

DEPARTMENT OF JURISPRUDENCE

**HISTORICAL FOUNDATIONS OF
SOUTH AFRICAN LAW**

HFL1501

Tutorial Letter 501

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PREFACE

Historical Foundations of South African Law (HFL1501) deals with the external and internal history of South African law. It provides an overview of the sources and factors that have contributed directly or indirectly to the development of the South African legal system against the backdrop of the Constitution of the Republic of South Africa, 1996. It further gives an outline of the Roman foundations of South African private law, explaining the historical development of certain private-law rules and principles. The influence of the Constitution on the common-law principles of the law of property and obligations is discussed and provides insight into the current legal principles guiding the transformation of South African law.

Because South Africa has a multi-cultural society, South African law is built on various legal systems. The South African legal system is multi-layered. It is an uncodified, hybrid legal system that relies not only on the Constitution – the supreme law of the land – but on different sources of law. These sources of law include legislation, case law, common law and indigenous African law. The South African common law mainly consists of Roman-Dutch law as influenced by English common law and adapted over the centuries by local legislation and judicial precedent. South African law is based on three main pillars, or composed of three main components, namely an African, Western and universal or human-rights component. In this module, we trace the external legal history of the three main components of South African law.

The internal legal historical section of the module focuses on the historical foundations and basic principles of the law of property and obligations and the relevance of these foundations in current-day practice. We explain terms, rules, concepts and established principles related to the Roman law of property and obligations. In addition, legal problems are identified and solved within the context of modern South African law.

The module illustrates the necessity of the continuous development of the South African law within the framework of its historical foundations and explains this development with reference to the interaction between the Constitution and the historical foundations of South African law.

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

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INTRODUCTION TO THE MODULE

As indicated in the preface, in this module you will learn about the external and the internal history of South African law. The external history deals with the origins of the South African legal system, that is, how and where our law began.

South Africa has a multi-cultural society and its uncodified, hybrid legal system is founded on various legal systems. Apart from the Constitution, the supreme law of the land, the law may be found in legislation, judicial precedent, the common law, custom and indigenous African law. The external history in this module traces the historical development of the three main components of the South African legal system, namely an African, a Western and a human-rights component. Broadly speaking, the African component comprises indigenous African law; the Western component consists of Roman, Roman-Dutch and English law; and the universal, or human-rights component, comprises human-rights law.

In turn, the internal legal history deals with the origins and development of specific legal rules and principles of the legal system within the framework of the external legal history. In this module we address the Roman foundations of two areas of the law in which the historical sources play a particularly significant role in current-day practice, namely the law of property and obligations.

The module illustrates the necessity of the continuous development of the law against the background of its roots and explains this development with reference to the interaction of its historical foundations and the Constitution.

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 true perspective of the sources from which our law developed. A proper understanding of the roots of one's legal system makes it possible to undertake meaningful law reform. You must remember that the law develops with a community in order to satisfy the community's needs and to keep tread with the advances in fields like medicine, science and technology. 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 that are part of daily legal practice were originally formed, you will not be able to understand them properly.

PART I

The origins of South African Law

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LEARNING UNIT 1

Setting the scene



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- explain the difference between external and internal legal history
- discuss the different components of South African law
- describe the relationship between these components
- analyse the reception phenomenon in the context of South African law

In this learning unit, we discuss certain concepts that you will encounter throughout this study guide that will help you to understand the historical development of the law.

1.1 EXTERNAL AND INTERNAL LEGAL HISTORY

This module deals with the external and the internal history of South African law.

The **external history** of the law traces the sources and factors that 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 external legal history sheds light on the internal history of the law.

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.

Political, constitutional, economic, sociological and environmental events influence the way people view their world and, consequently, the development of their legal system. The following practical examples illustrate the relationship between external and internal legal history:

The **policy of apartheid**, implemented by the National Party, was a political event in the external history of our law. 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.

The establishment of **trade unions** was an economic event in the external history of our law 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. 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.

1.2 THE DIFFERENT COMPONENTS OF SOUTH AFRICAN LAW

South Africa has a complex legal system and legal pluralism prevails in this country. To understand the history of South African law, there are two important concepts that you must come to grips with: “legal pluralism” and “a mixed or hybrid legal system”.

Let us first take a closer look at **legal pluralism**. South Africa’s multi-cultural society consists of various communities – such as the Hindu, Muslim, indigenous African and, broadly speaking, Western or European communities. Therefore, various systems of law are applied in South Africa, but not all of these systems are officially recognised. The official state law, which forms the foundation of the South African legal system, is Roman-Dutch law as influenced by English law. Until the 1990s this was officially the only law of South Africa. However, indigenous law is now recognised in the Constitution as part of the South African legal system. We will see more about the history of the recognition and application of indigenous law in learning unit 2.

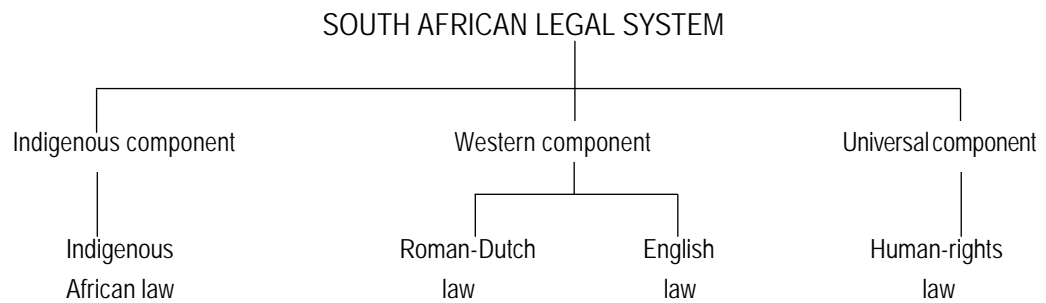
The second important concept is a **mixed or hybrid legal system**. The South African legal system originated in different legal traditions and therefore has characteristic features of diverse other legal systems. The two main legal traditions on which South African law is built, are the **civil- (Roman) law tradition** and the **English common-law tradition**. The civil-law tradition became relevant in South Africa when Jan van Riebeeck started the refreshment station at the Cape in the 17th century, and the common-law tradition when the British occupied the Cape in the 18th century. The African tradition was later added to this mix of legal traditions, when the Constitution officially recognised indigenous law as a part of the South African legal system.

Now, does this mean that various legal systems are officially applied in South Africa? The answer is “no”. We have a **single South African legal system**, which has distinctive features of Roman-Dutch law, English law and now also indigenous African law. But what about **human-rights** law? In learning units 6 and 7 you will learn how and when human-rights law became part of our law. You must always bear in mind how important this facet of our legal system is. In *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex Parte President of the Republic of South Africa and others*¹ the Constitutional Court stated: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”

Bearing in mind what has been said above, it should become clear that there are in essence **three components** of South African law: an African component (because of the indigenous African law influence); a Western component (because of the Roman-Dutch and English law influences) and a universal component (because of the influence of human-rights law). We will discuss the historical development of our complex legal system under these three headings.

This is a graphic representation of our law:

¹ 2000 (2) SA 674 (CC) para [44].



African law dates back so far that we say that it has existed since time immemorial. The earliest origins of indigenous African law cannot be specifically pinpointed, because African history, including the history of African law, is essentially preliterate history; that is, a history of societies without writing.

The first origins of the Western component of our law may be traced back to the foundation of Rome in the 8th century BC. In the 4th century AD, 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. We follow the origins of our law in the Western Empire. The Eastern Roman Empire played a role in the development of South African law only until the death of Emperor Justinian in the 6th century AD. After that period, we speak of the Eastern history of the law, which is not covered in this module.

The universal component of our law may be traced back to the rise of the natural-law theory. Natural-law theory is a legal philosophical school of thought that says that law must always be subject to testing against a higher norm of some kind. As we will see in learning unit 7, natural law was originally developed by the ancient Greeks and Romans, was later taken further by the Christian church fathers in medieval times, and was eventually adopted by liberal scholars whose thinking would eventually influence the birth and global spread of human rights. Bear in mind, though that in a South African context we also have to look at African values. This will be discussed in detail in learning unit 7.



NOTE

There is another important factor which, over the years, has shaped the development of all three components of our law, and which broadens our perception of the origins of our law, and that is religion. Legal-historical discussions usually focus on the influence of canon law (the law of the Catholic Church), Protestantism and perhaps even Judaism. But today, in our country, there are many different religions and religious legal systems that govern the lives of South Africans. It is specifically in the field of private law, and more importantly, in marriage and succession, that these personal religious laws have an impact on the lives of people. Although all 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 on the Recognition of Islamic Marriages.

In learning unit 2 we will explore the history of Islamic law. Islamic law regulates the lives of approximately one-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. Recently, the application of this system of law and the conflict between the values that form the foundation of Islamic law and of Western law have come under the spotlight through various cases tried in our high courts.

1.3 THE SOURCES OF LAW: THE RELATIONSHIP BETWEEN THE DIFFERENT COMPONENTS

The sources of law indicate where you can find the law, in other words, what should you consult if you want to know what the law says about a certain legal problem. In order to determine the relationship between the different components of the law, you have to look at the sources of 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.

The main sources of our law are the Constitution of the Republic of South Africa, 1996 (or, for purposes of this module, simply the Constitution); legislation (the primary authoritative source of law); court decisions; common law; custom; and indigenous African law. In this part, we will first focus on the development of the historical sources of our law. Then, in learning unit 7, we will learn more about the role of the courts and legislation in the development of our law.



NOTE

“Customary law” has two meanings. It may refer to customs and usages that have existed for a long time in a community, are uniformly observed, reasonable and certain and that a court of law will uphold. (You will learn more about this in the module *Introduction to Law ILW1036*.) In turn, “customary law” may also refer to the laws of the indigenous African people. In fact, the Constitution interchangeably refers to indigenous African law as “customary law” and as “indigenous law”. In this module we prefer to use the term “indigenous law” or “indigenous African law” to avoid any confusion.

Before the introduction of the 1996 Constitution, indigenous African law was not recognised as a source of law. Roman-Dutch law, as influenced by English law, was regarded as the primary legal system, while indigenous African law was merely regarded as a secondary legal system with limited application. However, as you are aware, our society experienced drastic changes in the 1990s. These changes also had an impact on our legal order. The **Constitution introduced a new human-rights culture**, protecting the fundamental rights that every person enjoys by virtue of the fact that he or she is a human being. Importantly, the Constitution also changed the secondary position of **indigenous law** and added it to the sources of South African law. In part I, learning unit 2 you will learn how section 211(3) of the Constitution safeguards the application of indigenous African law when it determines: “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

As indicated, the Constitution recognises the **common law** as a source of South African law and, in several provisions, compels the courts to develop the common law.² The common law is regarded as the historical component of our law. But what exactly constitutes the common law of South Africa? In the courts and in academic writing Roman-Dutch law is regarded as the common law and its rules, precepts and principles are looked upon as the basis of the legal system. The common law has its roots in both the Roman- (civilian) and English common-law traditions and consists mainly of Roman-Dutch law, influenced by English common law, adapted over the centuries by local legislation and judicial precedent (case law).

More importantly, the common law of South Africa is **not an invariable, unchangeable element** of the legal system. 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. The courts have shown that where the need arises, they are prepared to adapt or abolish the common law to suit the needs of a developed society and to conform to present-day constitutional principles. In *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited*,³ the Court pointed out with regard to a decision of the Supreme Court of Appeal: “The court ... was doing what appellate courts ought to do: it was moulding the common law according to justice and good sense in accordance with modern requirements.” It quoted with approval, the *dictum* in *Pearl Assurance Co v Government of the Union of South Africa*⁴ that characterised Roman-Dutch law as “a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society”.



NOTE

“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”.

Does this mean that the courts disregard the other components of our legal system in the development of the law? This is certainly not the case. Indigenous African law plays an increasingly important role in the development of the legal system. For example, in the decision in *Le Roux and Others v Dey*,⁵ the Constitutional Court noted (with regard to the Roman-Dutch origins of defamation) that “similar roots are to be found in [African] customary law and tradition, but their interrelation with the Roman-Dutch remedies, and their melding into the single system of law under the Constitution, requires mature reflection and consideration ...”. Further, in *Dikoko v Mokhatla*⁶ the Court stated: “Although *ubuntu-botbo* [an indigenous law principle] and the *amende honorable* [a Roman-Dutch law remedy] are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal.”

² S 8(3), 39(2) and (3) and 173.

³ 2015 (3) SA 479 (CC) para [142].

⁴ 1934 AD 560 563.

⁵ 2011 (3) SA 274 (CC) para [200].

⁶ 2006 (6) SA 235 (CC) para [116].

You should always remember that the Constitution, which contains a Bill of Rights, is the **supreme law of the land**. It establishes principles against which all other law should be tested. The Constitution recognises both the common law and indigenous African law as sources of law and prescribes how these sources must be applied. All law, whether you find it in legislation, court decisions, the common law, customary law or indigenous African law must conform to the Constitution. Section 8 of the Constitution states that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. Section 39(2) further states that “[w]hen interpreting any legislation, and when developing the common law or [African] customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. Any law that is in conflict with the Constitution may be developed to bring it into line with the Constitution, or it may even be abolished.

1.4 THE RECEPTION PHENOMENON

By now you should realise that there are several legal systems that had an impact on the development of the South African legal system. A question that comes to mind is how these legal systems became part of our law? There are different ways in which a legal system may become applicable in a territory. These include through reception, transplantation and imposition.

- **Reception** refers to the willing 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 that already has an existing legal system.
- **Transplantation** means the importation or introduction of a legal system into a territory that has no legal system.
- **Imposition** means imposing a legal system on a territory that already has an existing legal system – against the wishes of the local inhabitants.

Here are some practical 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. This is not correct. When Jan van Riebeeck (the Dutch official who first established a Dutch trading post at the Cape) came to the Cape, there were indigenous legal systems in existence that were applied by the indigenous communities. 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, had no legal systems at all. Therefore, one cannot speak of the transplantation of Roman-Dutch law.

