1828 and brought about important changes in the **court structure** and in the **formal law** (that is the law of evidence and procedure). Although there was no official instruction that English law should be applied, the use of the English court structure and formal law paved the way for the incorporation, or reception, of English law into the existing law.

The new system of legal administration included the following changes:

- The *Raad van Justitie* was replaced by the **Supreme Court of the Colony of the Cape of Good Hope**.
- An appeal to the **Privy Council** in London was instituted. The Privy Council was the highest court of appeal in all legal matters.
- The **jury system** was introduced. However, the jury system became unpopular from 1891 onwards, and was finally discontinued in 1969.
- **Judges** appointed to the new bench had to be recruited from among the advocates of England, Ireland and Scotland.
- **Advocates** of the court had to be advocates from England, Ireland and Scotland, persons in possession of a doctor's degree in law from the Universities of Oxford, Cambridge and Dublin or advocates of the old *Raad van Justitie*.

Note the following

A second Charter of Justice was implemented in 1834. This Charter was really only a re-enactment of the first Charter with a few amendments and additions.

8.4.1 THE MECHANICS OF THE RECEPTION PROCESS

Both Charters of Justice stipulated that the old law of the Colony, namely Roman-Dutch law, should be applied by the courts. Viscount Goderich indicated, however, that there should be a **gradual assimilation of English law** into the law of the Colony.

We shall next consider the following factors which contributed to the reception of English law:

- English institutions
- the judiciary
- legislation

8.4.1.1 The influence of English institutions

First of all, it is important that the penetration of the colonial legal system by English law should be evaluated against the social and political background of the Cape during the 19th century. The move towards English institutions is hardly surprising in view of the fact that the Cape was a **British colony**. It was logical that contact with English institutions and sympathy towards them would lead to contact with English common law. By 1830 it was clear that real change was taking place at the Cape and that the ''old ways'' were rapidly dying out. Education, language and commerce are the three areas where the influence of English law was strongest.

a Education

As part of his policy of Anglicisation, Lord Charles Somerset established a number of schools in the rural areas. These schools were staffed by teachers with an English background, and the classes were presented in English. This, of course, greatly influenced the young generation of that time, as they were schooled in English patterns of thought.

b Language

An English language policy was introduced: Lord Charles Somerset officially instituted English as the language of the Cape. This also meant that all legal procedures in the higher and lower courts had to be conducted in English.

c Commerce

Commerce was almost solely in the hands of people who, if not English speaking, were rapidly becoming immersed in the customs of ''English trading''. It goes without saying that their attitude to doing business by means of negotiable instruments, insurance and bills of lading and their thinking on business in general would be influenced by English practice and by the English law which regulated business practice. The records show that the commission of inquiry which led to the promulgation of the Charters of Justice had drawn attention to the lack of systematised mercantile law at the Cape and to the dissatisfaction among business people with the ''singularly deficient Dutch law''.

Note the following

It is not true to say that Roman-Dutch law was incapable of developing a commercial law. Probably the most important instrument of legal development, namely a university which had a civil-law (Roman-law) orientation, was lacking at the Cape. Without such a university, the development of a modern commercial law, founded solely on Roman-Dutch law principles, could not take place.

8.4.1.2 The role of the judiciary

Newly appointed English judges were given the task of promoting the gradual assimilation of English law into Roman-Dutch substantive law. It was intended that they should submit drafts of proposed reforms to both civil and criminal law. However, early judges like Menzies and Burton resisted the influence of English law. Eventually, it was not law reform but other factors which led to English law penetrating the system. These were the

- Inns of Court tradition
- accessibility of English sources
- precedent system

a The Inns of Court tradition

The Inns of Court are associations of advocates in England which are responsible for the training of advocates. They require advocates to pass exams in English common law before they are permitted to practise. In the absence of a university with a civilian or Romanist orientation at the Cape, the Inns of Court tradition quickly made its mark on Cape judicial practice and thus suppressed any possibility of research into the principal sources of Roman-Dutch law. The provisions of the Charters of Justice had the effect that many (and later, most) advocates at the Cape were schooled in English law only. This naturally meant that these advocates applied English law when they eventually practised.

Did you know?

Are you considering a career as an advocate when you have obtained your law degree? You will then most probably also become a member of the ''Bar''. Most South African advocates are members of the Bar Association. This means that they rent their ''chambers'' from the Association, and are subject to the rules and regulations of the Association. Before one can apply to become an advocate, one has to complete a period of training (known as pupilage) at the Bar under the supervision of two existing members. Therefore, although there are major differences between our current Bar Assocation and the English Inns of Court tradition, their main purpose remains the same.

b Accessibility of English sources

Neither judges nor advocates needed any encouragement to rely on English authorities. They did so as a matter of course. (Once again, both the judges and the advocates had received their training in English law and therefore preferred to make use of English authorities.) Furthermore, when legal problems had to be resolved, it was found that the principles of law were often stated too concisely by the ''old writers'' and so, when elaboration was required, they made use of English cases. Similarly, advocates tended to look at the more accessible sources of English law (it was easier to read English than Latin or Dutch!) on the assumption that the Roman-Dutch law principle was similar to that of English law or, worse still, on the assumption that the ''old writers'' did not refer to the issue.

c Doctrine of stare decisis

Ask yourself

Have you forgotten what the doctrine of *stare decisis* means? Refresh your memory by reading section 6.5.5 of study unit 6.

This doctrine literally means that ''the decision stands''. In other words, earlier decisions have binding authority. The **Cape Supreme Court** started following the doctrine of *stare decisis*. This fact was in

itself a movement away from the Roman-Dutch courts' attitude to the authority of previous decisions. (You should remember that the Roman-Dutch courts regarded a previous judgment as being merely of persuasive authority.) So, because of the great respect for judicial precedent, and not forgetting that the highest court of appeal was the Privy Council in London, it is not surprising that once English rules of law were imported, they ''stuck''.

8.4.1.3 The importation of law via legislation

A glance at the long list of statutes in force at the Cape from 1828 onwards, which were based on similar legislation effective in Britain, is convincing proof that English law was imported through statutes. It is not surprising that the judicial interpretation of these statutes would in turn lead to greater emphasis being placed on English law.

8.4.2 THE RECEPTION OF ENGLISH LAW AND THE INTERNAL HISTORY OF SOUTH AFRICAN LAW

This module deals with the **external history** of our law. Therefore, we are not concerned with the extent to which English law influenced South African law. (Reread sec 1.2 in study unit 1 in which the difference between external and internal legal history is explained.) However, when dealing with the factors which contributed to the reception of English law, an important question comes to mind: Are we concerned, on the one hand, with the reception of an odd legal rule here or there or, perhaps, with a reliance on borrowed legal terminology? Or, on the other hand, are we concerned with the reception of law as a scientific system (the principles, concepts and doctrines forming the basis of that law)? In other words, was there a **practical** or a **scientific** reception of English law at the Cape, or perhaps both?

Can we say that the extent of the reception of English law at the Cape was similar to the extent of reception of Roman law in the Netherlands?

Refresh your memory

In the Netherlands a reception took place both of **Roman legal rules** (a practical reception) and of the **Roman scientific system** (principles, concepts and divisions of law, that is a scientific reception). Refer to study unit 6 if you do not remember.

The Cape received, among others, the whole of the English *Companies Act*, the English law of negotiable instruments and the English law dealing with parliamentary conventions. This is reception in the true sense, because it is something more than a mere arbitrary accumulation of legal rules; it represents, in fact, a reception of a body of principles and concepts from English law. The answer to the question whether the Cape experienced a practical or a scientific reception of English law is that **some areas of the law experienced both a scientific and a practical reception of English law**.

ACTVITY 8.3

Answer the following short questions to test whether you understand what you have learnt with regard to the British administration at the Cape from 1795 to 1828.

(1) Are the following statements true or false? If you think a statement is false, give reasons for your answer.

   (a) From the very beginning of its administration at the Cape, the British government was determined to preserve burgher rights and privileges, including Roman-Dutch law.

(b) The arrival of the British settlers had no influence on the anglicisation of the Cape.

(c) During the early years of the British occupation, a civil law (Roman law) oriented university was established at the Cape.

(d) The use of English as the legal language played a part in the reception of English law in South Africa.

(2) Explain how the fact that the Cape Supreme Court adhered to the rule of *stare decisis* could be seen as an indication that the courts favoured the application of English law.

(3) Did Roman-Dutch law have the potential to develop a commercial law in South Africa?

(4) Read the following two statements regarding the role of the judiciary in the reception of English law at the Cape and determine whether each one is **true** or **false**:

(a) Early Cape judges like Menzies and Burton promoted the gradual assimilation of English law into Roman-Dutch law.

(b) Judges and advocates relied on English authorities because they were easily accessible, thus facilitating the reception of English law.

Choose your answer from one of the following:

(1) Both statements are true.

(2) Statement (a) is true, but statement (b) is false.

(3) Statement (b) is true, but statement (a) is false.

(4) Both statements are false.

FEEDBACK 8.3

(1) (a) True.

(b) False. After the arrival of the British settlers, Lord Charles Somerset actively pursued a policy of anglicisation.

(c) False. Such a university was not established at the Cape (or anywhere in South Africa!) during the early years of the British occupation.

(d) True.

(2) The principle of *stare decisis* was not recognised by Roman-Dutch law. Therefore, the fact that the Cape Supreme Court applied the rule of *stare decisis* cannot be an indication that the courts played an important part in preserving the rules of Roman-Dutch law. Rather, this would indicate that the courts favoured the application of English law.