Should we then say that Roman-Dutch law was received into the existing indigenous law? Once again, the answer is “no”. A true reception implies that the recipients have a desire to receive the new legal system. The indigenous population certainly had no desire to receive the Roman-Dutch law as their law. It would therefore be more correct to say that Roman-Dutch law was **imposed** on the indigenous communities.

There are many examples of the process of reception in our legal history. The oldest example would be the reception of **Roman law** in Western Europe, including in the Province of Holland. In addition, **English law** was willingly received in South Africa by the Cape settler community, especially in those instances where the existing Roman-Dutch law could not fulfil the needs of the 19th-century Cape community.

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 lengthy 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.

Reception of law has two meanings:

- **Practical reception:** The reception of the actual rules (the content) of a legal system.
- **Scientific reception:** The reception of the scientific system of a legal system. In other words, the reception of the concepts, categories, principles and divisions (the structure) of a legal system.

An example of the practical reception of English law in South Africa is the English Companies Act, which was adopted in its entirety and applied here. An example of the scientific reception of Roman law in South Africa (and in numerous European countries) is the distinction between public and private law.



ACTIVITY 1.1

(1) The aim of this question 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; global warming; recognition of political rights in the 18th century; the rise and spread of feminism; the recognition of group rights in the 1996 Constitution; recognition of the rule that a husband incurs criminal liability for raping his wife.

External legal history	Internal legal history

(2) Answer the following questions to see whether you understand the discussion so far and whether you are achieving the outcomes set out at the beginning of this learning unit:

- (a) The application of which religious legal system has recently come to the attention of the courts because of the conflict of values in the South African legal system?
- (b) This led to an investigation by the and a proposed

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

- (i) imposition
- (ii) transplantation
- (iii) reception
- (iv) none of the above

FEEDBACK 1.1

- (1) 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.

External legal history	Internal legal history
Constitutional event: The French Revolution of 1789	Recognition of political rights in the 18th century
Sociological event: The rise and spread of feminism	Recognition of the rule that a husband incurs criminal liability for raping his wife
Environmental event: Global warming	The recognition of group rights in the 1996 Constitution

- (2) (a) Islamic law.
 (b) This led to an investigation by the **South African Law Reform Commission** and a proposed **draft bill on the recognition of Islamic marriages**.
- (3) This is an example of a multiple-choice question. When you answer multiple-choice questions, make sure that you read the question very carefully. Then look at the different possible answers. You should know that indigenous African law already applied when Roman-Dutch and English law made their first appearance in South Africa. Indigenous law could therefore not have been imposed or received in South Africa. It is probably true that it was transplanted. You will learn in learning unit 2 that, for purposes of this module, we regard the laws of the different indigenous population groups as a unit. It is therefore safe to say that indigenous law (including the law of the Khoi and San peoples) was transplanted in an area where there was no existing legal system. Your answer should have been (ii).

1.5 CONCLUSION

This concludes the first learning unit. In the units that follow, you will learn more about the development of each of the three components of South African law. You will learn how knowledge of the political, constitutional, economic, sociological and environmental events in our history enables you to understand how the hybrid South African law developed. In learning unit 2, we will start with a discussion of the African component, which is perceivably the oldest component of our law.

SELF-ASSESSMENT QUESTIONS

Answer the following self-assessment questions on the material that you studied in learning unit 1. Make sure that you answer these questions to the best of your ability.

- Describe what an “uncodified legal system” means.
- Describe what the courts understand by “common law”.
- Explain what is meant by the three components of South African law.
- Identify one religious legal system.
- Distinguish between reception, transplantation and imposition and give an example of each from South African legal history.

LEARNING UNIT 2

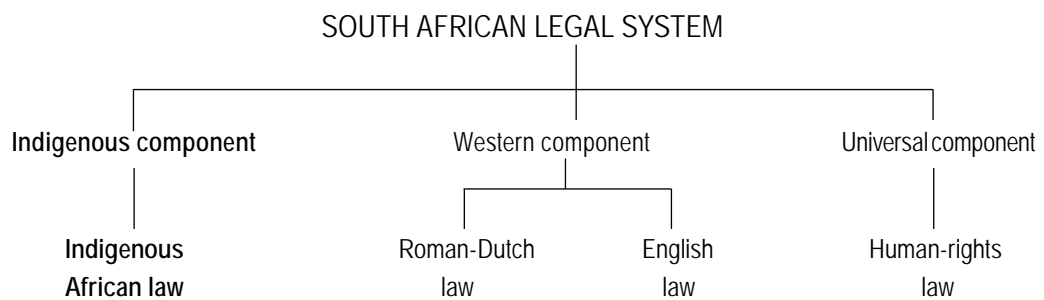
The African component and Islamic law



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- discuss the importance of oral traditions in the study of pre-literate history
- analyse the effect of colonialism on the recognition and application of indigenous law
- explain how the Constitution affected the recognition and application of indigenous law
- explain how the Constitution affected the recognition and application of Islamic law



You know by now that the South African legal system consists of three main components, namely an African component, a Western component and a universal component. In this learning unit, we concentrate on the African component and on Islamic law.

As indicated in learning unit 1, legal pluralism prevails in South Africa, which means that various systems of law are applied. Importantly, though, not all these legal systems are officially recognised. While legal effect is given to some of the legal institutions (especially related to marriage) of some South African communities, it is only indigenous law which, together with the Roman-Dutch common law, is officially recognised and constitutionally protected as a source of South African law.

This learning unit deals with the political, economic, social and constitutional factors that have contributed to the recognition and development of indigenous law. Although Islamic law does not form part of the African component of our law, we will also briefly discuss its historical development here.

2.1 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 there is a great variety of indigenous legal systems, 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.



NOTE

Bantu speakers form a broad linguistic group that originated in West Central Africa, and from there 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 appears that the Bantu speakers came to South Africa in approximately AD 500.

As mentioned above, indigenous law developed a 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 pre-literate people is passed on from one generation to the next and how such history is reconstructed by scholars. You will also learn about the impact of colonialism on the recognition and application of indigenous law and about the impact of the Constitution of the Republic of South Africa, 1996.

2.1.1 The pre-colonial era

• *Legal history and oral traditions in pre-colonial Africa*

The Bantu speakers have a pre-literate tradition, which is a tradition without writing. Accordingly, until approximately seven decades ago, there were no written records of their history or their law. Nevertheless, the absence of written records does not mean that there was no history. It is possible to reconstruct the unwritten legal history of Southern Africa by studying 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 that has been handed down from generation to generation.) Oral information is preserved through songs, legends and epic poems, which are orally 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 pre-literate community’s past.

Until the 1950s, pre-colonial history in Africa was a much neglected part of historical research, since it was believed that history could be based on written documents only. Historians chose not to research the unwritten history of Africa, because of the possibility that historical facts could be **distorted** when recounted orally; human memory alone was regarded as **unreliable**; and there was uncertainty about what **method** to use to process oral information in order to reconstruct the history of pre-literate communities.

These objections to the study and teaching of pre-literate African history were overcome by

- making use of an **interdisciplinary approach**, by using the source material of other disciplines such as ethnography and archaeology; and
- by the **critical analysis** and **comparison** of various oral accounts to substantiate the information.

Today, indigenous law has, to some extent, been recorded through legislation, codification and restatement. However, it is important to bear in mind that it is still essentially oral law. Its natural development has not ceased. It still develops within the indigenous communities and is still being orally transmitted from generation to generation. That is why field research has to be conducted in indigenous communities to establish what the real living indigenous law is.

- ***The Cape 1652–1795***

Jan van Riebeeck came to the Cape in 1652 to establish a trading post and refreshment station for the Dutch East India Company. The Company's judicial administration of the Cape during this period was not well ordered. The courts were staffed by laymen. As a result, the administration of justice in the interior and the application of indigenous law were not high on their agenda.

Although the establishment of the refreshment station may be viewed as the first organised intrusion on the South African indigenous cultures, for the purposes of the history of indigenous law, the pre-colonial 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 law and institutions largely continued to exist without interference from the Dutch settlers.

2.1.2 The colonial period

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 so-called "barbarous" laws and customs. Generally, a policy was followed that did not give recognition to indigenous law. In those instances where indigenous law was recognised, it was subject to the strict application of a repugnancy clause, which determined that indigenous law would apply only in as far as it was not contrary to the Western notion of public policy and natural justice.

In 1878 a codification of Zulu law was adopted in Natal and in 1883 a code was adopted for the Transkeian Territories (which formed part of indigenous criminal law of the Colony of the Cape of Good Hope). The Orange Free State formally recognised indigenous law in 1899.

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 post-colonial era

It is important to remember that we are discussing external legal history, in other words, the political, constitutional, economic, sociological and other factors that influenced the development of our legal system. The history of the development of indigenous law

in the post-colonial era provides us with a 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 since the early 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 legislation, which was aimed at keeping blacks in a position of subordination and which also had an impact on the development of indigenous law. The most important of these was the **Black Administration Act 38 of 1927**. (You will learn more about the contribution of the national liberation movements in the establishment of a constitutional democracy in learning unit 6.)

- ***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. Naturally, the diversity in the colonial legislation had led to injustices in the administration of justice. The Act provided for the limited recognition of indigenous law throughout the Union of South Africa, subject to a repugnancy clause in terms of section 11.

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, thereby implementing a national system of indirect rule. In line with the prevailing social and economic segregation at that 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 commissioners' court was instituted in an area, blacks were no longer allowed to approach the magistrates' court of the area. Officials presiding in 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.

- ***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 34 of 1986** 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 in the Magistrates' Courts Act 32 of 1944 and eventually in the **Law of Evidence Amendment Act 45 of 1988**. This latter Act is still applicable and is particularly interesting because it does not require that the parties to a suit have to be black before indigenous law may be applied.

The legislation referred to above limited the application of indigenous law by determining where, when and how indigenous law could apply. As a result of the implementation of these Acts, indigenous law was adapted and became distorted.

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. These courts 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. This Bill has been re-drafted several times due to concerns, among others, that it compromises the rights of women and children. The latest draft, the Traditional Courts Bill (B1-2017), has not yet served before Parliament.

2.1.4 The constitutional era

The introduction of a new constitutional democracy brought about important 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. Section 211(3) of the Constitution provides that: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." Theoretically, this puts indigenous law in the same position as the Roman-Dutch common law.

In practice, the application of indigenous law is, therefore, subject to the Constitution and other legislation that deals with indigenous law. The fact that indigenous law is subject to the Constitution means, among others, 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 and others v Magistrate, Khayelitsha and others; Shibi v Sithole and others; SA Human Rights Commission and another v President of the Republic of South Africa and another*¹ (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 it should therefore 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 promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. The purpose of the Act 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; and
- to give effect to the judgement of the Constitutional Court in the case of *Bhe*.

¹ 2005 (1) BCLR 1 (CC).

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 that 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 that is against the Constitution is slowly being amended or abolished. An important example of this law reform is the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. In the preamble to this 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".

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 now make it compulsory for students to take a course in indigenous law as part of the LLB degree.



ACTIVITY 2.1

To test whether you understand what you have learnt so far, answer the following questions regarding indigenous 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 an Act that was promulgated because of such policies.
 - (b) What was the general effect of this Act on the development of indigenous law?
- (2) (a) How can the Constitution influence the development of indigenous law?
 - (b) Give one example of how this has happened in practice.

FEEDBACK 2.1

- (1) (a) The Black Administration Act.
 - (b) Through the years, indigenous law was adapted and became distorted.
- (2) (a) In terms of the Constitution the application of indigenous law is subject to the Constitution. Therefore, indigenous-law rules and principle that 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 extra-marital children and that it should be abolished. As a result, the Customary Law of Succession and Regulation of Related Matters Act of 2009 was promulgated, which abolished the indigenous-law rule of male primogeniture as far as it applies to the law of succession.

2.2 ISLAMIC LAW

As indicated in learning unit 1, there are various religious legal systems that apply in South Africa, but which are not officially recognised as part of our law. In this section we will tell you briefly how one such system, namely Islamic law, came to apply in South Africa.

• *Before the constitutional era*

Muslims first reached the Cape of Good Hope in the 1650s when the Dutch East India Company recruited soldiers in Ceylon (today Sri Lanka) to protect the newly established Dutch settlement. From the earliest days of the Dutch settlement at the Cape, the personal laws of the Muslims were not recognised. This caused grave hardship, not only for spouses in Muslim marriages, but also for the children of such marriages, who were regarded as having been born out of wedlock.² Although recent 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 the Western common law was especially felt in areas such as marriage and the law of succession.

But what are these conflicting values?

Initially, the attitude of the courts was that Muslim marriages could not be recognised, because they are potentially polygynous³ and, therefore, against public policy. In the seminal decision of *Ismail v Ismail*,⁴ for example, the Appellate Division (as the Supreme Court of Appeal was formerly known) found potentially polygynous Muslim marriages immoral and against accepted customs and usages. Ironically, the Court held that non-recognition of Muslim marriages would not result in actual suffering.

• *The constitutional era*

The attitude of the courts changed and 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*⁵ and *Amod v Multilateral Motor Vehicle Accidents Fund*.⁶ In the latter case, the Supreme Court of Appeal for the first time 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, freedom and diversity must always be at the forefront when the Constitution is interpreted.

In the 2004 decision of *Daniels v Campbell NO and others*,⁷ 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.⁸

2 At the time, children born out of wedlock did not have the same rights and legal remedies as children born in wedlock (ie born when the father and mother are married). This distinction no longer exists, as s 9(3) of the Constitution prohibits discrimination on the basis of birth.

3 Polygyny refers to the practice where a man is allowed to have more than one wife.

4 1983 (1) SA 1006 (AD).

5 1997 (2) SA 690 (C).

6 1999 (4) SA 1319 (SCA).

7 2004 (7) BCLR 735 (CC).

8 Monogamy refers to the practice where only one man and one woman are allowed to be married to each other at the same time.

In 2009, in the decision of *Hassam v Jacobs NO and others*,⁹ the Constitutional Court declared that section 1 of the Intestate Succession Act 81 of 1987 was constitutionally invalid, because it excluded widows in polygynous marriages from the benefits of the Act. It held that this defect should be remedied by reading in the words “or spouses” after each use of the word “spouse”. Spouses in a polygynous Muslim marriage should be afforded the same benefits enjoyed by the surviving spouses in a *de facto* monogamous Muslim marriage. Importantly, the Court held that for any estates that had not been finally wound up, the declaration would have retrospective effect to 27 April 1994.

In short, the court held that the exclusion of “spouses in polygynous marriages” from the benefits of the Intestate Succession Act is inconsistent with the foundational right to equality before the law and equal protection of the law. This discrimination against women in polygynous marriages is unjustifiable and amounts to a violation of their right to equality and human dignity.



NOTE

It is important to understand that these judgements do not change the fact that Islamic law is still not recognised as a source of law in South Africa.

Finally, the South African Law Reform Commission, in a proposed Bill on the Recognition of Islamic Marriages, has recommended that polygynous Muslim marriages be recognised. The Bill makes provision for, among others, the status and capacity of the spouses and the dissolution of Muslim marriages. Parliament has not yet approved the Bill.



ACTIVITY 2.2

Answer the following questions to determine whether you understand 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 under Islamic law to Malik for 20 years. They have three children. In 2003 Malik takes a second wife, Mariam, whom he marries under Islamic law. Malik dies in 2005 and leaves behind his two wives and the children from his first wife. Malik does not leave a will, in other words, he dies intestate.

- (a) If the estate is finalised in 2005, will both wives be able to inherit a portion of his estate? Explain your answer.
- (b) Would the position be any different if Malik’s estate had not yet been finalised in 2009? Explain your answer.

FEEDBACK 2.2

- (1) In terms of the Constitution, indigenous law is officially recognised as a source of South African law. Islamic law is not yet officially recognised as a source of law in South Africa. However, the Constitution makes it possible for religious laws to be recognised and the Law Reform Commission has proposed a Bill on the Recognition of Islamic Marriages.
- (2) (a) The answer is “no”. The law as governed by the Constitutional Court decision in the case of *Daniels v Campbell NO and others* will apply. In that case the

⁹ 2009 (5) SA 572 (CC).

court held that the natural interpretation of the word “spouse” in the Intestate Succession Act 81 of 1987 should include only partners in a monogamous Muslim marriage. Therefore, only the first wife, Azeza, will be able to inherit. Malik’s marriage to Mariam will not be recognised as a valid marriage.

- (b) The answer is “yes”. Remember that the decision in the *Hassam* case had retrospective effect. This meant that, if the estate had not been finally wound up by 2009, the *Hassam* case will prevailed and both women will inherited.

2.3 CONCLUSION

This concludes our discussion of the development of the African component of our law. But this is not the last time indigenous law will be mentioned in this module. You will also come across Islamic law again. In learning unit 6, we will discuss how the liberation movement in South African history eventually contributed to the recognition of indigenous law as a source of our law alongside the Western common law.

SELF-ASSESSMENT QUESTIONS

Answer the following self-assessment questions on the material that you studied in learning unit 2. Make sure that you answer these questions to the best of your ability.

- Explain why historians neglected African history.
- Explain the meaning of “indigenous law”.
- What is meant by the “repugnancy clause”?
- Explain whether the repugnancy clause is still applicable today.
- 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.

LEARNING UNIT 3

The Western component: Roman legal history until the 11th century



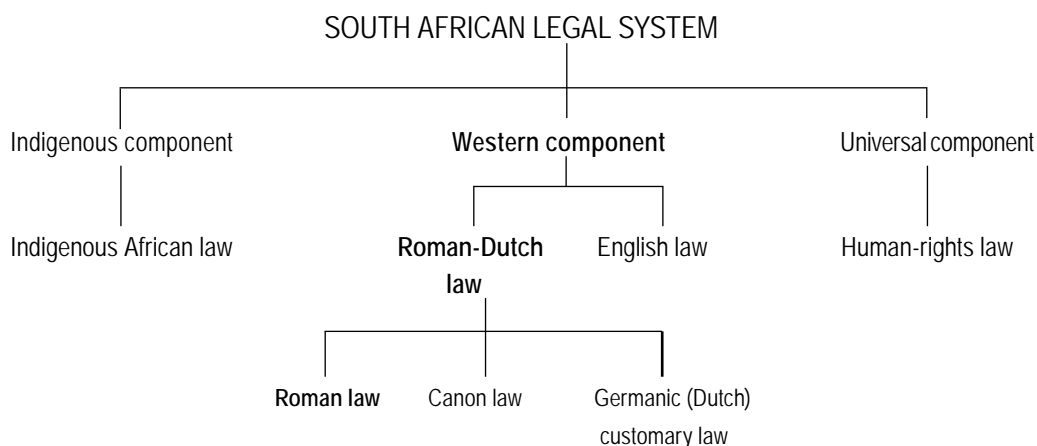
LEARNING OUTCOMES

After studying this learning unit, you should be able to

- describe the importance of Roman law for South African jurists today
- explain the importance of ancient Greek philosophical thought in the Western legal tradition
- discuss how Roman law developed during the four political eras of the Roman Empire
- explain the importance of the *Corpus Iuris Civilis* for modern jurists

Learning unit 3 will introduce you to an important part of the Western component of the law, namely Roman law. As indicated in learning unit 1, Roman law forms part of Roman-Dutch law. In this learning unit we will concentrate on Roman law and its survival in the early Middle Ages (until the 11th century AD).

A graphic representation of the component that we will study in this unit is given below:



In learning unit 1 we explained why Roman law is still relevant today, more than 1 500 years after the Western Roman Empire came to a fall. Although Roman law as an independent legal system no longer applies anywhere in the world, our courts still recognise it as an important part of the South African common law. Even today, judges rely on substantive Roman law. Thus, in a recent decision of the Supreme Court of Appeal in *Hendricks v Hendricks and others*,¹ the Court referred to the *Institutes* of Justinian (a source of Roman law compiled under the instruction of the Emperor

¹ 2016 (1) SA 511 (SCA) para [6].

Justinian) with regard to personal servitudes, and pointed out that Justinian's view was adopted by Grotius, Leeuwen and Van der Linden (old writers on Roman-Dutch law) and then accepted in South African case law.² Also, the *dictum* of Judge Madlanga of the Constitutional Court regarding the historical development of a private-law rule, illustrates the continued relevance of Roman law: "The rule has its origins in classical Roman law ... was carried through to Roman-Dutch law, reference to it being made by various old authorities Our common law is based on the same Roman law rule and the rule has been recognised in local case law as far back as 1830."³

Does this mean that Roman law forms the sole foundation of our law? This is certainly not the case. As indicated in learning unit 1, it is important always to bear in mind that Roman law is not the sole determining factor in legal development in South Africa. Moreover, the courts do not rigidly follow Roman or Roman-Dutch law and are prepared to adapt the law to the needs of society and in line with constitutional demands in accordance with section 39(2) of the Constitution.

You should bear in mind that the legal systems of many European countries (such as Germany, France, the Netherlands, Italy and Spain) are based on Roman law, even though their legal systems are now codified. These are known as civil-law legal systems. South Africa has a hybrid or mixed legal system (like those of Scotland, Sri Lanka and Zimbabwe), which shows a mixture of Roman law and English or common-law influences. This common historical foundation makes it possible for our lawyers to draw on the wisdom of other lawyers who practise systems of law that also have their roots in Roman law. Lawyers often have to seek solutions for new problems. Knowledge of the civilian roots of our legal system will ensure that you are able to work with other civil-law legal systems and that you are able to take note of the way they have solved legal problems. In other words, understanding Roman law will make comparative legal research with foreign civil-law systems easier. You will learn more about the common historical foundation of the civilian legal systems in learning unit 4.



NOTE

You should know that the roots of critical thinking in the Western tradition are found in ancient Greek thought. Although the content and structure of our law did not have their origins in Athens, Athens was the source of critical thinking about the ideals that inspire the Western legal tradition. 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. To this day, the ideal of a scientific and rational legal system forms the cornerstone of the Western legal tradition.

- ***The Roman political structures and the periods in the development of Roman law***

Although we are primarily interested in Roman legal development, you know by now that a legal system functions within a society and has to keep up with societal changes. We therefore require an integrated perspective on Roman society, politics and law throughout Roman history.

² See, for example, *Kidson & another v Jimspeed Enterprises CC & others* 2009 (5) SA 246 (GNP) paras [7] and [8].

³ *Paulsen and another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) para [42].

We will briefly look at the different stages in the development of Roman history, 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.

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 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 later invaded by Germanic tribes and fell in AD 476.

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 influence the legal systems of Western Europe after the reign of Emperor Justinian. For this reason we will not study the history of the Eastern Roman Empire after AD 565.

Rome had four different types of government, which followed each other chronologically: the **Monarchy** (753 BC–509 BC); the **Republic** (509 BC–27 BC); the **Principate** (27 BC–AD 284); and the **Dominante** (AD 284–AD 476).

Likewise, there were four periods in the development of Roman law:

- The era of **early Roman law** (753 BC–250 BC)
- The **pre-classical** period (250 BC–27 BC)
- The **classical** period (27 BC–AD 284)
- The **post-classical** period (AD 284–AD 565)

Do you see that the periods in the development of Roman law do not coincide exactly with the political periods? We will see below that the Roman Republic stretched over a long period. During the first centuries of the Republic, the law was still primitive and it was only in later years that it started developing into a sophisticated system.

3.1 THE MONARCHY AND EARLY ROMAN LAW (753 BC–509 BC)

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 period in Roman history from 753 BC to 509 BC is known as the Period of the Kings or the Monarchy. During this time, the Roman king was an autocratic ruler. 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. Also, the rigid, formal *ius civile* was the only recognised legal system and it applied to Roman citizens only.

Towards the end of the Monarchy, the population of Rome could be divided into two clearly demarcated social classes, namely the patricians and the plebeians. This division eventually led to a class struggle that lasted well into Republican times. The Monarchy came to an end in 509 BC, when the Roman people expelled the king.

3.2 THE REPUBLIC: EARLY ROMAN LAW AND PRE-CLASSICAL ROMAN LAW (509 BC–27 BC)

In 509 BC the government of Rome changed from a monarchy to a republic. There were various political roleplayers during this period, such as the magistrates (the collective name for consuls, the *praetor* and the *aediles curules*), the Senate and the Popular Assembly.

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 that influenced legal development during the Republic were:

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



NOTE

The *aediles curules* did not have a profound influence on legal development, but they were 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 that arose out of transactions at the markets. You will learn more about them in part 2, learning unit 3.7.2 of this module.

• *The Twelve Tables*

The Law of the Twelve Tables was promulgated in 450 BC. It had its origins in the class struggle between the patricians and the plebeians. The plebeians were unhappy that the priests (who were patricians) were the only people who had any knowledge of the law. As a result, 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. This law was known as the Twelve Tables.

The Law of the Twelve Tables was important for five reasons:

- It **ended the patricians' exclusive control** over the law.
- It was a collection of civil-law rules and marked the **division between the rules of law and the rules of religion**.
- It gave everybody **access** to the legal rules.
- Since everybody was now familiar with the law, this created **legal certainty**.
- The Twelve Tables treated the law systematically, thereby introducing the **beginnings of a legal science**.

• *The praetor*

The task of the *praetor* was to administer justice. By performing this task, he made a tremendous contribution to the development of Roman law. He determined the civil procedure that parties should follow in a lawsuit and published this procedure in edicts, which were placed in the market for all to see. There were two offices of the praetor.

On the one hand, the *praetor urbanus* applied the *ius civile*. The *praetor urbanus* could only administer justice between Roman citizens, since the Roman *ius civile* was only applicable to Roman citizens.

However, as Rome expanded, foreigners flocked to Rome. This led to the creation of a new office in 242 BC, that of the *praetor peregrinus*. He, on the other hand, was responsible for the administration of justice in matters involving foreigners. The *praetor peregrinus* played an important role in the development of Roman law. It was up to him to develop a body of legal rules that could be applied in cases between foreigners or between foreigners and Roman citizens. In order to do this, he developed the *ius gentium*.



NOTE

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

The *praetor urbanus* eventually developed a new law that 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. In time, the *ius honorarium* replaced the *ius civile*. It was characterised by fairness, flexibility and lack of formalism and applied alongside the *ius civile*.

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*.

- ***The jurists***

At first, during the Republic, jurists were simply laymen who took an interest in the study of the law. During the later years of the Republic, they developed into a separate group that gave free legal advice to the public.

3.3 THE PRINCIPATE AND CLASSICAL ROMAN LAW (27 BC–AD 284)

From 27 BC to AD 284, Rome was governed by an emperor or *princeps*. Augustus was the first emperor of Rome. Although his position was theoretically approved by the Senate and the Popular Assembly, in practice he had so much power that he is viewed today as an autocratic ruler. The most important political role players during this time were the *princeps* (emperor), the Popular Assembly, the Senate and the magistrates.

During this period, Roman law was developed and refined to such an extent that it was superior to any legal system of any other ancient civilisation. The Roman law of this period is today referred to as classical Roman law. The most important contributions to legal development during the Principate were made by the

- emperor
- *praetor*
- jurists

- ***The emperor***

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

had the power to make laws. 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. Imperial legislation became an important branch of the law. By the second century AD, most legislation originated from the emperor or his officials. However, his legislation was not of a high standard.

- ***The praetor***

During the period of the Principate, the *praetor* was elected by the emperor and acted only on his instructions. This meant that the emperor had, in effect, taken over the functions of the *praetor*. In addition, 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. This marked the end of the *praetor's* contribution to Roman legal development.

- ***The jurists***

The jurists contributed greatly to legal development during the Principate. They had already become an elite group of law experts during the later years of the Republic. Their functions included **legal advice** to the *praetor*, judges and ordinary citizens; **teaching**; **assistance in legal transactions**; **assistance in court** (although not in the same way as legal representatives do today); **interpretation** of legal rules to make them applicable to new problems, therefore making a major contribution to the development of Roman law; and **writing** (their writings were of great importance in the development of Roman law).