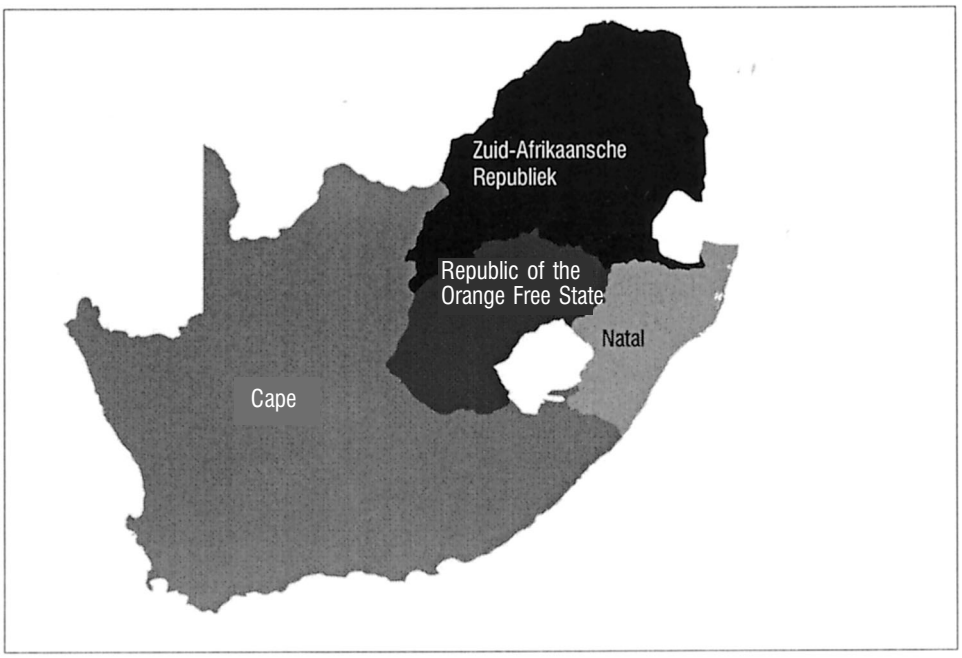
(3) No. Because there was no scientific study of Roman-Dutch law and no civil-law oriented university at the Cape, Roman-Dutch law did not develop sufficiently to fulfil the needs of a growing economy.

(4) This multiple-choice question appeared in a previous examination paper. It deals with the mechanics of the reception process during the Second British Occupation of the Cape, specifically with the role of the judiciary in this process. You had to decide whether each of the given statements is true or false.

Although the newly appointed judges were tasked with promoting the gradual assimilation of English law into Roman-Dutch law, the two judges mentioned in this question did quite the opposite. In fact, they resisted the influence of English law. The first statement is therefore false. If you read section 8.4.1.2 again, you will see that it was rather the Inns of Court tradition, the accessibility of sources and the precedent system which led to the reception of English law. It follows then that the second statement is true. English authorities were indeed more easily accessible to the judges than Roman-Dutch sources, which were written in Dutch or Latin. This is discussed in some detail in 8.4.1.2. Your answer should therefore have been (3): Statement (b) is true, but statement (a) is false.

8.5 LEGAL DEVELOPMENT OUTSIDE THE CAPE (1838–1910)

As mentioned above, the British government increasingly pursued a policy of anglicisation after the arrival of the British settlers. This policy was not welcomed by the existing non-British population (made up mostly of Dutch people, and referred to as ''Boers''). In fact, the Boers resisted this policy to such an extent that a large number of them decided to leave the Cape and to move inland to get away from the control of the British government. This mass exodus from the Cape is popularly referred to as the Great Trek (Afrikaans: ''Die Groot Trek'') and the people who participated in the Great Trek are referred to as the Voortrekkers. During this period, the Voortrekkers moved as far away as the areas known before 1994 as Natal, the Orange Free State and the Transvaal. We now briefly discuss the development of the legal systems in each of these three areas.



South Africa during the colonial era

8.5.1 NATAL

In 1838 the Voortrekkers declared that the *Hollandsche Rechtspleging* (Roman-Dutch law) would serve as a basis for the administration of justice at Port Natal (today known as Durban). After the British took control of Natal in 1845, however, it was stipulated that the legal system of the ''District of Natal'' would be the system as practised in the Cape Colony, namely **Roman-Dutch law as modified by English procedural laws**. Thereafter, the pattern in Natal resembled that of the Cape Colony except that in Natal there was an even stronger tendency to follow English law.

Refresh your memory

Do you remember that the countries that form part of the South African Law Association (namely Swaziland, Lesotho, Botswana and Zimbabwe) also received the law of the Colony of the Cape of Good Hope in the same way? Reread section 5.5.3 of study unit 5.

8.5.2 THE VOORTREKKER REPUBLICS

After the Great Trek, the Boers settled in the areas known before 1994 as the Transvaal and the Free State, which they declared to be independent states.

These two states were commonly referred to as the ''Boer Republics'' or ''Voortrekker Republics''. The Transvaal was then known as the *Zuid-Afrikaansche Republiek* (ZAR) and the Free State as the Republic of the Orange Free State. Both these republics were in a position to develop their legal systems independently of the Cape legal system, because at that time they were not under the control of the British government. However, they were also influenced by English law.

8.5.2.1 The *Zuid-Afrikaansche Republiek*

It was provided that the *Hollandsche Wet* would form the basis of the law of the ZAR. This was an indication of a move towards an independent legal system.

The *Hollandsche Wet* comprised **Van der Linden's** *Koopmans Handboek*. Where Van der Linden did not have anything to say on a particular matter, Leeuwen and the *Inleidinge* of Grotius were considered binding supplementary sources, subject always to local legislation.

Refresh your memory

Do you remember who Van der Linden, Leeuwen and Grotius were? If not, reread study unit 7.

8.5.2.2 The Orange Free State

The constitution of the Orange Free State provided that **Roman-Dutch law** would be the basic law of the state. The Volksraad (the executive authority of the government of the Orange Free State) defined the term ''Roman-Dutch law'' as that system of law in use at the Cape prior to 1828 (ie prior to the Charters of Justice and the appointment of English judges at the Cape). Eight old writers, including Voet, Leeuwen, Grotius, Van der Linden and Van der Keessel, as well as the authorities quoted by them, were regarded as authoritative sources.

8.5.2.3 The influence of English law

Did you know?

At the end of the 19th century, relations between Britain and the two Voortrekker Republics, namely the *Zuid-Afrikaansche Republiek* and the Orange Free State, became very strained. Diamonds and gold had been discovered in these areas. Britain wished to take advantage of the economic boom that these areas were experiencing and decided to include the two Republics under its control and to unify the whole of South Africa. The two Voortrekker Republics did not want to give up their independence. Confrontation over this matter culminated in a war. This war is known as the Anglo-Boer War and lasted from 1899 to 1902. The war ended when the two Republics finally surrendered their independence by signing the Treaty of Vereeniging at Melrose House in Pretoria on 31 May 1902.

The influence of English law was, however, apparent in both Voortrekker Republics long before they were annexed by Britain after the Anglo-Boer War. The reasons were the following:

- In the high courts of both Republics, the decisions of the **Cape Supreme Court** were regarded as being more than highly persuasive.
- The judges who sat in the courts of these Republics did not hesitate to consult **English authorities** when necessary.

8.6 THE YEARS OF CRISIS (1902–1910)

After the annexation of the two Boer Republics by the British, the Boers' first fear was that English common law would completely replace Roman-Dutch law. During this period some of the British were in favour of a radical modification, if not a complete abolition, of Roman-Dutch law in what were now the four British colonies in South Africa. Despite these pleas, there was no obvious attempt on the part of the British government to eliminate Roman-Dutch law. The British government was content merely with **modifications to the structure of the courts** and with the **importation of a great deal of Cape legislation** into the former republics. In other words, English law did not replace Roman-Dutch law; rather English law was assimilated (gradually incorporated) into Roman-Dutch law.

8.7 LEGAL DEVELOPMENT SINCE THE UNIFICATION OF SOUTH AFRICA IN 1910

Did you know?

In 1910 the British government decided to unify the four colonies (namely the Cape of Good Hope, Natal, the Transvaal and the Orange Free State). As a result, from 1910 to 1961, we refer to these areas as the Union of South Africa.

The unification of the four former British colonies in 1910 was the beginning of a new era in the legal development of South Africa. The Appellate Division of the Supreme Court (today the Supreme Court of Appeal) which was established in 1910 played an important role in this development.

Did you know?

Do you know where the Supreme Court of Appeal is situated? Yes, it is in Bloemfontein, and it is located in a beautiful old building. Whenever you visit Bloemfontein again, make a point of going to look at this Court, even if only from the outside. Practising attorneys and advocates also regard it as a highlight of their careers to appear in this Court hopefully you will get the opportunity to do just that one day!

After 1910 our judges were less inclined to consult English law for solutions to their problems than they had been in the past. South African judges began to believe in the importance of **retaining pure Roman-Dutch law**. The influence of English law did, however, continue after 1910, especially through legislation.

8.7.1 LEGISLATION

In the years after 1910, a large body of legislation dealing with a wide variety of subjects was promulgated by Parliament. Unfortunately, much of this legislation was of such a nature that it was not conducive to a healthy development of the law. It is a pity that our legislature has often been ill advised in its approach. Its biggest mistake was probably the direct incorporation of entire sections of English law into South African law, without adapting them to local conditions and circumstances. Having said

this, however, it should be borne in mind that this English law was later adapted and accepted by the courts and also amended by legislation.

It should also be remembered that the direct incorporation of English statutes may also affect our law in an indirect way because, in many instances, courts seek authority for the interpretation of such statutes from English cases that turned on the same point of law. For example, our company law is based largely on English law. If a certain provision has to be interpreted by a court, it is very possible that the same provision has already been interpreted by an English court, and then it is quite likely that our courts will follow the English decision. In this way, English case law gains authority in our courts.

8.7.2 THE TEACHING INSTITUTIONS

It is important for the healthy development of a legal system that jurists practise law scientifically. This means that the law should be studied from a theoretical point of view and be critically discussed. It is the universities in particular which play an important role in this regard. It was not until 1916, following the creation of the fully independent Universities of Cape Town and Stellenbosch, that it was possible to discern a movement in South Africa towards the scientific study of Roman-Dutch law. Today, the extensive literature on South African law with its scientific Roman-Dutch approach proves this, and the extent of the influence of our legal academics on the courts is evident.

8.7.3 THE APPELLATE DIVISION

Before unification in 1910, the legal systems in the different parts of South Africa developed independently from each other. Therefore, although each area applied the same basic legal system, the legal system of a specific area developed by taking into account local customs, traditions and opinions. As a result, there were many minor differences in the law of the different areas. Many of these differences still exist today. However, despite these differences, the formation of the Union marked the beginning of a new period of **unification and assimilation of law**. The establishment of one Supreme Court for South Africa, with its separate provincial and local divisions, and, most importantly, an Appellate Division for the whole of South Africa, including the then South-West Africa (Namibia) and Southern Rhodesia (Zimbabwe), played a particularly important role in this process of unification and assimilation.

Note the following

At this point it is important to remember that the Privy Council, situated in London, remained our highest court of appeal until 1950. Although the existence of the Privy Council had the effect of slowing down the development of a purely South African legal system, its influence decreased markedly after 1910 because our own Appellate Division adopted an independent attitude.

The Appellate Division contributed to the development of South African law through the **unification of the law of South Africa** and the **creation of an independent legal system**. After 1910 the Appellate Division was the most important factor in legal development in South Africa. An important task of the judges of appeal was (and still is) to continue independent legal development. In this respect, the court has achieved remarkable success. The court did not cling to strict and outdated principles which were no longer useful, but it was never prepared to deviate from the established and recognised principles of Roman-Dutch law.

The Appellate Division was also not prepared to be led by English law. Although English law still influences our law, in general it can be said that with the founding of the Union and the establishment of the Appellate Division, Roman-Dutch law in South Africa was given a new lease of life.

8.7.4 THE ''PURISTS'', ''POLLUTIONISTS'' AND ''PRAGMATISTS'' DEBATE

In 1936 Watermeyer JA (a judge of the Appellate Division at the time) warned against the dangers of relying too much on the medieval commentators or on civilians (Romanists), and thus disregarding the changes taking place in the developing Roman-Dutch common law of South Africa through influences such as custom. He also drew attention to the possibility of upsetting an apparently sound line of modern cases in this way. Two-and-a-half decades later a debate between the so-called ''**purists**'', ''**pollutionists**'' and ''**pragmatists**'' was initiated. These approaches may be summarised as follows:

- The **purists** demanded that Roman-Dutch law be applied in its pure form, free of English-law contamination.
- The **pollutionists**' point of view was that for practical reasons English-law solutions should be accepted where the old writers are silent.
- The **pragmatists** wished to steer a middle course between the two opposing points of view.

What was the view of the Appellate Division in this regard?

From its decisions, it appears that the Appellate Division associates itself most closely with the **pragmatic** point of view. It has often rejected English legal rules which have penetrated our system and found support through the *stare decisis* rule but which were never really received into our law. However, this has mostly not been done without careful consideration of the implications of rejecting an English rule which has been accepted into our law.

At the same time the Appellate Division has not found it impossible to abolish a rule of Roman-Dutch law which it considers to be obsolete (out-of-date). Where it has been necessary to adapt the law to changing social conditions, it seems that the Appellate Division has made an effort to **develop the law within the Roman-Dutch framework**.

Did you know?

We have just mentioned that the Appellate Division does not hesitate to adapt our common law to fulfil the changing needs of society. An example of such a judgment is the 2004 decision in **Fourie and Bonthuys v Minister of Home Affairs and Director-General of Home Affairs** in which the Supreme Court of Appeal (as it is called today) finally recognised gay marriages. In this judgment it was found that the common-law definition of marriage should be amended to include unions of two persons of the same sex.

8.7.5 THE SOUTH AFRICAN LAW REFORM COMMISSION

In conclusion, the excellent work being done by the South African Law Reform Commission (established in 1973) should be mentioned. The task of the Commission is to investigate certain matters referred to it by Parliament. In each investigation, the Commission considers the present legal position, the historical development of the matter under consideration and then, after extensive research, proposes changes to the law to bring it into line with the needs of society. The proposed changes often take the form of a draft bill, which is then studied by Parliament and, if approved, becomes law. If we look at these draft bills, it appears that the Commission does not hesitate to make use of **comparative legal material** and that it takes cognisance of the civil-law heritage which we share with other European legal systems. The Law Reform Commission has achieved much in the harmonisation of (Western) common law and indigenous law in South Africa.

A suggestion

Students who have access to a law library could ask the librarian to show them a copy of a report of the South African Law Reform Commission. Many of these reports deal with current and

controversial topics and sometimes make for quite interesting reading! Remember that all the reports of the Law Reform Commission are also available on the internet. You can access these reports by going to their website at: *http://www.doj.gov.za/salrc/index.htm.*

Note the following

This concludes our discussion of the Western component of our legal system. In study unit 9 we turn to the third and final component, namely the universal component. You will learn about the law in South Africa's new constitutional dispensation, where the concept of human rights came from and how human rights came to play a role in South Africa.

ACTVITY 8.4

Answer the following question to test your understanding of what you have learnt so far:

Should the establishment of the Appellate Division in 1910 be regarded as the most important event in the development of the South African legal system in the 20th century? Give reasons for your answer.

FEEDBACK 8.4

The establishment of the Appellate Division in 1910 should be regarded as a landmark in the development of our legal system. This court has played an important role in the unification and assimilation of the law and in the development of a common law for South Africa. However, one must not forget that before 1994, when the Interim Constitution came into operation, the courts had no power to question the content of legislation. Therefore, until that time the role of the courts in legal development was limited and they often had to execute blatantly unjust, discriminatory legislation. So, if we have to look for a landmark in legal development in South Africa in the 20th century, we should rather look at the promulgation of the Constitution and the establishment of the Constitutional Court, which paved the way for the development of a just legal system.

Note the following

This question deals with the important concepts of **parliamentary sovereignty** and **constitutional supremacy**. You will learn more about these two concepts in study unit 9. You will have a better understanding of this question and answer after studying study unit 9.

Test yourself

Answer the following self-assessment questions with reference to the material that you have studied in study unit 8. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions.

- Explain how Roman-Dutch law came to apply at the Cape. (1)
- Discuss how the Charters of Justice assisted with the reception of English law in South Africa. (10)

- Explain why the Boer Republics experienced an English-law influence. (2)
- Explain why the promulgation of the Constitution and the establishment of the Constitutional Court are more important landmarks in the development of the South African legal system than the establishment of the Appellate Division. (2)

Study unit 9

The history of human rights in South Africa

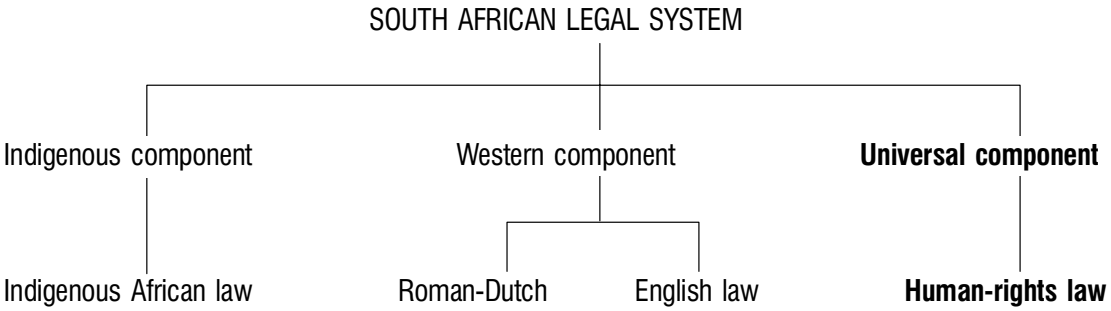
Learning outcomes

After having studied this study unit, you should be able to

- understand the three approaches to constitutionalism
- decide which approach would best ensure the success of the ideal of an open and free democratic society
- explain what is meant by the formal testing capacity of the courts
- have a basic understanding of what human rights are
- explain the origin and development of the idea of human rights
- identify the most important characteristics of the South African Bill of Rights
- explain how human rights were protected in South Africa before 1994 and how they have been protected since 1994

9.1 INTRODUCTION: THE PRINCIPLE OF CONSTITUTIONALISM

You should know by now that the South African legal system consists of three main components. We have already discussed two of these components, namely the indigenous component (study unit 2) and the Western component (study units 3 to 8). In study unit 9 we will explore the third and last component, namely the universal component. The diagram below is a graphic presentation of where the discussion in study unit 9 fits into the development of our legal system.



The interim Constitution introduced a new era in South African legal history. This constitution introduced the principle of democratic constitutionalism into our legal system for the first time. You will see that the concept of **human rights** is an inseparable part of the principle of **constitutionalism**. In this study unit we investigate the origins and history of the principle of constitutionalism and the concept of human rights in South African law.

Limiting state power

The principle of constitutionalism is based on the idea that the power of the state should be controlled or limited in order for an open and free democracy to flourish. In other words, constitutionalism simply means that the **government of a country is obliged to act in accordance with the prescriptions/ guidelines/conditions laid down in a constitution**.

Note the following

A constitution is a set of principles or rules according to which a state must govern. A constitution may be written (as in South Africa) or unwritten (as in Britain).

Mechanisms to control state power

A constitution may contain a variety of mechanisms to curb the power of the state. These mechanisms could include

- certain procedures for the making of law
- a bill of rights
- the separation of power between the legislative, executive and judicial authorities
- an independent judiciary (which is essential for the protection of fundamental rights)
- a separation of power between the national (central) and provincial levels of government

For this reason constitutionalism is sometimes called ''limited government''.