We will now take a brief look at the so-called 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 sixth century AD. Further, in terms of the Statute of Citation of AD 426, they were the only jurists who could be regarded as authoritative. The Five Great Roman jurists were:

- **Gaius**: He lived during the second century AD and wrote a book called the *Institutes*.⁴ This was a law textbook for students. He is regarded as one of the most influential jurists of the classical period.
- **Papinian**
- **Ulpian**
- **Paul**, and
- **Modestinus**

3.4 THE DOMINATE AND POST-CLASSICAL ROMAN LAW (AD 284–AD 476)

During the period of the Dominate there was no longer any question of shared rule. From AD 284, when Diocletian became emperor, the emperors were autocratic rulers. All the power in the state – legislative, executive and judicial – was vested in the emperor.

This era was known as the post-classical era of Roman law and was characterised by the decline of classical Roman legal science. This was as a result, first, of the fact that the jurists were absorbed into the imperial law office and ceased to exist as an independent group; and, secondly, that the Senate now functioned merely as an institution in which

⁴ Gaius's *Institutes* should not be confused with the *Institutes* of Justinian, discussed in 3.6 below. The *Institutes* of Justinian was one of the four parts of the *Corpus Iuris Civilis*.

imperial legislation was announced – the Popular Assembly no longer existed. During this period, efforts were made to simplify the law, and the influence of what is known as “vulgar law” made itself felt. “Vulgar law” was not the pure Roman law of the classical period. It was Roman law, influenced by Germanic law and was administered by officials as in distant parts of the Roman Empire. Towards the end of this era there was a renewed interest in classical law that led to Justinian’s codification of Roman law.

We will now take a brief look at the important features of post-classical Roman law.

- ***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. The *Codex Theodosianus*, for example, was the first official collection of imperial legislation issued in the Eastern Roman Empire. It 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*).

- ***Collections and simplifications of classical writings***

The jurists of the post-classical period produced a number of short, elementary works, which consisted of nothing more than extracts from the great classical writings, and they published simplified editions of the works of the most important classical jurists. Examples of these are the *Epitome Gai* and the *Sententiae Pauli*, adaptations of Gaius’s and Paulus’s most important works.

- ***The Statute of Citation, AD 426***

This statute is a good example of how post-classical law was simplified and how legal science deteriorated. This statute proclaimed that only the works of the so-called Five Great jurists (Papinian, Ulpian, Paul, Modestinus and Gaius) would in future be seen as authoritative. Only in exceptional cases could the works of other jurists be consulted.

3.5 THE FALL OF THE WESTERN ROMAN EMPIRE

As indicated above, the Western Roman Empire was invaded by Germanic tribes and came to a fall in AD 476. All over Western Europe, the different Germanic tribes lived in close proximity to one another and each tribe had its own law. During this time, the personality principle applied. The personality principle meant that each person lived according to the law of his or her own tribe. Therefore, Roman subjects in the Germanic kingdoms continued applying Roman law.

- ***Leges Romanae barbarorum***

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 the *leges Romanae barbarorum*. 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 AD 506 and was applicable in the countries today known as Italy, France and Spain. The Justinian code (see 3.6 below) was only completed some 30 years later in the Eastern Roman Empire. The *Lex*

Romana Visigothorum played an important role in preserving Roman law in the West after the fall of the Roman Empire:

- 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.

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

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. Justinian decided to codify the existing law for the following reasons:

- By the time Justinian became emperor, the law was a disorganised mixture of different types of legislation, regulations, opinions and the like. Justinian realised that the law needed to be **systematised**.
- Justinian wanted to **eliminate outdated legislation** by codifying the law that was still applicable.
- 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.

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

• ***The codification process***

The final *Corpus Iuris Civilis* consisted of four parts:

- The **Codex**: Imperial legislation was systematised and updated and the inconsistencies were eliminated.
- The **Digest**: Juristic law was updated and systematised and the inconsistencies were eliminated. The largest percentage of the *Digest* consists of the works of the Five Great jurists.
- The **Institutes**: A textbook on the law intended for students. It was based on Gaius's *Institutes*.
- The **Novellae**: Imperial legislation that was promulgated after the publication of the *Codex*.

• ***The importance of the Corpus Iuris Civilis***

The *Codex*, the *Digest*, the *Institutes* and the *Novellae* together comprise the codification of Roman law that 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 at that 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 post-classical jurists to understand.

- **Justinian forbade the writing of commentaries** on the *Corpus Iuris Civilis*, which might have made it more accessible.

You may well ask whether the *Corpus Iuris Civilis* has any significance for a modern lawyer. In the next learning unit, we will see that the *Corpus Iuris Civilis* was the most significant source of Roman law studied from the 12th century onwards and that it eventually influenced the Dutch legal system that was brought to South Africa. Today, about fifteen centuries after it first appeared, South African courts still refer to this codification as part of our legal heritage. We saw this in the decisions in the *Hendricks* and the *Paulsen* cases referred to above. In both those cases, Justinian's codification was quoted as authority for Roman law rules that still apply today.⁵



ACTIVITY 3.1

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

- (1) What was the most important task of the *praetor urbanus*?
- (2) (a) Why was the office of the *praetor peregrinus* instituted?
(b) How did the *praetor peregrinus* contribute to the development of Roman law?
- (3) (a) Who were the so-called Five Great Roman jurists?
(b) Why were they important?
- (4) How important were the emperor's creative activities during the Principate in the development of Roman law?
- (5) Why did the law deteriorate in the post-classical era of Roman law?
- (6) Why is the *Corpus Iuris Civilis* still of importance for modern jurists?

FEEDBACK 3.1

- (1) The *praetor urbanus* had to administer justice in disputes between Roman citizens.
- (2) (a) The office of *praetor peregrinus* was instituted to administer justice between foreigners or between foreigners and Roman citizens.
(b) As a result of the activities of the *praetor peregrinus*, the *ius gentium*, a body of international law based on equity, developed. The *ius gentium* was much more flexible and less formalistic than the *ius civile* applied by the *praetor urbanus*.
- (3) (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.
- (4) 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.
- (5) There are basically three reasons:
 - The jurists were absorbed into the imperial law office and ceased to exist as an independent group.
 - The Senate merely functioned as an institution in which imperial legislation was announced.

⁵ 2015 (3) SA 479 (CC) para [42].

- The Popular Assembly no longer existed. As a result, the public did not really have a say in the law-making process any longer.
- (6) 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, which is from around the 2nd century AD.

3.7 CONCLUSION

Finally, in this learning unit we took you through the development of Roman law over a period of more than 2 000 years. You learnt that Roman law is still applied today and that the *Corpus Iuris Civilis* provides modern lawyers 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 learning units we will take a look at how this happened.

SELF-ASSESSMENT QUESTIONS

Answer the following self-assessment questions on the material that you studied in learning unit 3. 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.
- Briefly discuss how law and religion were intertwined during the Monarchy.
- Explain why the promulgation of the Twelve Tables should be regarded as a milestone in the development of Roman law.
- Explain the importance of the *praetor* in the development of Roman law.
- Name four reasons for the codification of the *Corpus Iuris Civilis*.

LEARNING UNIT 4

The Western component: Legal development in Europe from the 12th to the 19th centuries

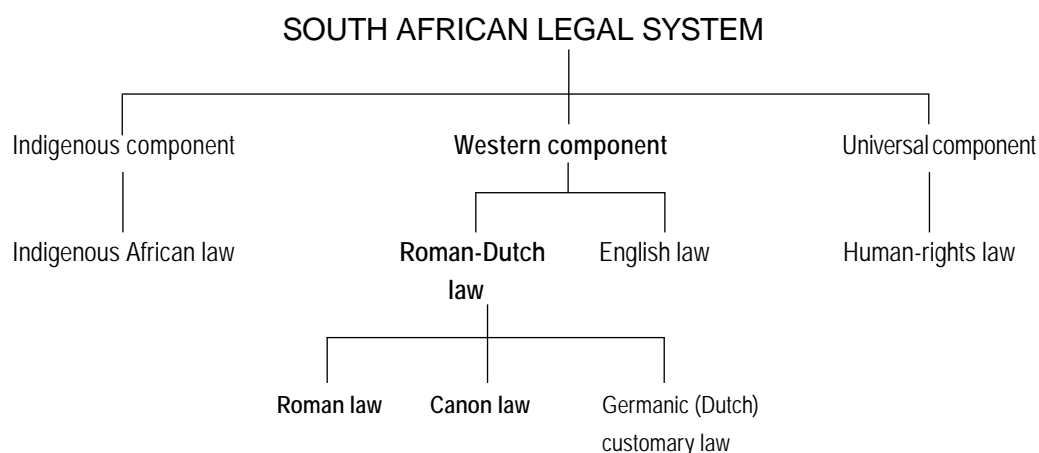


LEARNING OUTCOMES

After studying this learning unit, you should be able to

- describe how the different medieval law schools contributed to the reception of Roman law in the Middle Ages
- discuss the relevance of canon law in South African legal history
- discuss the relevance of the European *ius commune*
- explain what is meant by a Southern African *ius commune*
- understand the importance of the Netherlands in South African legal history

The following graph shows how the discussion in learning unit 4 fits into the development of our legal system:



As indicated in 3.6 in learning unit 3, the *Corpus Iuris Civilis* was not really successful in its own time and after his death, Justinian's codification was forgotten for seven centuries. Nevertheless, by the end of the 11th century, Roman law entered a new life when it was received in Italy and further affixed in Western Europe.

The renewed interest in Roman law may be attributed to the need for a new legal system that could fulfil the demands of the developing Western European society. 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. Furthermore, under the feudal system, which evolved in Western Europe from the 9th century AD, each region, city or town had its own separate legal system. The resulting **legal diversity** hampered trade and created a need for one universal, written legal system. Roman law

was able to meet this need. It is not surprising that the jurists turned to Roman law, a sophisticated legal system that was known to everybody and that 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.

4.1 THE MEDIEVAL LAW SCHOOLS

- *The glossators*

The glossators were the first group of jurists who scientifically studied Justinian's codification of Roman law from the beginning of the 12th century in Bologna in Italy. 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. The glossators followed an interpretative method of study and wrote explanatory grammatical notes ("glosses") on the *Corpus Iuris*.

The best-known glossator is **Accursius**, who made the final contribution to the work of the school of glossators with his *Glossa Ordinaria*. It consisted of a selection of the glosses previously made by various glossators and became so authoritative that it was eventually published with any text of the *Corpus Iuris Civilis*.

The glossators were the first medieval scholars in the West to study law on a **scientific basis**. 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 work of the glossators ensured the very **survival** of Roman law. 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.

- *The ultramontani*

The *ultramontani* were a group of jurists who were situated at the French law school of Orléans during the 13th and 14th centuries. They were more practical in their study of Roman law than the glossators. Their efforts led to the creation of a practical legal system, which could be applied in the 14th-century Italian courts. They regarded the *Corpus Iuris Civilis* as a source book for critical discussion. Their goal was to incorporate Roman law into contemporary practice. Therefore, they investigated sources of law outside Roman law that were essential for practice, namely town law, canon law¹ and Germanic customary law.

The two most important *ultramontani* were **Revigny** and **Bellaperche** who were the first to work out rules for the reception of canon law into secular law.

- *The post-glossators or 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. As a result, the commentators focused on the practical aspects of law. They wrote commentaries on the text of the *Corpus Iuris Civilis*, provided legal opinions on practical problems and delivered lectures.

¹ In this discussion, canon law means the law of the Catholic Church (see 4.2 below).

They referred to the *Glossa Ordinaria*, canon law, Germanic customary law and town law. Over time, they achieved a synthesis between Roman law, Germanic law, canon law and town law. Therefore, the method used by the commentators of interpreting Roman law, as glossed by the glossators, led to its being adapted to contemporary conditions. This, in turn, led to the creation of medieval Italian law, which was later to exert a considerable influence on the shaping of modern civil law.

There were many commentators. This is not surprising, since the period in which they worked, stretched from approximately 1250 to 1650. For the purposes of this module, it is sufficient to take note of **Bartolus**, who is generally regarded as the greatest medieval jurist, and his pupil, **Baldus**. They laid the foundation for private international law (conflict of laws).

The commentators' achievement in legal development can hardly be overrated:

- They laid the foundations for the 17th-century school of natural law.
- They laid the foundation for modern private international law.²
- Their contribution was considerable in the field of private law.
- They 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 on, was the Roman law that 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.

4.2 CANON LAW

• *Historical backdrop*

Together with Roman law, canon law was received into the Germanic customary legal systems and became part of Roman-Dutch law, which was brought to South Africa in 1652. It is therefore important to take a brief look at the development of canon law.



NOTE

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.

For example, the Roman law of contract provided that a mere agreement does not give rise to an action (*ex nudo pacto non oritur actio*) and so various formal requirements had to be complied with for a contract to come into existence. (You will learn more about the Roman law of contracts in part 2, learning unit 3.) Canon law relaxed this rule and held that a person should be held accountable for any agreement (regardless of whether additional formalities were performed) to give effect to the moral virtues of honesty and integrity that are valued by the Catholic Church. This principle (*pacta servanda sunt*) is still part of the South African common law today. Recently, in the decision *AB and Another v Minister of Social Development 2017 (3) BCLR 267 (CC)*

² The subject of private international law encompasses the rules that a (local) court applies in order to indicate the legal system applicable to a legal matter that contains a foreign/international element (see the study guide for Private International Law (LJU4804)).

in para [316], the Constitutional Court stated that the “constitutional value of self-autonomy ... is encapsulated in the maxim *pacta sunt servanda*”, explaining further that “[t]his phrase essentially means that ‘agreements are binding and must be enforced’ and has long been a principle of South African law”.

Emperor Constantine of the Western Roman Empire granted religious freedom and protection to the Christians in the 4th century AD. In Roman times, the Catholic Church in the West was built on a Roman legal foundation and internal relations in the Church were governed by Roman law. After the fall of the Western Roman Empire, the Church continued to flourish in the Germanic kingdoms. In certain areas, the Church used the *Breviarum Alarici* as the source of Roman law, and in others the *Corpus Iuris Civilis*. The law of the Church of the early Middle Ages laid the foundation for the development of canon law.

The foundation of canon law was Roman law, adapted and amended to suit the needs of the Church, expressed through the resolutions passed at church meetings.

- ***The Corpus Iuris Canonici***

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, which was given official recognition. This work formed the foundation of the *Corpus Iuris Canonici*, the most comprehensive collection of classical canon law. The *Corpus Iuris Canonici* was studied in the medieval law schools in the same way the *Corpus Iuris Civilis* was studied. As a result, from the 12th century, two dynamic legal systems, namely Roman law and canon law, were studied in the medieval law schools. 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 European common law. (You will learn more about the European *ius commune* in 4.3 below.)

- ***Reception of canon law into secular law***

The reception of canon law into secular law was initially only random. There were no rules governing this reception. Some of the canonists were trained by the glossators and they taught canon law at the University of Bologna. 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*, who were mostly clerics and held doctorates in both canon law and Roman law, would lay down rules for the reception of canon law into secular law. According to them:

- Canon law applied to matters of the Roman Catholic Church, while Roman law applied to secular matters.
- Canon law, by virtue of its fairness, could be used to temper the severity of Roman law.

As you already know, **the commentators** also studied canon law and Germanic customary law in addition to Roman law. Their influence was not confined to Bologna in Italy, but spread to most parts of Western Europe and played a major role in the creation of a European common law or *ius commune*. The commentators further developed the rules of the *ultramontani* regarding the reception of canon law.

4.3 THE EUROPEAN *IUS COMMUNE*

From the 12th to the end of the 15th centuries, a common law was built up in Western Europe, based on Roman law, canon law and Germanic 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*. 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 France, Germany and the Netherlands.

• ***What is the relevance of the European *ius commune* for the study of South African law?***

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. 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. Although these jurists came from different countries, they all used Latin as the international medium of communication, therefore transcending the language barriers. For example, Roman-German law and Roman-French law developed in much the same way as Roman-Dutch law.



NOTE

There is a difference between the European *ius commune* and English common law. The European *ius commune* was the common law of Western Europe. In other words, it was the law commonly used by many Western European countries. By contrast, the common law of England refers to the English legal system, or English customary law as it applied in England.

In Western Europe, the reception of Roman law included the reception of the concepts, categories, principles and divisions (a scientific reception), as well as the substantive law or rules (a practical reception) of Roman law. But the renewed interest in Roman law, which naturally led to its reception, also spread beyond Western Europe. This reception did not always include the reception of substantive rules of Roman law. Some countries outside Western Europe experienced only a scientific reception, which was not accompanied by a practical reception.

It is only natural that the 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. The enduring nature of the scientific structure of Roman law is illustrated by the fact that the distinction between private law and public

law remains a feature of many legal systems today, even in some countries that do not apply substantive Roman law. It is the scientific structure of Roman law which is an important factor in the harmonisation of the laws of Western Europe.



NOTE

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.

• *A Southern African ius commune?*

Now think about the following: Is it possible to speak of a Southern African *ius commune*? The answer is yes. It is not only the European legal systems that share a common core. In Africa, certain countries, such as South Africa, Namibia, Lesotho, Botswana, Swaziland and Zimbabwe share a common legal heritage. Their legal systems are based on indigenous African law and Roman-Dutch law, as influenced by English law. The fact that there is a common historical foundation of this kind in the laws of these African countries was illustrated in the following *dictum* in the Botswana decision in *Matumo v News Company (Botswana) t/a*:³ “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.” Also in *Ntshethe and others v Lesotho Electricity Corporation*⁴ the Court referred to the common heritage of Lesotho and South Africa: “Roman-Dutch law by reason of our colonial association with the Cape Province is the proper civil law of this Kingdom.”⁵



NOTE

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 with the common historical foundation mentioned above, but includes, for example, the countries belonging to the Southern African Development Community (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.

4.4 LEGAL DEVELOPMENT IN EUROPE FROM THE 16TH TO THE EARLY 19TH CENTURIES

Due to the French humanists’ contributions, the centre of European legal scholarship shifted from Italy to France from the beginning of the 16th century. After France, the Netherlands and, finally, Germany became the centre of European legal scholarship.

3 *The Gazette* 1997 BLR 43 (IC).

4 [2002] LSCA 150 para [6].

5 See, also, *Motoko v Mota* [2001] LSCA 91 para [6]: “The institution of *stipulatio alteri* by virtue of being part of the Roman-Dutch Law, also forms part of the law of Lesotho”

- ***France and legal humanism***

The humanists emerged during the 16th century in France. They aimed to **rediscover classical Roman law** as it was before Justinian codified it and wanted to study the **law as a system**. This method was in contrast to the methods of the medieval law schools, who studied the *Corpus Iuris* in fragments. They focused on the *Corpus Iuris Civilis* and on sources of Roman law that dated before the *Corpus Iuris*.



NOTE

It should be kept in mind that legal humanism was not limited to France. For example, Gentilis was of Italian origin. There were also groups of humanists in Germany and in the Netherlands.

Although the humanists lacked historical perspective and did not take the needs of their time into account, they were nevertheless important, because

- they played a significant role in the **spread of Roman law**;
- their work in the field of **pure Roman law** was of a very high standard; and
- their work on the **systematisation of legal material** was of great value.



NOTE

French law of the 16th century was not confined to the work of the humanists. French national law consisted of customary law as adapted and streamlined by the adoption of Roman law. An important national jurist was Pothier (18th century). He 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.

In 1804 French civil law (private law) was codified by Napoleon. The *Code Civil* 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. It had an enormous influence on the legal systems of many European countries, such as the Netherlands, Italy, Spain and Portugal.

- ***Germany***



NOTE

It is important that you distinguish between the terms “Germanic” and “German”. “Germanic” is a collective term referring to the peoples who populated Western Europe at the time of the fall of the Western Roman Empire (AD 476). “German” refers to anything from the present-day country of Germany, which is situated in Western Europe.

The reception of Roman law in Germany was far more complete than in either France or the Netherlands. In general, the German legal literature of the 16th century followed the same approach to the study of law as that of the humanists. However, the German humanists had a greater influence on practice.

During the 17th and 18th centuries a new school of law emerged in Germany, namely the *usus modernus pandectarum*. They did not study law only in theory, but also as it applied in practice. **Carpzovius II** was the leading proponent of the *usus modernus pandectarum*.

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. During this century, the **historical school** came to the fore in reaction against the doctrine of the law of nature.

- The historical school did not recognise any permanent and unchangeable law; and studied Roman law merely for its scientific interest.

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.

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.

4.5 THE NETHERLANDS

The Netherlands has a specific place in the history of South African law, because Roman-Dutch law, which was the law of the province of Holland, was brought to South Africa in 1652 and today forms an important part of the law of South Africa.



NOTE

Before its unification in 1579, the Netherlands consisted of seven provinces, one of which was the province of Holland. However, the law of Holland was the leading law in the Netherlands. The other six provinces of the Netherlands were strongly influenced by the law of Holland.

The reception proper of Roman law took place 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. The foundation of the University of Louvain in the 15th century was the most important cultural factor that contributed to the reception of Roman law in the Netherlands. The Church played a significant role in its establishment and a faculty of canon law existed alongside the faculty of Roman law (civil law). Doctorates could be conferred in both canon law and Roman law.



NOTE

It was not pure classical Roman law that was received in Holland, but Roman law as glossed by the glossators and commented on by the commentators.

- **Codification**

When Napoleon conquered the Netherlands, his brother, Louis Bonaparte, became its King. In 1809, he introduced the French civil code into the Kingdom of Holland and adapted it for conditions there. In 1838, a Dutch civil code, which was modelled on

the *Code Civil*, was promulgated. The result is that, today, the law of the Netherlands shows great similarity to the original French law. You should bear in mind that 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.

Dutch jurists

Roman-Dutch law existed as an independent legal system in Holland for almost three centuries. Even though Dutch legal literature comprises the works of a large range of jurists, we mention only a selection of the many important Dutch jurists that are still relied on today.



NOTE

The authoritative writers on Roman-Dutch law are, first, 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.

- ***Hugo de Groot (Grotius) (1583–1645)***

Hugo de Groot is generally regarded as the greatest of the Dutch jurists and indeed one of the most outstanding jurists of all time. His two best-known works are:

- *Inleidinge tot de Hollandsche Rechtsgeleerdheid*: The first treatise on Roman-Dutch law as an independent system, which also served as a textbook to first-year law students.
- *De Jure Belli ac Pacis*: The first comprehensive work on public international law (law of nations), dealing with international law, natural law and legal philosophy. Grotius is rightly considered the father of public international law⁶ in the Western world.

- ***Simon van Leeuwen (1626–1682)***

He was the first writer to refer to the existing Dutch law as “Roman-Dutch law”. One of his most important works is:

- *Het Roomsche-Hollandsche Recht*. It provides a thorough review of Roman-Dutch law.

- ***Johannes Voet (1647–1713)***

He had an enormous influence on South African practice. His influence extended throughout Europe. The work that overshadows all his other works is:

- *Commentarius ad Pandectas*: A commentary on Justinian’s *Digest*, in which he provides a comprehensive review of the whole field of Roman-Dutch law. Sir Percival Gane published an English translation of this work in the 1950s.

6 Public international law, or simply international law, may be defined as a body of rules and principles that are binding on states in their relations with one another (Dugard J *International Law: A South African Perspective* 4th ed (Juta Claremont 2011) 1.)

- ***Dionysius van der Keessel (1738–1816)***

He was unquestionably the most outstanding Dutch jurist of the late 18th century. His most important published work is:

- *Theses Selectae Juris Hollandici et Zeelandici*, which was based on lectures that Van der Keessel gave on the *Inleidinge* of Grotius. It was the last outstanding work in the field of Roman-Dutch law before South Africa was separated from the Netherlands.

- ***Johannes van der Linden (1756–1835)***

He was a prolific writer, particularly on the law of procedure. He published an addition to Voet's *Commentarius*. He translated a number of treatises by the French jurist Pothier, among others, his work on the law of obligations. His best-known work was:

- *Rechtsgeleerd, Practicaal en Koopmans Handboek*, which was the last treatise on Roman-Dutch law as it existed in Holland before the codification of the law of the Netherlands.

- ***The Dutch humanist school***

The Dutch Republic was strongly influenced by humanism. However, like their German counterparts, the Dutch humanists paid attention to the needs of practice, devoting their attention to the existing law.



ACTIVITY 4.1

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

- (1) Why was the work done by the post-glossators or commentators of importance for legal development from the 14th century onwards?
- (2) Write a paragraph on Roman law as an enduring element in European law.
- (3) Why, do you think, is the date of the codification of the law of the Netherlands important to a South African jurist?

FEEDBACK 4.1

- (1) The commentators laid the foundation for the 17th-century natural-law school. (In learning unit 7 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*.
- (2) 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.

- (3) Roman-Dutch law became applicable in South Africa when Jan van Riebeeck settled at the Cape in the 17th century. 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 in the Netherlands until its law was codified in 1809. Importantly, the civil code of the Netherlands never applied in South Africa.

4.6 CONCLUSION

In this learning unit we told you about the revival of Roman law from the 12th century onwards and its reception in Europe. You learnt how a European *ius commune* developed with Roman law and canon law as its foundation and why the law of the province of Holland became important for South African legal history. In the next learning unit we will discuss how Roman-Dutch law became the common law of South Africa.

SELF-ASSESSMENT QUESTIONS

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

- Explain how the 16th-century French humanists approached the study of law.
- How did the approach of the German humanists differ from that of the French humanists?
- Name two reasons why the law of the province of Holland is of particular significance for South African legal history.
- Complete the following table with regard to the various schools of law that you have encountered in this learning unit:

	Glossators	<i>Ultramontani</i>	Commentators	Canon Lawyers	Historical School	French Humanists	Dutch Humanists
Time period							
Place of origin							
Proponent							
Approach to the study of Roman law							
Role in ensuring the endurance of Roman law							

LEARNING UNIT 5

The development of the Western component in South African law before the 1990s



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- explain how Roman-Dutch law become part of South African law
- understand what is meant by Roman-Dutch law
- describe how English law become part of South African law
- discuss the role of English law in the development of the South African legal system

5.1 INTRODUCTION

In the previous learning unit, you learnt about the revival of Roman law in the medieval law schools and about the development of a European *ius commune*. You also learnt about the reception of Roman law and canon law in Western Europe from the 16th to the early 19th centuries and the development of Roman-Dutch law in the province of Holland.

This learning unit focuses on the development of the Western component of the law in South Africa. During the period from 1652 to the 1990s, indigenous law held an inferior position in South African law and legal administrators and academics busied themselves mainly with Roman-Dutch and English law. You will learn how Roman-Dutch law and English law came to apply in South Africa and how these systems of law were merged and developed to become a single system of South African law.



NOTE

It is possible to interpret Roman-Dutch law narrowly or broadly.

- In a narrow sense, Roman-Dutch law refers to the law of the province of Holland as it existed in the 17th and 18th centuries. In other words, Roman law received in the province of Holland, amended by customary law and legislation of Holland in the 17th and 18th centuries.
- In a broad sense, Roman-Dutch law also includes the law of all seven Dutch provinces, as well as elements of the European *ius commune*.

In 1988, the Supreme Court of Appeal in *Du Plessis v Strauss* 1988 (2) SA 105 (A) decided in favour of the narrow interpretation of Roman-Dutch law. Nevertheless, the court emphasised the historical context of the rules of Roman-Dutch law, indicating that Roman-Dutch law should be 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 practice, when authority is sought

- with regard to **specific rules** of Roman-Dutch law, one would look at the law of the province of Holland; and
- with regard to **general principles, ideas and doctrines** of Roman-Dutch law, one would also look at the common law of Western Europe (including the law of the other Dutch provinces) before codification.

You saw in learning unit 2 that Jan van Riebeeck established a refreshment station at the Cape in 1652. He was an employee of the Dutch East India Company, a trading company that applied Roman-Dutch law in its colonies. This does not mean that Van Riebeeck 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.

Originally, the governor of the Cape was in charge of law and order. The first proper court, the *Raad van Justitie*, was established in 1685. At first, this court was composed of laymen and it was only much later that qualified lawyers started serving as judges and practising at the bar. In comparison with the conditions prevailing in the Netherlands, the administration of justice at the Cape during the 17th and 18th centuries was primitive and badly ordered.