Three approaches to the principle of constitutionalism

In the history of South African law, there have been three distinct approaches to the principle of constitutionalism, namely

- complete denial of constitutionalism
- partial recognition of constitutionalism
- full recognition of constitutionalism

A brief discussion of each of these three approaches follows:

9.1.1 COMPLETE DENIAL OF CONSTITUTIONALISM

A complete denial of constitutionalism entails that **the will of the majority in a democracy (as represented by parliament, or in former years, a Volksraad) may not be limited by the rules and procedures of a constitution**. An example from our legal history was the *Zuid Afrikaansche Republiek* (or ZAR) at the end of the 19th century (read paragraph 8.5.2 in study unit 8 if you do not remember what the ZAR was). In this regard, you should also study paragraph 9.5.2 below, which discusses the constitutional crisis in the ZAR. You will learn that the danger inherent in the denial of the principle of constitutionalism is that parliament can obtain unlimited power, and that this may become a threat to the continued existence of an open and free democracy.

9.1.2 PARTIAL RECOGNITION OF CONSTITUTIONALISM (PARLIAMENTARY SUPREMACY OR PARLIAMENTARY SOVEREIGNTY)

Where there is partial recognition of constitutionalism it is accepted that some restrictions on the power of parliament are necessary in a democracy. In other words, state power may only be exercised in terms of clearly defined rules of law (the so-called ideal of the rule-of-law). A constitution should set out the procedures for the making of these laws. In accordance with this approach, **parliament remains the sovereign power in the state and can make whatever laws it wishes, even unjust laws, as long as the democratic procedures for the adoption of these laws are followed**. Courts can only decide whether the prescribed procedures were followed but cannot declare laws invalid because they are unjust or unreasonable.

This was the situation in the Union of South Africa (under the Constitution of 1910) and the Republic of South Africa (under the Constitutions of 1961 and 1983), and is still the dominant doctrine in Britain. The constitutional crisis regarding the voting rights of so-called ''coloured'' persons in the 1950s is another example of the application of partial recognition of constitutionalism and is discussed in more detail in paragraph 9.5.4 below. When studying that paragraph, you will learn that this interpretation of the principle of constitutionalism is also too narrow to ensure freedom and equality in an open democracy.

9.1.3 FULL RECOGNITION OF CONSTITUTIONALISM (CONSTITUTIONAL SUPREMACY OR CONSTITUTIONAL SOVEREIGNTY)

Where there is full recognition of constitutionalism it is accepted that restrictions on the powers of parliament and the state are necessary in a democracy. In the case of partial recognition of constitutionalism, **parliament is supreme**, but where there is full recognition of constitutionalism, the **constitution is supreme**. In other words, full recognition of constitutionalism means that the government of a country is subject to the constitution of that country. The constitution includes restrictions and guidelines to which the government should adhere in ruling the country. These restrictions usually include a bill of (human) rights which is used to test the content of the law and legislation. The constitution sets out the democratic **procedures** that parliament must follow when making and applying laws, as well as the basic **standards** with which the content of the law and legislation must comply.

The following table gives a summary of the three approaches to constitutionalism discussed above:

CONSTITUTIONALISM		
complete denial	even if the legislature does not follow its own procedures, its actions remain valid	will of the majority in a democracy is supreme — majority may, for instance, be represented by a Volksraad (as in the ZAR)
partial recognition	procedures for making laws must be followed — this means that courts have formal testing power (see paragraph 9.5.3 of study unit 9)	parliament or Volksraad, chosen by the people, is sovereign — known as parliamentary sovereignty.
full recognition	courts can test the content of legislation and the procedures followed by parliament when adopting new legislation	constitutional supremacy

But what is a bill of rights?

The inclusion of a bill of human rights in a constitution is considered the best means of protecting the rights and freedoms of the individual against the tyranny of rulers, the intolerance of majorities, and the social power wielded by private individuals and institutions. This is so because legislation issued by parliament, or state actions which are incompatible with the constitution and the bill of rights, can be declared invalid by a court. In other words, a bill of rights contains certain minimum standards to which all legislation (and other decisions of state) must adhere. If parliament issues legislation which does not comply with the minimum standards set by the bill of rights, a court could be requested to declare that legislation invalid. Only in exceptional circumstances may human rights be suspended or limited.

Full recognition of constitutionalism has prevailed in South Africa since 1994 when the 1993 (or interim) Constitution and the Bill of Rights along with it were incorporated into South African law. Many other democracies throughout the world, such as Namibia, Germany, Australia, Canada and the United

States of America, practise this type of constitutionalism. Section 7 of the Constitution of the Republic of South African, 1996 (or final Constitution) describes the Bill of Rights as the ''cornerstone (basis) of democracy in South Africa'' and states that it ''affirms the democratic values of human dignity, equality and freedom''.

Did you know?

In 1994, after months of negotiations at Codesa, South Africa finally adopted a new draft Constitution which mirrored a truly democratic society. This Constitution of the Republic of South Africa 200 of 1993 was known as the interim Constitution. After some amendments had been made and the Constitution had been certified by the Constitutional Court, the Constitution of the Republic of South Africa, 1996 came into effect in 1996. This Constitution, which is known as the Final Constitution, replaced the interim Constitution.

ACTVITY 9.1

Answer the following questions to see whether you understand what you have learnt so far:

(1) (a) What are the three fundamental values of South Africa's new constitutional order?

(b) Do you remember the case of *Hassam v Jacobs*, which was decided in the Cape High Court in July 2008 and which we discussed in study unit 2, section 2.2.2.1? What did the court say in this regard in respect of the interpretation of the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act?*

(2) Briefly explain what you understand by the partial recognition of the principle of constitutionalism.

(3) Briefly explain what you understand by the full recognition of the principle of constitutionalism.

FEEDBACK 9.1

(1) (a) The three fundamental values of South Africa's new constitutional order are **human dignity**, **equality** and **freedom**. These values are enshrined in section 7 of the Bill of Rights.

(b) In the *Hassam* case the Court stated that the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act* should be interpreted in a manner which is consistent with the foundational values of human dignity, equality and freedom as enshrined in the Bill of Rights. It consequently ruled that widows of polygynous Muslim marriages should not be excluded from the provisions and benefits of the two Acts.

(2) Partial recognition of the principle of constitutionalism means that parliament is supreme and can make whatever laws it deems fit as long as the procedure for the adoption of those laws is followed. Also, courts may only declare laws invalid if the prescribed procedure has not been complied with, and not because the laws are unjust or unreasonable.

(3) Full recognition of the principle of constitutionalism means that the restrictions on state power must include a Bill of Rights which can be used to test the content of the law and legislation. Also, the Constitution is regarded as sovereign. It is the highest law or supreme law of the land against which all other laws and actions may be tested.

9.2 TESTING CAPACITY OF THE COURTS

Now that we have dealt with the three approaches to constitutionalism, you should note that there is another important concept that goes hand in hand with these three approaches. This important concept is the testing capacity of the courts.

But what is meant by the testing capacity of the courts?

The testing capacity of the courts refers to the power of the courts to **test the validity of legislation** issued by the legislature (or state). However, one should distinguish between

- the formal testing capacity of the courts
- the full testing capacity of the courts

9.2.1 THE FORMAL TESTING CAPACITY OF THE COURTS

The formal testing capacity of the courts means that the courts may enquire whether the legislature followed the prescribed **procedure** when the relevant piece of legislation was passed. These procedures are usually contained in the **constitution of a country**.

If it is established that the legislature (namely parliament or a Volksraad as in the old Boer Republics) has followed the correct procedure, the courts have no capacity to judge the content of the legislation. Only if the legislation was not drafted correctly or if the legislature did not follow the correct procedure when adopting the legislation, may the courts declare the relevant legislation invalid. In other words, **the courts cannot question the content or the unreasonable consequences of the legislation, nor may they declare immoral legislation invalid.**

Very important

If the courts have only formal testing capacity, the **power of the state is partially limited**. Why do we say this? Because the state cannot issue legislation (or make laws) as it pleases: the state's power is limited in that at least the procedure for the making of laws is prescribed. If the state does not follow the prescribed procedures, the courts can declare the legislation invalid.

9.2.2 FULL TESTING CAPACITY OF THE COURTS

Full testing capacity of the courts means that the courts may enquire whether the legislature followed the prescribed **procedure** when the relevant piece of legislation was passed **and** test the **content** of the legislation against the constitution, especially the rights and freedoms contained in the Bill of Rights.

Very important

If the courts have full testing capacity, the **constitution is supreme**. Why do we say this? Because the state cannot issue legislation (or make laws) as it pleases: the state is subject to the constitution. Not only the **procedure** for the making of laws, but also the minimum **content** of laws is prescribed by the constitution. If the state does not follow the prescribed procedures, or if the legislation does not meet the conditions set out in the constitution, the courts can declare the legislation invalid.

In summary

- Where the courts have no testing capacity, it means that constitutionalism is completely denied.
- Where the courts have formal testing capacity, it means that constitutionalism is partially recognised.
- Where the courts have full testing capacity, it means that constitutionalism is fully recognised.

In paragraph 9.5 you will learn how these different approaches to the testing capacity of the courts were applied in South African history.

9.3 WHAT ARE FUNDAMENTAL RIGHTS (OR HUMAN RIGHTS) AND FREEDOMS?

In the final Constitution, the Bill of Rights is referred to as the cornerstone of democracy. At this point you may well ask yourself: but what are human rights and freedoms? Human rights and freedoms are rights and freedoms which are innate, meaning they are rights and freedoms which belong to every person on earth because he or she is a human being. In other words, human rights and freedoms are automatically ascribed to every human being from birth. That is why we say that they are natural and inalienable. Inalienable here means that these rights and freedoms cannot be taken away or restricted without good reason, either by another individual or by the state.

9.4 THE ORIGINS AND DEVELOPMENT OF THE IDEA OF FUNDAMENTAL RIGHTS

Now that you know what human rights are, let us look at where the idea of human rights came from. In the next few paragraphs we will talk about the origins of human rights.

Traditionally, academic opinion held that the idea of human rights was of purely Western origin and that it developed from the natural-law theory. It was further believed that the Bill of Rights is a set of rights and freedoms largely borrowed from Western instruments such as the French Declaration of the Rights of Man and the Citizen (1789). However, as will become clear in our discussion below, in an African and more specifically South African context such an understanding of human rights and a Bill of Rights is inadequate. We will first look at the traditional view of **natural law** as the origin of human rights and then consider the impact of **African values** on its development.