The formal sources of law during the period of Dutch rule (1652–1795) were: **legislation**; the **old writers** on Roman-Dutch law (discussed in learning unit 4); **judicial decisions**; and **custom**.

5.2 THE PERIOD FROM 1795 TO 1827

Dutch rule ended in 1795 with the first British Occupation of the Cape. During this Occupation, the British authorities maintained the existing system of justice. In 1803 the British withdrew from the Cape and the Dutch again took control for a period of three years.

The second British Occupation of the Cape took place in 1806. In terms of the Articles of Capitulation, burgher¹ rights and privileges, which included Roman-Dutch law, were preserved. However, 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. The governor of the Cape, Lord Charles Somerset, started following a policy of anglicisation. 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 in 1828.

¹ The term “burghers” or “free burghers” are used to describe the former servants of the Dutch East India Company (or VOC) who were released from their employment and who then settled at the Cape as free citizens (Hahlo HR & Kahn E. *The Union of South Africa* (Juta Cape Town 1960) 3).

5.3 THE RECEPTION OF ENGLISH LAW AT THE CAPE (1828–1910)

The first Charter of Justice brought about important changes in the court structure and in the formal law and introduced the beginning of an era that was extensively influenced by the English. 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 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 jury system was introduced (it 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, Scotland, persons in possession of a doctor's degree in law from the Universities of Oxford, Cambridge or Dublin or advocates of the old *Raad van Justitie*.

A second Charter of Justice was implemented in 1834. This Charter was only a re-enactment of the first Charter with a few amendments and additions.



NOTE

Both Charters of Justice stipulated that the old law of the Colony, namely Roman-Dutch law, should be applied by the courts. However, Viscount Goderich determined that there should be a gradual assimilation of English law into the law of the Colony.

5.4 THE MECHANICS OF THE RECEPTION PROCESS

We will now consider the following factors that contributed to the reception of English law:

- **English institutions:** The move towards English institutions is hardly surprising in view of the fact that the Cape was a British colony. Education, language and commerce are the three areas where the influence of English law was strongest. Commerce was almost solely in the hands of people who were immersed in the customs of English trading. They followed English practice and the English law, which regulated business practice.



NOTE

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 with a civil-law (Roman law) orientation, was lacking at the Cape at that time. Without such a university, the development of a modern commercial law, founded solely on Roman-Dutch law principles, could not take place.

- **The judiciary:** Newly appointed English judges were given the task of promoting the gradual assimilation of English law into Roman-Dutch substantive 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 law. With training in English law, it is not surprising that both judges and advocates preferred to make use of English authorities (which were more accessible than the old Roman-Dutch authorities written in Latin or Dutch).

- **Legislation:** Numerous Cape statutes from 1828 onwards were based on similar legislation effective in Britain. It is not surprising that the judicial interpretation of these statutes would, in turn, lead to greater emphasis being placed on English law.



NOTE

When dealing with the factors that contributed to the reception of English law, an important question comes to mind: How extensive was the reception of English law? Was there merely a reception of an odd legal rule here and there, or was there a reception of English 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?

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. Therefore, one may say that some areas of the law experienced both a scientific and a practical reception of English law.

5.5 LEGAL DEVELOPMENT OUTSIDE THE CAPE (1838–1910)

To get away from the control of the British government with their policy of anglicisation, a large number of the non-British population (made up mostly of Dutch people, and referred to as “Boers” or “Voortrekkers”) decided to leave the Cape and to move inland. They eventually formed independent states.

The areas known before 1994 as the Transvaal and the Free State, became commonly known as the “Boer republics” or “Voortrekker republics”. In the **Zuid-Afrikaansche Republiek** (Transvaal), it was provided that Van der Linden’s *Koopmans Handboek* would form the basis of the law, and that Leeuwen and Grotius would be binding supplementary sources. In the **Orange Free State**, Roman-Dutch law was declared the basic law of the state with, among others, Voet, Leeuwen, Grotius, Van der Linden and Van der Keessel as authoritative sources. At the end of the 19th century, relations between Britain and the two Boer republics became so strained that it resulted in the Anglo-Boer War that lasted from 1899 to 1902. After the annexation of the two Boer republics by the British, English law was assimilated into Roman-Dutch law.

In **Natal**, Roman-Dutch law initially served as a basis for the administration of justice, but after the British took control of the area in 1845, it was stipulated that the legal system would be the system as practised in the Cape Colony, namely Roman-Dutch law as modified by English procedural laws.

5.6 LEGAL DEVELOPMENT SINCE THE UNIFICATION OF SOUTH AFRICA IN 1910

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). The unification of the four former British colonies 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.



NOTE

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 should be critically discussed. Universities, in particular, 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.

The formation of the Union in 1910 marked the beginning of a new period of unification and assimilation of South African 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 and in the creation of an independent legal system.



NOTE

The Privy Council, situated in London, remained the highest court of appeal until 1950. Although the existence of the Privy Council slowed down the development of a purely South African legal system, its influence decreased markedly after 1910, because the Appellate Division adopted an independent attitude.

An important task of the judges of appeal was to continue independent legal development. In this respect, the court achieved remarkable success. It did not cling to strict and outdated principles of Roman-Dutch law that were no longer useful, but it was not prepared to deviate from established and recognised principles of Roman-Dutch law. In turn, the Appellate Division was also not prepared to be led by English law. It rejected English legal rules that penetrated our system through the *stare decisis* rule but which were never really received into our law. However, this was done only after careful consideration of the implications of rejecting an English rule. Although English law still influences our law, in general it may 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 on life.

Nevertheless, you should bear in mind that the courts do not hesitate to adapt Roman-Dutch legal rules that have fallen out of step with the needs of present-day South African society. Recently, in *Linvestment CC v Hammersley and another*² the Supreme Court of Appeal

² 2008 JDR 190 (SCA) para [30].

re-evaluated a rule of Roman-Dutch law as stated by Voet, observing 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 ...”. Importantly, the court stated:

[T]his court has always possessed an inherent power to develop the common law [Roman-Dutch law] The power is confirmed in s 173 of the Constitution ‘taking into account the interests of justice’. 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.³

5.7 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 approved by the Minister of Justice and Constitutional Development and 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 that 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.



ACTIVITY 5.1

Answer the following questions to test your understanding of what you have learnt so far:

- (1) Did Roman-Dutch law have the potential to develop a commercial law in South Africa during the second British Occupation of the Cape?
- (2) 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 5.1

- (1) 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.
- (2) 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,

³ Para [25].

discriminatory legislation. So, if we have to look for the most important event 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. (The concepts of parliamentary sovereignty and constitutional supremacy are dealt with in learning unit 7.)

5.8 CONCLUSION

This concludes our discussion of the Western component of our legal system until the early 20th century. In learning unit 6 we will discuss the emergence of the liberation movement and its impact on the development of South African law.

SELF-ASSESSMENT QUESTIONS

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

- Explain how Roman-Dutch law came to apply at the Cape.
- 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) The Charters of Justice determined that judges should incorporate English law into Roman-Dutch law.
 - (b) Judges and advocates relied on English authorities, because they were easily accessible, therefore 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.

LEARNING UNIT 6

The South African liberation movement and its contribution to the development of South African law and constitutionalism



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- discuss the role played by the South African liberation movement in the development of apartheid and post-apartheid South African law
- identify political activists that contributed to the creation of a democratic legal order and the recognition of fundamental human rights
- discuss the historical significance of the Freedom Charter in attaining a constitutional democracy in South Africa

6.1 INTRODUCTION

We have already explored the influence of the African and the Western legal traditions on the development of South African law. We now turn to the external historical events of the 20th century that contributed to the development of a human-rights culture in South Africa. In this learning unit, we will focus on the historical role of the national liberation movement in the development of law and justice in South Africa.

Do you remember what we learnt in learning unit 1? The teaching of the origins of South African law used to focus predominantly on the Western legal tradition. But we know now that there is much more to the history of our law. This learning unit forms a prelude to learning unit 7, which discusses the historical development of the universal, or human-rights, component of our law.

Having studied the preceding learning units, you should realise that it is not an easy task to trace the historical course of the development of a legal system – especially one as complex as the hybrid South African legal system. It should be clear that it is impossible to describe the external history of South African law without referring to all three the components that we introduced you to in learning unit 1. Therefore, before you proceed with this learning unit, you should refresh your memory by carefully reading learning unit 1. But you should also read again learning unit 2, which discusses the history of the recognition of indigenous law in South Africa. Why? Because an important element of the discontent of the black South African population, during the time of colonisation and apartheid, was the state's consistent refusal to give recognition to indigenous African law and cultural institutions.

South Africa's unique history clearly illustrates how important political events (or external legal historical events) were in shaping the legal system. The history of the national liberation movement provides an excellent example of how people's actions

influenced the development of a constitutional democracy and played a role in creating institutional and organisational constraints on the exercise of power.



NOTE

What is a national liberation movement?

A national liberation movement is a political movement that has as its goal the national independence of a country and freedom from domination. In South Africa, the liberation movement worked towards the creation of a just society and a legitimate legal order – initially through passive resistance (non-violent protest) and civil disobedience (a form of non-violent protest by deliberately breaking the law) – from the early 1960s, through an armed struggle. Numerous organisations joined the liberation movement, which gained international support from the Organisation of African Unity.

6.2 THE NATIONAL LIBERATION MOVEMENT AND CHANGE IN SOUTH AFRICA

• *Background*

As indicated, in this learning unit we will focus on some events that took place during the 20th century. This does not mean that racial discrimination and political repression of those who did not belong to the privileged white minority in South Africa and the general negation of their laws and culture, started only then. This occurred throughout the history of South Africa. In learning unit 2, we explored the external history of the recognition of indigenous and Islamic law. There we learnt how state policies affected the development of indigenous and Islamic law long before the policy of apartheid was *officially* introduced when the National Party won an all-white election in 1948.

During the course of our history, policies of political, social and economic segregation led to the promulgation of numerous unjust laws that were aimed at keeping blacks and other racial groups in a position of social, political and economic subordination. You must remember that, during the 20th century, the power of the state was virtually unlimited. Parliament was supreme and could pass any legislation irrespective of its content, provided they followed the prescribed procedure for passing legislation. (You will learn more about the history of constitutionalism in learning unit 7.)

The following are but a few examples of the oppressive laws of the time:

- The Natives Land Act of 1913: limited land ownership for blacks to designated areas reserved for blacks (comprising a mere 7% of South African land).
- The Natives (Urban Areas) Act of 1923: created separate urban locations for blacks and controlled influx into these areas.
- The Native¹ Administration Act of 1927: created a separate court system for blacks (see the discussion in learning unit 2).
- The Prohibition of Mixed Marriages Act of 1949: prohibited marriages between “whites and non-whites”.
- The Group Areas Act of 1950: created segregated urban areas for different races and later led to forced removals and the uprooting of thousands from their homes.

¹ In later years, “Native” was replaced with “Black”.

- The Reservation of Separate Amenities Act of 1953: reserved certain amenities, such as beaches, busses, benches and parks for whites only.
- The Bantu Education Act of 1953: created a separate system of education for blacks.
- The Bantu Homelands Citizenship Act of 1970: excluded blacks from South African citizenship and forced them to become citizens of one of the self-governing territories.

• ***The national liberation movement of the 20th century***

It comes as no surprise that racism, the pursuit of segregation and the promulgation of unjust laws would be met with resistance. For example, already in 1825, Khoi labourers and slaves rebelled against their employer/owners; in 1894, Mahatma Gandhi formed the Natal Indian Congress, which aimed at resisting discrimination against Indian traders in Natal; and in 1897, Chief Justice Kotzé challenged the legality of the Zuid-Afrikaansche Republiek's Volksraad (Parliament), which led to his dismissal by President Paul Kruger (more about this constitutional crisis in learning unit 7).

The free movement of certain members of the South African population occurred long before the 20th century. In the first half of the 18th century, for example, slaves were forced to carry passes to make it easier for their colonial owners and the local authorities to control their movements. In addition, during the 19th century, pass laws were promulgated in the Boer republics to restrict the movement of the indigenous population there and to facilitate unlawful and forced labour practises.

During the 20th century, several campaigns were led against the notorious pass laws: In 1906, Gandhi led a passive resistance campaign in the Indian community in the Transvaal against the pass laws, among others. Mass action by black and coloured women in the Free State followed in 1913 and this led to the relaxation of pass laws for women in 1914; there was a workers' strike against the carrying of passes in 1918; and in 1930, the Communist Party of South Africa and various trade unions organised campaigns to burn passes. The Bantu Women's League (formed in 1918) and, later, the ANC Women's League in 1948 passively resisted the pass laws. In 1956, the well-known Women's March to the Union Buildings against pass laws took place in Pretoria.



NOTE

What were the pass laws?

The pass laws were designed to restrict the residence and movement of black South Africans. "Pass laws" is the collective name for legislative enactments that made it compulsory for black South Africans to carry a pass or identity document to move or reside freely within South Africa. Initially, passes granted the bearer permission to be in a certain area for a limited period. These were later replaced by identity documents or "reference books", which had to be carried at all times. The documents contained extensive information about the carrier, including employment details, permission to be in a certain area and reports of employers. Failure to carry a pass had severe consequences and could lead to imprisonment.

Do you remember that the commissioners' courts, which were special courts for blacks, lost all credibility when they started enforcing the notorious pass laws? (Reread learning unit 2.)

When the apartheid era officially commenced in 1948, a concerted effort emerged for stricter application and enforcement of discriminatory legislation and the optimisation

of apartheid as government policy. For example, in 1956, 156 leaders of the freedom movement were detained and charged with high treason. The charges related to the drafting of the Freedom Charter, which was regarded as a revolutionary document that would lead to the overthrow of the state. Also in 1956, the Minister of Native Affairs was authorised to banish persons (including chiefs) without the right of a trial or appeal. In terms of the Industrial Conciliation Act of 1956, the Minister of Labour was authorised to reserve jobs for whites and order the dissolution of multi-racial trade unions.

A significant event that had a profound influence on the course of South African history, was the Sharpeville massacre of 21 March 1960, where the police killed 69 protesters. The massacre was preceded by a non-violent demonstration against the pass laws in the township of Sharpeville, south of Johannesburg.