9.4.1 NATURAL-LAW PHILOSOPHY AS THE FOUNDATION OF HUMAN RIGHTS

Note the following

Does the term ''natural law'' look familiar to you? It should! Reread section 6.3.4 and the feedback on activity 6.2 in study unit 6, where you were briefly referred to natural law.

The development of the idea of fundamental, natural rights goes hand in hand with the development of the **natural-law theory** in Western legal philosophy. Natural-law thinkers typically claim that there is a higher set of eternal and universal norms which were not created by human beings but which exist in nature. All states and lawmakers are subject to this set of norms. However, natural-law thinkers differ among themselves on the nature and source of this higher set of norms. They ascribe the norms to

- either religious or supernatural origins
- or human rationality

9.4.1.1 Religious or supernatural origins as a source of a higher set of norms

One group believe that these norms have religious or supernatural origins; in other words, that a god or deity was the source of natural law. This is the case with Christian and Muslim philosophers like St Augustine (4th century AD), Ibn Rushd (12th century AD) and Thomas Aquinas (13th century AD).

9.4.1.2 Human rationality as a source of a higher set of norms

With the advent of science and the Age of Enlightenment in the 16th and 17th centuries, however, many philosophers began to suggest that human reason itself was the source of these norms.

Did you know?

The **Age of Enlightenment** was a time in the history of Western culture, roughly from AD 1600 to 1800, in which there was great emphasis on the rational nature of human beings and their ability to draw up rules that would be applicable to all people at all times. Consequently this period is also sometimes known as the **Age of Reason**.

This new emphasis on rationalism also had a direct influence on the development of law. Rationalism was the underlying philosophy of the **humanists**, who emphasised (Roman) law as a scientific system and the rational and logical nature of the law. Further, Roman-Dutch law blossomed and experienced its golden age during this period. Reread section 6.2.2 in study unit 6 and section 7.3.1.5 in study unit 7 regarding the humanists, and revise study unit 7 regarding the golden age of Roman-Dutch law.

Hugo de Groot (refer to section 7.3.1.1 (a) in study unit 7), one of our best-known and most important common-law writers, can probably be regarded as the father of modern natural law. He was a link between the old world, where religion played an all-important role, and the new Western world. He succeeded in separating natural law from its former religious connotations. He was responsible for what was, at the time, a challenging statement that even if there were no God, natural law would still exist. He believed, in contrast to the jurists of the Middle Ages, that natural law did not derive from God, but from the **rational nature of humans** themselves. According to De Groot, natural law is so unchangeable that even God himself could not change it: two and two remain four, and what is wrong, remains wrong. De Groot maintained that the content of natural law is dictated by human reason.

Another tenet of this school of thought is that a person is a social creature who wishes to be a member of a community. Consequently, a person's reason dictates rules which will make it possible for him or her to be a member of such a community, and these rules or prescriptions are embodied in a **social contract** which is concluded with other members of the community.

But what does the idea of natural law have to do with the origins of human rights?

It was the English philosopher, **John Locke**, who, in the 17th century, was the first to suggest that natural law consisted of the **inalienable rights to life, liberty and property**. The term ''inalienable rights'' means that these rights can never be taken away from a person; although the rights may be suspended or limited in certain cases and under certain conditions, every person will always have a minimum of rights. Locke made use of De Groot's idea of a social contract. Locke claimed that citizens agreed to create a state, solely for the purpose of protecting their basic rights to life, liberty and property. If the state fails to protect those rights or violates them, it (the state) may legitimately be overthrown by its citizens. Locke therefore developed the theory that the state's power is limited and laid the theoretical foundations of constitutional democracy.

Ask yourself

Doesn't this sound familiar? Haven't you recently learnt about the limitation of state power? Yes, of course, this is the basis of the principle of constitutionalism! Refer to section 9.1 in this study unit if you do not remember! Can you see that the concept of human rights and the principle of constitutionalism are therefore intertwined? A policy of full recognition of constitutionalism can never be successful without the recognition of human rights.

Now, as indicated above, in South Africa we cannot look at the idea of human rights purely from a Western perspective. We also have to consider the impact of African values on the development of the concept.

9.4.2 THE AFRICAN PHILOSOPHY OF UBUNTU AS THE FOUNDATION OF HUMAN RIGHTS

When the South African Bill of Rights was applied for the first time in South Africa by the Constitutional Court (*S v Makwanyane* 1995 (6) BCLR 665 (CC)) (you may refer to this as the *Makwanyane* case), a number of the judges made it clear that the Final Constitution and the Bill of Rights should not be understood as merely a Western import. Instead, the Court held that the Constitution and the Bill of Rights are also deeply rooted in, and a reflection of, the values of the South African community itself. The judges accepted that in interpreting the Bill of Rights, they had to give effect to indigenous values and thus develop a specific South African understanding of human rights.

According to the Court, ***ubuntu*** is the source of African values. In the postscript to the interim Constitution, *ubuntu* was explicitly mentioned as the source of the underlying values of the new legal order. *Ubuntu* was further listed as a defence against the injustices of the past, a disregard for human rights and a legacy of hatred. The Bill of Rights should therefore be seen as an attempt to give expression to the values associated with *ubuntu*.

Although in many ways similar to international and Western documents of the same type, our Bill of Rights was born out of a long struggle against colonial oppression and apartheid. In the *Makwanyane* case, Judge Sachs said that the concept of *ubuntu* should be used when the Bill of Rights is applied ''to restore dignity to ideas and values that have long been suppressed or marginalised''.

Born out of the African spirit of *ubuntu*, the Bill of Rights is part of the African Renaissance (ie the rebirth of African values which have been suppressed or marginalised by colonial powers and institutions) and is NOT a new way of imposing Western values on the peoples of (South) Africa.

But what exactly is meant by ubuntu?

We have so far established that the African spirit of *ubuntu* should be regarded as one of the origins of the developing human rights culture in South Africa. But what does *ubuntu* mean? *Ubuntu* has been translated as a feeling of common humanity, a spirit of humaneness, social justice and fairness. It refers to the art of being a human being and includes a number of virtues such as tolerance, compassion and forgiveness in relation to other human beings. *Ubuntu* has also been called African humanism. It emphasises the value of human dignity irrespective of a person's usefulness. It expresses the idea that a person's life is meaningful only if he or she lives in harmony with other people, nature, the gods and the ancestors.

How does ubuntu impact on the concept of human rights?

Ubuntu changes the idea of **individual human rights** to include the concepts of the

- community, and
- the co-existence of rights and duties.

In the final Constitution, there are many examples of group or community rights. (This will be explained later.) Also, the idea of duties may be found in section 8(2) of the final Constitution, which states the following:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any **duty** imposed by the right.

Is ubuntu a unique South African concept?

No, *ubuntu* is an **African** concept. It also forms the underlying philosophy or spirit of the **African Charter on Human and Peoples' Rights** (1981). In the Charter the impact of *ubuntu* is very clear. It is stated that rights should be exercised with due regard for collective security, morality and the common interest. Moreover, the Charter recognises the coexistence of human rights and freedoms with

collective duties by listing a number of specific duties a person has towards his or her family, society and the African community.

However, the history of human rights in South Africa cannot be seen in isolation since it forms part of a global movement towards a greater recognition of human rights. We shall now take a brief look at how human rights gradually attained greater recognition in the legal institutions of the international community. But first do the activity below to see whether you understand what you have learnt so far.

ACTVITY 9.2

Answer the following questions to see whether you understand what you have learnt so far:

(1) (a) What is the name of the first case dealing with the Bill of Rights decided by the Constitutional Court in South Africa in 1995?

(b) What did the Court have to say about values in this case?

(2) Give a brief description of the African concept of *ubuntu*.

FEEDBACK 9.2

(1) (a) The first reported case dealing with the Bill of Rights that was decided by the Constitutional Court was *S v Makwanyane* 1995 (6) BCLR 665 (CC) (or merely, the *Makwanyane* case).

(b) The Court said the following:

- The Constitution and the Bill of Rights are deeply rooted in the values of the South African community itself.
- When interpreting the Bill of Rights, the Court had to give effect to **indigenous values**.
- *Ubuntu* is the **source** of these indigenous values.
- Since the Bill of Rights should be seen as an attempt to give expression to the values associated with *ubuntu*, the concept of *ubuntu* should be used when the Bill of Rights is applied to restore dignity to ideas and values that have long been suppressed or marginalised.
- The Bill of Rights is part of the African Renaissance, that is the rebirth of African values which had been suppressed or marginalised by colonial powers, and is not a new way of imposing Western values on the peoples of South Africa.

(2) The concept of *ubuntu* is the source of indigenous values. It was mentioned in the postscript to the interim Constitution as being a source of the underlying values of the new legal order in South Africa. It implies a coexistence of human rights and freedoms, on the one hand, and collective duties on the other, because it emphasises the role of the individual as a member of the community. Furthermore, *ubuntu* implies a spirit of humaneness and includes virtues such as compassion, forgiveness and human dignity.

9.4.3 THE INTERNATIONAL RECOGNITION OF HUMAN RIGHTS

The philosophy of modern natural law (the social contract and the idea of fundamental rights and freedoms to which each individual is entitled) soon found expression in the written constitutions of a number of states. Examples are the American Declaration of Independence after the civil war in the United States of America and the written Constitution of France after the French Revolution of 1789. Often great sociopolitical upheavals brought about a complete break with the past.

In the 1940s, after World War II, the term ''human rights'' came to be widely used. The war crimes committed during this war put an end to the idea that states have the sole say in how their citizens are

treated. The **Universal Declaration of Human Rights** (1948) was an international agreement which came about in an attempt to give content to the idea of fundamental rights at the international level. Since then, the concept of human rights has been expanded and established through various international conventions.

Did you know?

A convention is a written agreement between states that creates mutual obligations and duties.

Some of the most important conventions on human rights are the following:

- The International Covenant on Economic, Social and Cultural Rights (1966)
- The International Covenant on Civil and Political Rights (1966)
- The European Convention of Human Rights (1950)
- The African Charter on Human and People's Rights (1981)

The African Charter on Human and People's Rights was adopted by the Organisation of African Unity and became operational in 1986. In 2004 an African Court on Human and People's Rights was instituted to apply the African Charter. Although the Court was expected to start operating in that year, owing to certain logistical problems the opening of the Court was delayed. At the time of writing of this study guide, it had been decided that the seat of the Court would be in Arusha, Tanzania; the eleven judges had been elected and they were in the process of finalising the rules of procedure.

It is envisaged that the Court, when fully functional, will be comparable to similar courts found in Europe and the Americas. Thus individuals will be able to take their governments to the African Court on Human and People's Rights. However, the Court will only have jurisdiction over those African countries which have ratified the protocol to the African Charter on Human and People's Rights which established the Court. At the time of writing the guide, only 24 African states, among them South Africa, had ratified the protocol.

ACTVITY 9.3

Answer the following questions to see whether you understand what you have learnt so far:

(1) How did the Age of Reason (or Age of Enlightenment) change the concept of natural law and how was this relevant to the development of the concept of human rights? Illustrate your answer with examples.

(2) How did *ubuntu* change the concept of human rights in Africa?

FEEDBACK 9.3

(1) During the Age of Reason the idea that human reason is the source of natural law developed. This replaced the earlier belief that natural law had religious origins. Hugo de Groot was the first jurist who held the view that natural law did not derive from God, but from the rational nature of humans themselves. De Groot also believed that this rational nature of human beings enabled them to lay down rules for the functioning of society. Because of these rules, it is possible for an individual to be a member of society by concluding a social contract with other members of society. John Locke stated that in terms of this social contract, the state is obliged to protect the basic rights of every citizen and that the state may be overthrown if it does not fulfil this function. In other words, Locke developed the theory that the state's power is limited. He was also the first to suggest that natural law consisted of the inalienable right to life, liberty and property.

(2) There is a new emphasis on the individual as **part of a community**. This means that the individual receives **rights and freedoms** along with the **duty** to uphold these rights and freedoms in the community. The idea of a coexistence of rights (or freedoms) and collective duties is found in the African Charter on Human and People's Rights. The Charter gives a list of specific duties a person has towards his or her family, society and the African community.

9.5 HUMAN RIGHTS IN SOUTH AFRICA BEFORE APRIL 1994

The injustices in South Africa's past could lead one to believe that human rights became part of South African history only after the fall of apartheid. However, it should be remembered that the policy of apartheid, which led to the violation of people's basic human rights, was implemented through legislation. This legislation also seriously restricted the common law, which was inherently fair and contained elements of natural law. If the history of human rights in South Africa is examined from this perspective, the conclusion that springs to mind is that human rights were part of South African history before the constitutional era, which was introduced in 1994. In the following paragraph, you will learn more about human rights and the common law.

9.5.1 HUMAN RIGHTS AND THE COMMON LAW

It is clear from the above discussion of modern natural law that the idea of a social contract between individuals themselves, and between the individual and the government, developed from the Western natural-law philosophy. The Western natural-law philosophy is one of the pillars of the development and protection of inalienable human rights.

Do you remember?

In section 7.2 in study unit 7 you learnt about the narrow and broad definitions of Roman-Dutch law. If you do not remember, read that paragraph again. According to the broad definition of Roman-Dutch law, the law of the province of Holland formed part of the European *ius commune*, and it therefore included **elements of natural law**.

By applying this knowledge, you should immediately realise that the natural-law philosophy and the idea of natural, inalienable rights form part of our **Roman-Dutch legal heritage**. But, as indicated, parliament was sovereign and not only implemented the policy of apartheid, but also limited the application of Roman-Dutch law, as well as the powers of the courts. Consequently, neither Roman-Dutch law nor the courts were in a position to offer much resistance to apartheid legislation which made provision for discrimination on the grounds of race, detention without trial and limitations on freedom of speech.

However, human rights were also considered important before the apartheid era. We will briefly look at the status of human rights in the two old Boer Republics.

Do you remember?

Before you continue, it is important that you refresh your memory with regard to the two Voortrekker Republics that were established in the 19th century. Reread section 8.5.2 in study unit 8 on the Orange Free State and the *Zuid-Afrikaansche Republiek*.

9.5.2 THE CONSTITUTIONAL CRISIS IN THE *ZUID-AFRIKAANSCHE REPUBLIEK* (ZAR)

The ZAR Constitution of 1858 made no mention of the courts' testing power or of precisely where sovereignty was to reside. (In other words, the Constitution did not state whether the *Volksraad* or the

Constitution was supreme.) Before long, a crisis arose concerning the decisions of the *Volksraad* and whether the courts could test their validity. Under the leadership of Chief Justice Kotze, the courts declared certain *Volksraad* decisions invalid because the correct procedure, prescribed by the Constitution of the ZAR for the adoption of legislation, had not been followed.

In 1897 this led to the dismissal of Chief Justice Kotzé by Paul Kruger, the State President of the ZAR. Kruger called the testing right of the courts a ''beginsel van die duiwel'' (principle of the devil).This incident marked the failure of the courts' attempt to test legislation formally against the ZAR Constitution. The bottom line was that the ZAR Constitution did not even give the courts a formal testing capacity. The principle of constitutionalism was completely denied, in spite of the fact that the Republic had a written Constitution. The *Volksraad* was considered supreme and the will of the majority could not be restricted by the Constitution or by other rules.

Important

It is therefore clear that the mere existence of a constitution does not in itself amount to a recognition of the principle of constitutionalism.

9.5.3 HUMAN RIGHTS IN THE OLD REPUBLIC OF THE ORANGE FREE STATE

Although the idea of individual rights forms part of our common law which has been applied at the Cape since 1652, the first document in South Africa which contained provisions that went some way towards the recognition of human rights was the Orange Free State Constitution of 1854. The Constitution was strongly influenced by the American Constitution and the idea of constitutionalism. (Remember that the American Constitution or American Declaration of Independence was implemented after the American civil war at the end of the 18th century.)

The Constitution of the Orange Free State provided that its *Volksraad* (legislature) would not be completely sovereign (supreme). **Procedural** rules for the promulgation of legislation were laid down in the Constitution and the courts had a **formal testing capacity**. This meant that the courts could enquire whether the procedural rules for the promulgation of legislation had been complied with by the *Volksraad*. The Constitution further guaranteed a number of fundamental human rights such as equality before the law and the right to free association. The Orange Free State, which is regarded as a model state, also accepted the principle of a division of power.

Did you know?

Do you know what the expression ''division of power'' refers to? Division of power is one of the characteristics of a true democracy. It simply means that the different powers of the state are separated. Each arm of the state therefore functions independently of the others to prevent the state from having absolute power. The power of the state is usually divided into three arms, namely the **legislature** (which makes laws), the **executive** (which sees to it that these laws are executed or applied) and the **judiciary** (the courts, which decide legal disputes arising from these laws). (For a more detailed discussion, refer to study unit 7 of ILW1036.) For true democracy to flourish, it is thus very important for the judiciary (the courts) to be independent. If the judiciary is not independent of the other powers of the state, the testing capacity of the courts is easily undermined and the principle of constitutionalism is easily denied.

The Constitution of the Orange Free State also recognised the independence of the judiciary and granted the courts' testing rights (refer to paragraph 9.2 for a discussion of the testing rights of the courts). The Supreme Court of the Orange Free State upheld its independence against the legislative and executive authority with much more success than the Supreme Court of the ZAR.

9.5.4 THE CONSTITUTIONAL CRISIS IN THE UNION OF SOUTH AFRICA

Unlike the Constitution of the ZAR, the 1910 Constitution of the Union of South Africa made explicit provision for the formal testing powers of the courts. The question arises to what extent constitutionalism was recognised. The key to answering this question lies in the constitutional crisis of the 1950s, when the first of the well-known ***Harris* cases** (*Harris v Minister of the Interior* 1952 (2) SA 428 (A)) was decided.

In this case, the **formal testing capacity** of the courts was asserted once again. The Constitution that was applicable when the *Harris* case was decided provided that if the legislature wanted to remove the so-called ''coloured'' voters from the common voters' roll, a two-thirds majority of the Senate and the House of Assembly had to be in favour of such amendment. In the *Harris* case, the Court had to decide whether the prescribed procedure for the adoption of legislation had been followed. It was not the content or reasonableness of the legislation (in this case, the question of racial discrimination) that was at issue here. The Court's viewpoint on the content of the legislation was irrelevant, since the Court only had formal testing capacity. The Appellate Division ruled that the Act was null and void because the provisions of the Constitution regarding the **procedure** for the promulgation of new legislation had not been fulfilled.

It is important to note that in this case the Court had the necessary formal testing capacity and the legislature accepted that it was bound by the rules laid down for its functioning in the Constitution. However, the government side-stepped this limitation of its powers by later ''loading'' the Senate with supporters of the National Party (the ruling party at the time) in order to attain the necessary two-thirds majority when it attempted for a second time to promulgate the same piece of legislation. In a subsequent court case it was decided that, in spite of the National Party's actions, the formal prescriptions of the Constitution had been fulfilled. The court was still powerless to decide on the moral or material content of the legislation in question.

What is the importance of the Harris case with regard to the principle of constitutionalism?

This constitutional crisis, during which ''coloured'' voters were deprived of their vote, makes it clear that the existence of a formal testing capacity of the courts is **not in itself sufficient to protect the basic underlying principles of an open and free democracy**. The full recognition of the principle of constitutionalism obviously requires more than simply the following of the correct procedures when a law is made. The principle of constitutionalism also requires that the **content** of legislation be tested against a bill of rights contained in a constitution.