Shortly after the massacre, the ANC and the PAC were declared unlawful in terms of the Unlawful Organisations Act 34 of 1960. Race discrimination and political repression intensified and, with that, the gross violation of human rights. Arbitrary detentions and banning of numerous liberation activists followed. Leaders, such as Robert Sobukwe,² were imprisoned for the alleged incitement of Africans, and Oliver Tambo³ was forced into exile where he continued to canvass more support for the liberation discourse. These events saw the genesis of the armed struggle. The military wing of the PAC was established in 1961 and in 1962 the ANC formed its military wing, *Umkhonto we Siswe* (MK).



NOTE

The PAC was established in 1959 when some members of the ANC broke away to form the Pan Africanist Congress of Azania. They were, among others, opposed to the ANC's commitment to non-racialism and non-violence.

Following the Sharpeville massacre, there was a worldwide condemnation of apartheid and its laws. Anti-apartheid movements started forming also in other countries. UN representatives of numerous Asian-African governments requested an urgent meeting of the Security Council to consider “the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa”.⁴ This was followed by a resolution of the Security Council, which deplored the Union of South Africa's actions and called upon the Secretary-General and the Government of South Africa to uphold “the purposes and principles of the [United Nations] Charter”. There was an important shift towards the diplomatic isolation of South Africa when the Second Conference of Independent African States in Addis Ababa called for the isolation of South Africa through, among others, severance of diplomatic ties, boycotting of all South African goods, closure of ports to South African vessels and refusal of landing passage to South African aircraft. The purpose of the sanctions was to isolate South Africa economically and to provide nations with the platform to illustrate their strong objections to apartheid legislation and racial segregation in South Africa.

2 Robert Sobukwe (1924–1978), the founder and later president of the PAC, was a lecturer in African studies at the University of the Witwatersrand and the editor of a newspaper, *The Africanist*.

3 At the time, Oliver Tambo (1917–1993) was deputy president of the ANC. He started the first black law firm with Nelson Mandela.

4 UN Resolution of 1 April 1960 [S/4300].

It is not surprising that the detention and banning of the leaders of the liberation movement left a vacuum that largely halted the liberation struggle. This led to the emergence of the Black Consciousness movement in the early 1970s. This movement was founded on an exclusively black student organisation, started by Steve Biko.⁵ The student organisation soon expanded to include other organisations and was joined by intellectuals, journalists and poets. Among others, these organisations worked towards an end to apartheid, the right to vote for all South Africans and a socialist economy. The increasing pressure of the Black Consciousness movement met with the government's banning of eighteen organisations allied to the Black Consciousness ethos. On 16 June 1976, a student protest in the township of Soweto against Afrikaans, alongside English, as medium of instruction in schools, ended in the violent death by police of numerous protesters. An international outcry against this brutality was inevitable and gave a renewed stimulus to the liberation struggle that led to large-scale unrest among students and workers and to renewed repressive measures by government. The death of Biko, the driving force of the Black Consciousness movement, a year later in police custody, again resulted in a vacuum in the liberation struggle. However, it did not end the resistance against oppression, but rather gave it a new impetus throughout the 1980s.

Following intense campaigning inside South Africa and abroad, President FW de Klerk unbanned all political parties on 2 February 1990. Nelson Mandela was released from custody on 11 February. In 1993, an interim Constitution with a Bill of Rights was adopted. On 27 April 1994, the ANC won the first free national election. The interim Constitution came into force in that year and the final Constitution in 1996.

From a legal historical perspective, the Sharpeville massacre may be regarded as an important historical reference point for the eradication of unjust laws and conditions. In the long run, Sharpeville put in motion events that ultimately led to the abolition of pass laws and the creation of laws that acknowledged the rights of all citizens, irrespective of colour, to be holders of a single national identity. It eventually culminated in the constitutional protection of the rights to citizenship and human dignity. The liberation movement finally paved the way for putting constraints on the use of state power.



NOTE

It is ironic that, while the struggle for a legitimate legal order and the recognition of the basic human rights of all in a democratic South Africa gained fierce momentum following the Sharpeville massacre, a debate raged in white academic circles about the relative position of English law in the Roman-Dutch common-law model. This was called the purist-pollutionist debate. On the one end of the spectrum, the purists demanded that Roman-Dutch law should be applied in its pure form, free of English-law contamination, while on the other end, the pollutionists' saw English law as the solution where the old writers were silent.

The status and recognition of indigenous African law did not feature in this debate.

- ***The influence of political activists***

Besides the activists already mentioned, there were numerous other people who played a role in shaping a new democratic legal order and who contributed to the discourse

⁵ Steve Biko (1946–1977) was killed in police custody. The police officers responsible for his death were denied amnesty by the Truth and Reconciliation Committee in 1999, but were never prosecuted.

by challenging the legitimacy of the apartheid South African legal order through their actions, writing and public statements. Among them were women such as British born Helen Joseph (1905–1992)⁶ and Albertina Sisulu (1918–2011), who were principal organisers of the Women’s March of 1956 against the pass laws.⁷

Three of the liberation activists received international recognition through the Nobel Peace Prize:

- Chief Albert Luthuli (1898–1967) pleaded for the recognition of traditional leadership in 1952 when the apartheid government dismissed him from his position as chief for refusing to resign from the ANC. Albert Luthuli was the first African to be awarded the Nobel Peace Prize. He received it in 1960 in the field “human rights”, for activism against racial discrimination. Chief Luthuli’s ideal of an inclusive democracy is reflected in the following excerpt from his Nobel Peace Prize lecture: “Our vision has always been that of a non-racial, democratic South Africa which upholds the rights of all who live in our country to remain there as full citizens, with equal rights and responsibilities with all others. For the consummation of this ideal we have laboured unflinchingly. We shall continue to labour unflinchingly.” He further said: “[A]ll Africa has this single aim: ... a united Africa in which the standards of life and liberty are constantly expanding ... in which the dignity of man is rescued from beneath the heels of colonialism which have trampled it.”⁸
- Bishop Desmond Tutu (1931–) received the Nobel Peace Prize in 1984. In the award-ceremony speech, the chair of the Norwegian Nobel Committee stated: “Racial discrimination in South Africa is rightly regarded as a threat to peace and as an outrageous violation of basic human rights Desmond Tutu has formulated as his goal ‘a democratic and just society without racial segregation’. His minimum demands are: equal civil rights for all, the abolition of the Pass Laws, a common system of education and the cessation of the forced deportation of blacks from South Africa to the so-called ‘homelands’ ”.⁹ Desmond Tutu later chaired the Truth and Reconciliation Committee, established in 1995, to investigate violations of human rights in the apartheid era (more about this Committee in learning unit 7).
- Nelson Mandela (1918–2013), also referred to as “Africa’s Greatest Freedom Symbol”, received the Nobel Peace Prize (with FW de Klerk) in 1993¹⁰ for his work in “the peaceful termination of the apartheid regime, and for laying the foundations for a new democratic South Africa”.¹¹ His ideal was “a society which recognises that all people are born equal, with each entitled in equal measure to life, liberty, prosperity, human rights and good governance”.¹² At his trial in 1963/1964, Mandela commented on the democratic parliamentary system of the West: “I am an admirer of such a system. The Magna Carta, the Petition of Rights, and the Bill of Rights are documents which are held in veneration by democrats throughout the world ... the independence and the impartiality of its [the British] ... judiciary never fail

6 She was the founder member of the ANC’s white ally, the Congress of Democrats.

7 Albertina Sisulu, a nurse by profession, received several international humanitarian awards, as did her husband Walter Sisulu (1912–2003).

8 Chief Luthuli’s Nobel lecture, delivered in Oslo on 11 Dec 1961, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1960/lutuli-lecture.html.

9 Speech available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1984/presentation-speech.html.

10 One among many other international prizes awarded.

11 http://www.nobelprize.org/nobel_prizes/peace/laureates/1993/mandela-facts.html.

12 See his Nobel lecture presented on 10 Dec 1993, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1993/mandela-lecture_en.html.

to arouse my admiration. The American Congress, and that country's doctrine of separation of powers, as well as the independence of its judiciary, arouses in me similar sentiments."¹³

- ***The recognition and role of South Africa's national liberation movement in the United Nations***

The international recognition, standing and role of the national liberation movement in South Africa goes back to the 1940s, when the UN put on its agenda South Africa's racial policies at its inaugural first session in 1946. In 1963, Oliver Tambo made his first public statement on the role and "supreme effort" which the UN had made to dismantle apartheid and South Africa's racist policies. He regarded the UN Special Committee on South Africa – which assisted the militant liberation movement to achieve justice, liberty and peace in South Africa – as a significant part of the liberation struggle in South Africa. Following his appearance before the UN in 1963, members of the ANC and the PAC were heard in the main committees of the UN National Assembly and, in later years, in the Security Council. The ANC and PAC were eventually granted observer status in the UN Special Political Committee discussions on apartheid.

During this critical period in South African history, the UN denied the legitimacy of the apartheid South African government. At the same time, it recognised the role of the liberation movement and viewed the political organisations involved in the liberation struggle as lawful, true and legitimate representatives of South Africa. The UN pledged its support through a number of resolutions passed in the General Assembly. In 1975,¹⁴ the UN General Assembly recognised "the contribution of the liberation movements and other opponents of apartheid in South Africa to the purposes of the UN". It commended "the courageous struggle of the oppressed people of South Africa under the leadership of their liberation movements supported by the United Nations", taking note of "the heavy sacrifices made by the people of South Africa in their legitimate struggle for self-determination". It proclaimed that the UN and the international community had a "special responsibility towards the oppressed people of South Africa and their liberation movements, and towards those imprisoned, restricted or exiled for their struggle against apartheid".

6.3 THE FREEDOM CHARTER

In 2009, the South African High Court stated in *African National Congress v Congress of the People and others*:¹⁵ "The Freedom Charter is one of the most important documents in the history of this country. For some it is the most important document in the history of this country. In it are embodied principles for which those who took part in the liberation struggle fought and suffered. Principles of the Freedom Charter underlie the Constitution of the Republic of South Africa, 1996."

In this section, we will briefly look at the historical significance of the Freedom Charter in the context of this module. However, before we proceed to this discussion, we must first establish what exactly this document was.

13 Jacques Derrida "Admiration of Nelson Mandela, or The Laws of Reflection" (2014) *Law & Literature* 9-30 11.

14 UN Resolution of 28 November 1975 [S/3411].

15 2009 (3) SA 72 (GPHC) para [5].

**NOTE**

The Freedom Charter is a historical document that was adopted at a multi-racial convention of the Congress of the People (sponsored by the ANC, the South African Indian Congress, the South African Coloured People's Organisation and the Congress of Democrats) held in Kliptown, Soweto on 26 June 1955. The Charter contains a declaration of the core principles of a just and equitable democratic society, envisaging a non-racial unitary state, focusing on basic human rights.

The Freedom Charter articulated democratic principles inspired by the Universal Declaration of Human Rights. As such, it has been regarded as the blueprint for a democratic South Africa and as a symbol of the struggle against apartheid. It provided the groundwork for South Africa's Constitution.

PREAMBLE OF THE FREEDOM CHARTER

We, the People of South Africa, declare for all our country and the world to know:

- that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;
- that our people have been robbed of their birth right to land, liberty and peace by a form of government founded on injustice and inequality;
- that our country will never be prosperous or free until all our people live in brotherhood enjoying equal rights and opportunities;
- that only a democratic state, based on the will of all the people, can secure to all their birth right without distinction of colour, race, sex or belief.

And therefore we, the People of South Africa, black and white together – equals, countrymen and brothers – adopt this Freedom Charter. And we pledge ourselves to strive together sparing neither strength nor courage, until the democratic changes here set out have been won.¹⁶

So, what is the significance of this document?

The Freedom Charter is considered as one of the first documents to pave the way and lay the foundation for a democratic and constitutional state in South Africa. The Constitution of the Republic of South Africa, 1996 (and in particular the Bill of Rights) built on the course of political and institutional change that was set in motion by the Freedom Charter. The ANC's *Constitutional Guidelines for a Democratic South Africa*, issued in Lusaka in 1988, which would later have a significant influence on the Constitution, was founded on the Freedom Charter. The Freedom Charter set the cornerstone for the South African concept of the government of the people, by the people and for the people. There are many similarities and functionally equivalent provisions in the Freedom Charter and the Constitution.

The Charter proposed a constitutional democracy and the guarantee of rights and freedoms to all citizens, particularly those who had been excluded from the enjoyment

¹⁶ For an archival copy of the Freedom Charter, see the Historical Papers Research Archive of the University of the Witwatersrand, available at www.historicalpapers.wits.ac.za/inventories/inv_pdfo/.../AD1137-Ea6-1-001-jpeg.pdf.

of these rights and freedoms. Among others, the Freedom Charter called for equality before the law; the repeal of all laws that discriminate on the basis of race, colour or belief; equal access to education; equal access to land and the redistribution of land; discarding of bodies and institutions of minority rule, and their replacement by the democratic organs of self-government.

Does this mean that the idea of individual human rights originated in the Freedom Charter? The answer is “no”. While the Freedom Charter played an important role in the recognition of human rights in South Africa, and contributed to the African conception of human rights, you will see in learning unit 7 that we have to go back much further in history to trace the origins of the idea of individual human rights.

- ***The national liberation movement and the development of a just legal system***

Through civil disobedience and political activism, the liberation movement challenged the legitimacy of the imposed Western (Roman-Dutch orientated) legal regime in South Africa, playing a crucial role in the establishment of a constitutional democracy and a legitimate legal order. Through the liberation movement, civil society engaged in a recurring and sustained resistance against the legitimacy of the laws in place during the apartheid era. They questioned the moral justifiability of Roman-Dutch law as the true foundation of South African law to the exclusion of indigenous law (then called Bantu law – to refresh your memory, reread learning unit 2 that deals with the recognition of indigenous African law).

The resistance and civil disobedience of civil society in the national liberation movement, saw the emergence of a number of political, economic and legal theories, some of which are still relevant today: for example, the notions of decolonisation and land redistribution, which are also found in the Freedom Charter. In addition, the development of the South African legal theory of sovereignty and the international acceptance of South Africa’s statehood were influenced and shaped by the national liberation movement.