ACTVITY 9.4

Answer the following questions to test whether you understand what you have learnt so far:

(1) What is the formal testing capacity of the courts? Was this capacity sufficient to protect basic individual rights and freedoms during the apartheid era? Explain your answer with reference to the constitutional crisis concerning the voters' roll during the 1950s.

(2) How did the position of human rights differ in the two old Boer Republics?

(3) Study the following scenario and then choose the correct answer from one of the four available options:

It is 1962. Legislation is passed in the Republic of South Africa that Chinese merchants may not conduct business in designated white areas. Parliament does not follow the correct procedure as prescribed in the Constitution when adopting the legislation. Mr Chang is very unhappy about the new legislation. His family has had a supermarket in a designated white area in Kimberley for generations. He takes the matter to court. Keeping in mind the principle of constitutionalism, what will the outcome of the case be?

(a) There is full recognition of constitutionalism and the court has full testing capacity. The

legislation will be declared invalid because the correct procedure was not followed in the adoption of the legislation and the content of the legislation is unreasonable.

(b) There is partial recognition of constitutionalism and the court has formal testing capacity. Because the correct procedure was not followed in the adoption of the legislation, the court will declare the legislation invalid.

(c) Constitutionalism is completely denied. The court cannot test the reasonableness of the legislation, but will declare the legislation invalid because the correct procedure was not followed in the adoption of the legislation.

(d) Constitutionalism is completely denied. The court cannot enquire whether the correct procedure was followed in the adoption of the legislation or whether the legislation is reasonable. Nothing can be done for Mr Chang.

FEEDBACK 9.4

(1) Formal testing capacity of the courts means that the courts have no authority to question the content of legislation. Provided that parliament has followed the prescribed procedure, the courts must accept any law, no matter how unjust. Therefore, formal testing capacity is only a partial recognition of the principle of constitutionalism.

No, formal testing capacity alone is not sufficient to protect the basic underlying principles of an open and free democracy. In the *Harris* case (1950s) the Appeal Court ruled that the Act (which would remove the ''coloured'' voters from the common voters' roll) was null and void on the ground that the prescribed procedure for the adoption of the Act (ie the requirement of a two-thirds majority in parliament) had not been followed. The Court could not question the reasonableness of the Act (which entrenched racial discrimination). In the end, the ''coloured'' voters were deprived of their right to vote by ''loading'' parliament with National Party supporters.

(2) In the *Zuid-Afrikaansche Republiek*, human rights were not protected at all. The state had unlimited power and could issue any legislation, even if it violated human rights. The courts had no testing powers and could test neither the content of legislation nor whether the correct procedures had been followed when such legislation was promulgated. In other words, constitutionalism was completely denied.

In the Orange Free State, on the other hand, human rights were protected to a certain extent. The Constitution of the Orange Free State provided that its *Volksraad* (legislature) would not be completely sovereign (supreme). Procedural rules for the promulgation of legislation were laid down in the Constitution and the courts had a formal testing capacity. This meant that the courts could enquire whether the procedural rules for the promulgation of legislation had been complied with by the *Volksraad*. The Constitution further guaranteed a number of fundamental human rights such as equality before the law and the right to free association. In other words, constitutionalism was partially recognised.

(3) This multiple-choice question tests whether you are able to apply your knowledge of constitutionalism and the testing capacity of the courts. When you read the scenario, the first thing to which you must pay attention is, as always in legal history, the time frame. The reason why it is so important in this specific instance is that over the years various constitutions have been implemented in South Africa, in most cases changing the recognition of constitutionalism and the testing capacity of the courts.

Under the 1961 Constitution of the Republic of South Africa there was only partial recognition of constitutionalism. This implies that the Constitution was not supreme. Parliament had to follow prescribed procedures when making laws. When requested to test the validity of legislation, the courts could enquire whether these procedures had been followed because they had formal testing capacity. However, the courts could not judge the content of legislation (see sections 9.1.2; 9.2.1 and 9.2.2). Now, if you apply this knowledge to the facts as set out in the scenario,

you will realise that option (b) is the correct answer. The court would have been able to declare the legislation invalid on the grounds that the prescribed procedure had not been followed. Option (c) is not correct because the 1961 Constitution did not completely deny the principle of constitutionalism.

Do you think the court would have been able to declare the legislation invalid if the correct procedure had been followed when it was passed? The answer, of course, is ''No''. Under the 1961 Constitution the courts could not test the content of the legislation. Under those circumstances, unfortunately for Mr Chang, the court would not have been able to come to his aid.

9.6 HUMAN RIGHTS IN SOUTH AFRICA SINCE APRIL 1994

In chapter 3 of the interim Constitution (the Constitution of the Republic of South Africa 200 of 1993), fundamental rights are set out and entrenched (protected). This interim Constitution became operational in April 1994. The interim Constitution of 1993 was the result of protracted negotiations at a multiparty conference in Kempton Park during which many compromises were reached, for example on affirmative action and the inclusion of a provision on the right of ownership.

The history of the struggle for human rights in South Africa cannot be separated from the international recognition of human rights referred to above. Until recently, South Africa's history was characterised by gross violations of human rights, which went hand-in-hand with the National Party's policy of apartheid and the armed struggle against it. The Bill of Rights contained in the Constitutions of 1993 and 1996 represented a radical break with this period of our history, and finally made South Africa part of the international movement towards the recognition of human rights. **The Truth and Reconciliation Commission** was established in 1996 to determine the extent and nature of previous violations of human rights, to suggest ways of preventing a repetition of those abuses and to right the wrongs of the past.

What is the importance of the Truth and Reconciliation Commission in the development of the South African legal system?

In its report of 2003, the Truth and Reconciliation Commission found that the inability of our courts to take a stand against the onslaught of apartheid legislation was mainly the result of the following:

- the doctrine of parliamentary sovereignty (which had its origins in English law)
- the principle that judges could only administer justice and not create it
- legal positivism

Important

Parliamentary sovereignty means that parliament is supreme and that a judge may not question the content of legislation made by parliament.

Legal positivism means that law and morality must be separated. Judges must apply the law (legislation, common law, etc) even if it is unjust. They may not make or create new law.

In the report, apartheid judges were blamed because they did not always use the available opportunities where legislation was unclear or ambiguous to appeal to common law and to protect the individual against state interference. It was argued that even without a bill of rights, judges and lawyers could have appealed to basic common-law values and rights to protect the individual from intrusive apartheid legislation.

The final Constitution

The final Constitution (the Constitution of the Republic of South Africa, 1996) came into effect in

February 1997 and contains the Bill of Rights in chapter 2. Fundamental (human) rights are entrenched in the final Constitution by, among others, the following provisions:

- the provision that these rights may be amended only if the amendment is supported by at least **two-thirds** of the members of the National Assembly and at least **six (of the nine) provinces** represented on the National Council of Provinces
- the provision that rights may be limited by generally prevailing legal rules (eg general legislation) only if the limitations are **reasonable and justifiable** in an open and democratic society based on human dignity, equality and freedom

Note the following

Various factors must be taken into account in the determination of the reasonableness and justifiability of a limitation, such as:

(1) the nature of the right which is being limited
(2) how important the aim of the limitation is
(3) the nature and extent of the limitation
(4) the relationship between the limitation and its aim
(5) whether the aim of the limitation could be achieved in a less restrictive way

The 1993 and 1996 Constitutions may be regarded as milestones in South African legal history because they finally established full recognition of constitutionalism in South Africa. In other words, the Constitution is sovereign or supreme, and parliament and the courts are bound by the law and are not above it. Parliament is now subordinate to the Constitution, and the courts have the capacity to test legislation on the basis of the Bill of Rights. In other words, parliamentary sovereignty has been replaced by **constitutional supremacy**. The position of the courts has been greatly strengthened. The Constitution is now the yardstick against which all other law must be measured.

ACTVITY 9.5

Study the following cartoon and answer the questions regarding the Truth and Reconciliation Commission to see whether you understand what you have learnt so far:

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Questions:

(1) Who or what is symbolised by the patient? Why do you think the ''patient'' is in need of medical treatment?

(2) What is the significance of the light?

(3) Why are the two doctors identified as ''Tutu'' and ''Boraine''?

(4) What does Tutu mean when he says that the wounds will have to be opened up and cleansed?

FEEDBACK 9.5

(1) The patient symbolises the country of South Africa. South Africa is pictured as a patient in need of treatment because of the injustices of apartheid and the violation of human rights.

(2) The light entitled ''Truth Commission'' signifies that (the history of) South Africa has to be put under the ''spotlight''; in other words, the injustices of the past can only come to light when closely investigated by the Truth and Reconciliation Commission.

(3) The doctors signify the leading members of the Truth and Reconciliation Commission who will oversee the ''surgical investigation''. Archbishop Desmond Tutu was the chairperson of the Truth and Reconciliation Commission and Dr Alex Boraine was the vice-chairperson of the Commission.

(4) The philosophy behind the establishment of the Truth and Reconciliation Commission was that South Africa could not heal itself from the injustices of the past without bringing to light those injustices. In other words, South Africans had to relive those incidents that caused them and others physical, emotional and psychological harm by sharing their experiences with the rest of the country. It was hoped that those who perpetrated the injustices would apologise to the victims, and that the victims would forgive their perpetrators. Only through this process could South Africans learn to forgive and forget and eventually look to the future.

ACTVITY 9.6

Answer the following question to test whether you understand what you have learnt so far:

(1) Is it possible to limit the application of a human right? Explain your answer.

(2) Do you remember the case of *Hassam v Jacobs* which we discussed in study unit 2, section 2.2.2.1? What did the court say regarding the limitation of the rights of Mrs Hassam?

FEEDBACK 9.6

(1) Yes, it is possible to limit the application of a human right, but only if the following factors have been taken into account:

- the nature of the right which is being limited
- how important the aim of the limitation is
- the nature and extent of the limitation
- the relationship between the limitation and its aim
- whether the aim of the limitation could be achieved in a less restrictive way

(2) In the case of *Hassam v Jacobs* the court said that limitation of the rights of Mrs Hassam, in other words excluding her from claiming maintenance and receiving a share of the estate of her husband, would amount to a violation of her right to equality and her right to human dignity. The court ruled that there is no justification for excluding the widows of polygynous Muslim marriages from the benefits of the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act*.

9.7 GENERAL CHARACTERISTICS OF THE SOUTH AFRICAN BILL OF RIGHTS

Now that you have some knowledge regarding the history of human rights, we turn our attention to the vehicle for the protection of human rights in South Africa, namely our Bill of Rights.

The South African Bill of Rights has the following three important characteristics:

- It is comprehensive (many different types of rights are protected).
- It applies both vertically and horizontally.
- It attempts to rectify the injustices of the past.

Each of these three characteristics will now be discussed individually.

9.7.1 THE COMPREHENSIVE NATURE OF THE SOUTH AFRICAN BILL OF RIGHTS

Human rights are commonly categorised into three different groups, namely

- first-generation rights
- second-generation rights
- third-generation rights

Although this classification is open to criticism, it does assists us in identifying the different influences that have had a bearing on the development of human rights in South Africa.

9.7.1.1 First-generation rights

First-generation rights (also called blue rights) are traditionally regarded as typically Western. These traditionally Western rights (all of which also appear in the South African Bill of Rights) are:

- freedom of religion
- freedom of belief and opinion
- freedom of expression
- freedom of movement and residence
- freedom of trade, occupation and profession
- the right to life
- the right to human dignity
- the right to equality
- the right to freedom and security of the person
- the right to privacy

Something to do

Do you have a copy of the 1996 Constitution? Or of the Bill of Rights? If you do, it might be interesting to look up each of these fundamental rights listed above in the Bill of Rights. Write down the number of the section which deals with each of these rights. Why? You will encounter these rights again and again throughout your studies and during your career as a lawyer.

The rights and freedoms which **prohibit the authorities from interfering in the affairs of the individual** are the most easily enforced. (The term ''freedoms'' refers particularly to the general right to be free from governmental interference.) These rights are thus a shield against government interference.

9.7.1.2 Second-generation rights

Other rights in the South African Constitution and the Bill of Rights have, however, moved away from the Western idea of rights that serve as a shield to protect the individual against excessive state interference. The second-generation rights (also called red rights) strive for the **improvement of the socio-economic conditions** of the individual. These so-called socio-economic rights are concerned with the **state's obligation to play an active role in providing certain basic goods and services** if it has the means to do so. In this connection, human rights are sometimes spoken of as a ''sword'' with which to enforce particular government action. The South African Constitution is carefully worded to provide for rights such as

- the right to housing
- the right to basic education
- access to health care

Important

Apart from the fact that first- and second-generation rights include different types of rights (ie civil and political vs socioeconomic), one can also differentiate between these two groups of rights by saying that while first-generation rights prohibit or prevent the state from taking certain actions, second-generation rights force the state to perform certain actions.

9.7.1.3 Third-generation rights

A further aspect which gives the South African Constitution its specific character is the emphasis placed on the **importance of the group**. Group rights include

- the right to form and participate in cultural, religious and language communities
- the right to an environment that is not harmful to the population's health or wellbeing

These rights are sometimes called third-generation rights or green rights. These rights have a definite African orientation.

An interesting provision contained in the Constitution is the one that provides for affirmative action. One of the objects of this provision is to advance ''categories of persons'' who, in the past, were disadvantaged by unfair discrimination.

ACTVITY 9.7

Complete the following table to test your understanding of the three different groups/types of human rights:

GENERATION / CATEGORY OF RIGHT	WHAT IT REFERS TO	COLOUR CODE	EXAMPLES
		blue rights	• right to life • right to equality • right to privacy
second-generation rights			• • •
		green rights	• •

FEEDBACK 9.7

GENERATION / CATEGORY OF RIGHT	WHAT IT REFERS TO	COLOUR CODE	EXAMPLES
first-generation rights	civil and political rights	blue rights	• right to life • right to equality • right to privacy
second-generation rights	social and economic rights	red rights	• right to housing • right to education • access to primary health care
third-generation rights	group rights	green rights	• right to a healthy environment • cultural, religious and language rights

9.7.2 THE HORIZONTAL AND VERTICAL APPLICATION OF THE BILL OF RIGHTS

The South African Bill of Rights differs considerably from traditional Western bills of fundamental rights in that it provides that human rights may be enforced not just vertically, but also horizontally.

What is meant by the vertical application of the Bill of Rights?

The Constitution provides that all organs of state must respect human rights. Thus, we say that the Constitution has **vertical application between the state and its subjects**. This is so because the state is seen as being in a position of power in relation to the individual, who is more or less powerless against the state, without the protection afforded by human rights.

What is meant by the horizontal application of the Bill of Rights?

The Constitution also provides that in certain circumstances, an ordinary person (and this includes a juristic person such as a company) must respect other people's human rights. We may also say, therefore, that the Constitution has **horizontal application between private individuals**. This is so because, unlike the state, individuals are regarded as being on the same level — no individual is in a position of power. The horizontal application of the Constitution means that it is applicable in interactions between private individuals, where such interactions were traditionally regulated by means of common law. The horizontal application of the Constitution has caused and may still cause many changes to South African common law and indigenous law. This is so because there are many instances where both South African law and indigenous law allow individuals to infringe upon each other's rights and freedoms.

For example, the Constitution provides explicitly that the right to equality (the right not to be subjected to unfair discrimination) has horizontal application, and that legislation to enforce this right must be enacted. This means that, in principle, it is not just the government that may not discriminate unfairly against anybody on grounds such as sex, gender, race, belief or disability, but also private individuals as well as private institutions such as clubs or businesses. Recently, the Constitutional Court has decided that in indigenous law individuals may no longer discriminate against each other on the grounds of sex or gender when it comes to succession. Also, females may now inherit from a deceased ancestor.

The other rights contained in the Bill of Rights can apply horizontally if the court finds that a particular right can be horizontally applied in the light of its nature and the duties it imposes.

Important

Look at the following two diagrams. They demonstrate the difference between horizontal and vertical application.

Vertical application can be demonstrated as follows:

state

v
e
r
t
i
c
a
l

individual

Horizontal application can be demonstrated as follows:

individual —— horizontal application —— individual

The South African common law has already recognised many of the rights now entrenched in the Constitution. Examples are

- the right to privacy
- the right to human dignity
- the right to freedom of the person

These rights are traditionally protected by the law of delict, but are now also protected by the Constitution. They could be placed in the same class as those constitutional rights which are considered fit to operate horizontally and to apply between individuals. Rights which place too great a burden on individuals might not be considered suitable to operate horizontally.

9.7.3 RECTIFYING THE INJUSTICES OF THE PAST

The third characteristic of our Constitution is that it attempts to rectify the injustices of our past. For example, the Constitution provides that property (regarded by John Locke as an inalienable fundamental right) may be alienated only after payment of fair compensation. However, it also provides that the history of the acquisition and use of the property and the purpose of the alienation may be taken into account in the determination of what would be fair compensation. The public interest is also emphasised and the rights of the community are protected. Communities are entitled to the restoration of property taken from them after 19 June 1913 (when the first *Land Act* was adopted).

In summary, then, the Bill of Rights in the South African Constitution may be regarded as comprising a mixture of different trends: traditional Western-oriented individual rights (particularly the concept of first-generation rights) on the one hand, and group rights on the other hand. Group rights are linked to the African emphasis on the importance of the community and the group, and participation in the decision-making process.

ACTVITY 9.8

Answer the following questions to test whether you understand what you have learnt:

(1) In section 1.5 of study unit 1 you learnt about the difference between reception, transplantation and imposition. Apply your knowledge of these three concepts to what you have learnt regarding the history of constitutionalism in South Africa by answering the following questions:

   (a) Was parliamentary sovereignty imposed upon our legal system or was there a reception thereof?

   (b) Was the Constitution with its Bill of Rights imposed upon our law, or was there a reception thereof?

(2) Various attitudes towards constitutionalism or limited government are reflected in our legal history. Which of the attitudes were unfavourable towards the protection of the democratic values of freedom, equality and human dignity?

(3) Distinguish between the vertical and the horizontal application of the Bill of Rights.

FEEDBACK 9.8

(1) (a) Parliamentary sovereignty is part of our English-law heritage. On the one hand, one may argue that, like Roman-Dutch law, English law and English institutions were imposed upon the indigenous community in South Africa. On the other hand, one may also argue that English law was willingly received into Roman-Dutch law and that thus parliamentary sovereignty was not imposed.

   (b) The Constitution, with the Bill of Rights, was the outcome of a democratic decisionmaking process and one may infer that it was willingly received and not imposed upon the legal system.

(2) Before it received full recognition in 1994, the principle of constitutionalism was either completely denied as it was at the end of the 19th century in the ZAR or only partially recognised as it was between 1910 and 1994. The constitutional crisis of the 1950s, when the so-called ''coloured'' citizens of South Africa were deprived of their basic human right to vote (a right now entrenched in s 19(3) of the Constitution, 1996), made it clear that the formal testing ability of the court (the partial recognition of constitutionalism) is not sufficient fully to protect the democratic values of freedom, equality and dignity against an unjust legislature. These values can be protected only if the court also has the ability to declare legislation unconstitutional because the content thereof violates basic human rights (the full recognition of constitutionalism).

(3) The South African Bill of Rights applies both vertically and horizontally. The Bill of Rights applies vertically when it regulates interaction between the state and its subjects. The Bill of Rights applies horizontally when it regulates interaction between private persons.

Test yourself

Answer the following self-assessment questions with reference to the material that you studied in study unit 9. The knowledge you gained by doing the activities as you worked through the study unit should help you to answer these questions.

- Does the concept of human rights form part of our Roman-Dutch law heritage? Give reasons for your answer. (3)
- Write a note on the Constitutional Court's view of the role of *ubuntu* in human-rights law. Name the case in which the Court first mentioned *ubuntu*. (4)