It is clear that the liberation movement played an integral part in eventually bringing about the post-apartheid legal system. However, did this movement have any influence on the creation of apartheid law? The answer is “yes”. Nevertheless, this does not mean that the liberation movement was aimed at the creation of apartheid law, nor is it to blame for apartheid law. Racism was the ultimate cause of the apartheid order. The struggle for liberation was simply the series of external historical events that caused panic to the white leadership of South Africa and led to the promulgation of apartheid laws by the apartheid regime. We mentioned that, before apartheid officially commenced, there had been many laws that were designed to keep blacks in a position of social, political and economic subordination. These legislative measures set the liberation movement in motion. As the struggle for liberation (which is an external historical event) intensified, so did the counter-measures of the apartheid regime in the form of oppressive legislation. Therefore, before the struggle could eventually succeed, it first had the opposite effect: the apartheid government increasingly promulgated unjust laws, among others, to suppress the organisations that took part in the liberation movement.

The history of the liberation movement in South Africa illustrates how external legal history directed the development of the internal legal history. The liberation movement played a significant role in the eventual recognition of the idea that all individuals are entitled to equal treatment under the law and that they possess inalienable human rights.

More importantly, pragmatic concerns about many issues that led to civil disobedience and related activities of the liberation movement, not only drove important South African political reforms (external legal-historical events), but were also instrumental in significant legal reforms (internal legal-historical events).



ACTIVITY 6.1

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

- (1) Why does knowledge of the development of the recognition of indigenous law and institutions form a necessary background to the study of the history of the liberation movement in South Africa?
- (2) How was it possible for the Legislature to promulgate unjust laws that were aimed at keeping blacks in a position of social, political and economic subordination during the 20th century?
- (3) Which campaign of the liberation movement marked a turning point in the history of the liberation struggle? Explain why.
- (4) In 2009, the South African High Court stated: “Principles of the Freedom Charter underlie the Constitution of the Republic of South Africa, 1996.” Explain what the Court meant by this statement.

FEEDBACK 6.1

- (1) An important element of the discontent of the black South African population, was the state’s consistent refusal to give recognition to indigenous African law and cultural institutions.
- (2) The power of the state was virtually unlimited. Parliament was supreme and could pass any legislation, irrespective of its content, provided they followed the prescribed procedure for passing legislation.
- (3) The turning point was the peaceful demonstration against pass laws in Sharpeville, Soweto where the police killed 69 demonstrators. After Sharpeville, the Unlawful Organisations Act 34 of 1960 was promulgated and the ANC and the PAC were declared unlawful; there were arbitrary detentions; leaders were imprisoned or forced into exile abroad and the once-peaceful resistance turned into an armed struggle; international condemnation of apartheid followed and there was a shift towards diplomatic isolation of South Africa.
- (4) There are many similarities between the Freedom Charter and the Constitution. Among others, the Charter proposed a constitutional democracy and the guarantee of rights and freedoms to all citizens. It called for equality before the law; the repeal of all laws that discriminate on the basis of race, colour or belief; equal access to education; equal access to land; and democratic organs of self-government.

6.4 CONCLUSION

This concludes our discussion of the political events of the 20th century that paved the way for the introduction of a constitutional democracy in the 1990s.¹⁷ In the next learning unit, we will look at the historical development of constitutionalism and the origins and development of the idea of fundamental human rights in South Africa.

¹⁷ The history of the liberation movement and the freedom struggle is complex. In this learning unit, we touched on some of the important events that contributed to the establishment of our constitutional democracy, the recognition of human rights and a legitimate South African legal order. If you are interested in further reading on this topic, you may consult the website “South African History Online: Towards a People’s History”, which is available at <http://www.sahistory.org.za/>. However, bear in mind that this does not form part of your study material.

SELF-ASSESSMENT QUESTIONS

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

- Is it relevant to consider the role of the national liberation movement in the foundations of the South African law? Explain your answer.
- The national liberation movement in South Africa strove to influence the formation of a just society and the development of legitimate laws. Do you agree with this view? Motivate your answer.
- How did the Freedom Charter influence the development of democracy and constitutionalism in South Africa?

LEARNING UNIT 7

The universal component: The history of human rights in South Africa

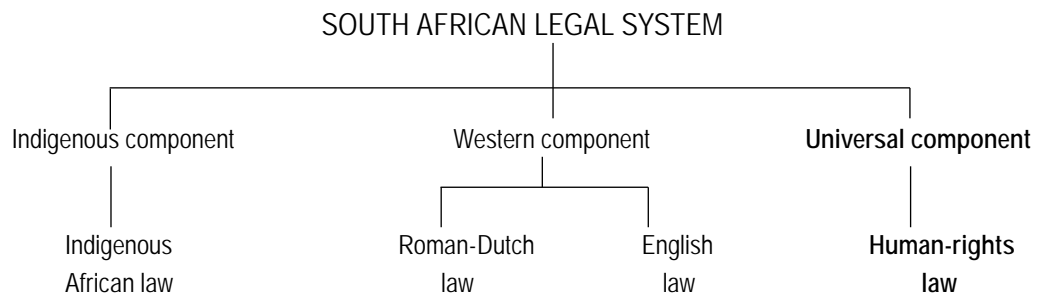


LEARNING OUTCOMES

After studying this learning unit, you should be able to

- identify the approach to constitutionalism that would best ensure the success of the ideal of an open and free democratic society
- describe how the testing capacity of the courts developed in South African history
- understand where the idea of human rights originated
- discuss how the African concept of ubuntu had an impact on the development of human-rights law
- know whether human rights were protected in South Africa before 1994

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 and the Western component. In this learning unit we will explore the third and last component, namely the universal component. The diagram below is a graphic presentation of where this discussion fits into the development of our legal system:



The 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 learning unit we investigate the origins and history of the principle of constitutionalism and the concept of human rights in South African law.

7.1 THE PRINCIPLE OF CONSTITUTIONALISM

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 guidelines laid down in a constitution. The **testing capacity of**

the courts goes hand in hand with the principle of constitutionalism. It refers to the power of the courts to test the validity of legislation issued by the legislature (or state).



NOTE

- 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).
- A bill of rights contains certain minimum standards to which all legislation (and other – decisions of the state) must adhere. It 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.

In the history of South African law, there have been three distinct approaches to the principle of constitutionalism, namely:

- **Complete denial of constitutionalism**, which 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. The courts have **no testing capacity** and cannot assess the decisions of parliament (eg the Constitution of the Zuid-Afrikaansche Republiek).
- **Partial recognition of constitutionalism**, which entails that parliament is supreme. Courts have **formal testing capacity** and may enquire whether the legislature followed the prescribed procedure when the relevant piece of legislation was passed. They cannot question the content or the unreasonable consequences of the legislation (eg the Constitutions of the Orange Free State, the Union of South Africa, and both the 1961 and the 1983 Constitutions of the Republic of South Africa).
- **Full recognition of constitutionalism**, which means that the constitution is supreme. The courts have **full testing capacity**. They may enquire whether the legislature followed the prescribed procedure when the relevant piece of legislation was passed and they may test the content of the legislation against the constitution.

Full recognition of constitutionalism has prevailed in South Africa since 1994, when the 1993 (or Interim) Constitution and the Bill of Rights were incorporated into South African law. In 1994, after months of negotiations at the Convention for a Democratic South Africa (CODESA), South Africa finally adopted a new draft Constitution which mirrored a truly democratic society. The final Constitution of the Republic of South Africa came into effect in 1997.

7.2 THE ORIGINS AND DEVELOPMENT OF THE IDEA OF FUNDAMENTAL RIGHTS

In the next few paragraphs, we will discuss the origins of human rights.



NOTE

Human rights and freedoms are rights and freedoms which inherently belong to every person on earth, because he or she is a human being. They cannot be taken away or restricted without good reason, either by another individual or by the state.

Traditionally, academic opinion held that the idea of human rights was of purely Western origin and that it developed from the natural-law theory. 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.

- ***Natural-law philosophy as the foundation of human rights***

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 that were not created by human beings, but which exist in nature. All states and lawmakers are subject to this set of norms. Christian and Muslim philosophers, such as St Augustine (4th century AD), Ibn Rushd (12th century AD) and Thomas Aquinas (13th century AD), ascribed these norms to **religious or supernatural origins**; while philosophers of the 16th and 17th centuries' Age of Enlightenment (or Reason) ascribed their origins to **human rationality**.



NOTE

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.

Hugo de Groot, one of the most important common-law writers, may be regarded as the father of modern natural law. In contrast to the jurists of the Middle Ages, he held that natural law did not derive from God, but from the rational nature of humans themselves. A person is a social creature that seeks to be a member of a community. Consequently, a person's reason dictates rules that 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?***

The 17th-century English philosopher, **John Locke**, was the first to suggest that natural law consisted of the inalienable rights to life, liberty and property. Locke built on Grotius's idea of a social contract, claiming that citizens agreed to create a state, solely for the purpose of protecting their basic rights to life, liberty and property. He developed the theory that the state's power is limited and laid the theoretical foundations of constitutional democracy.

The history of human rights in South Africa forms part of a global movement towards a greater recognition of human rights. The philosophy of modern natural law found expression in, for example, the American Declaration of Independence of 1776 and the Constitution of France of 1789. Further, the Universal Declaration of Human Rights of 1948 came about to give content to the idea of fundamental rights at international level.

In Africa, 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 hear disputes relating to the

application of the African Charter. South Africa was one of the countries that ratified the protocol to the African Charter that established the court.

As indicated, 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.

- ***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 in *S v Makwanyane and another*¹ a number of the judges made it clear that the Constitution and the Bill of Rights should not be understood as merely a Western import. The Court held that the Constitution and the Bill of Rights are also deeply rooted in the values of the South African community itself and that ubuntu is the source of African values. The judges accepted that, in interpreting the Bill of Rights, they had to give effect to indigenous values and therefore develop a specific South African understanding of human rights.

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, Sachs J 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”.²

- ***But what exactly is meant by ubuntu?***

Ubuntu has been translated as a spirit of humaneness, social justice and fairness. It includes virtues, such as tolerance, compassion and forgiveness in relation to other human beings. Ubuntu 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.

- ***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 Constitution, there are many examples of group- or community rights, as well as the idea of duties.

7.3 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 law 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. 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

1 1995 (6) BCLR 665 (CC).

2 Para [365].

implemented the policy of apartheid, but also limited the application of Roman-Dutch law, as well as the powers of the courts. 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.

- ***The constitutional crisis in the Zuid-Afrikaansche Republiek (ZAR)***

During the 1890s, a crisis arose in the ZAR concerning the validity of the decisions of the Volksraad. Under the leadership of Chief Justice Kotzé, the courts declared certain Volksraad decisions invalid, because the correct procedure as prescribed by the ZAR's Constitution for the adoption of legislation, had not been followed.

This led to the dismissal of the Chief Justice by the State President, marking the courts' failure to test legislation formally against the Constitution. The principle of constitutionalism was completely denied, in spite of the fact that the ZAR 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.

- ***Human rights in the old Republic of the Orange Free State***

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. The Constitution of the Orange Free State provided that its Volksraad would not be completely sovereign. Procedural rules for the promulgation of legislation were laid down in the Constitution and the courts had a formal testing capacity. The Constitution further guaranteed a number of fundamental human rights, such as equality before the law and the right to free association.³ 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.

- ***The constitutional crisis in the Union of South Africa***

The 1910 Constitution of the Union of South Africa made explicit provision for the formal testing powers of the courts. However, during the 1950s a constitutional crisis emerged that made it clear that the existence of a formal testing capacity of the courts was not in itself sufficient to protect the basic underlying principles of an open and free democracy.

In *Harris v Minister of the Interior*⁴ the court had to decide whether the prescribed procedure for the adoption of legislation had been followed to remove the so-called coloured voters from the common voters' roll. The content (the question of racial discrimination) of the legislation was not at issue here. The Appellate Division ruled that the Act was void, because the procedure laid down in the Constitution for the promulgation of new legislation had not been fulfilled.

The government then side-stepped this limitation of its powers by "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

³ However, these rights were only granted to the white citizens of the Orange Free State.

⁴ 1952 (2) SA 42 (A).

the same piece of legislation. In a subsequent court case it was decided that the formal prescriptions of the Constitution had been fulfilled. The court could not declare the legislation invalid as it was powerless to decide on its moral content.

7.4 HUMAN RIGHTS IN SOUTH AFRICA SINCE APRIL 1994

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 (as discussed in learning unit 6). 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. In its report of 2003, it found that the inability of our courts to take a stand against the onslaught of apartheid legislation was mainly the result of

- the **doctrine of parliamentary sovereignty** (which had its origins in English law);
- the **principle that judges could only administer justice** and not create it; and
- **legal positivism**, which means that law and morality must be separated – judges must apply the law (legislation, common law, etc.) even if it is unjust.

The Commission blamed apartheid judges, because they did not always use the available opportunities, where legislation was unclear or ambiguous, to appeal to the 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.



NOTE

In *Le Roux and others v Dey*,⁵ the Constitutional Court noted that Roman-Dutch law was a “rational, enlightened system of law, motivated by considerations of fairness” and that “in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness”.

The 1993 and 1996 Constitutions, which were the result of protracted negotiations at a multi-party conference, may be regarded as milestones in South African legal history, because they finally established full recognition of constitutionalism in South Africa, and replaced parliamentary sovereignty with constitutional supremacy.⁶

5 2011 (3) SA 274 (CC) para [198].

6 S 2 of the Constitution provides that the Constitution is the supreme law of South Africa, that any law or conduct inconsistent with it is invalid and that the obligations imposed by the Constitution must be fulfilled. This means that all law, including the common law and indigenous African law, that is inconsistent with the Constitution, may be declared invalid by the Constitutional Court (see also ss 39(2), 172, 173 and 211 of the Constitution).



ACTIVITY 7.1

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

- (1) 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.
- (2) In learning 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 on our legal system or was there a reception of this principle in our law?
 - (b) Was the Constitution with its Bill of Rights imposed on our law, or was it received into our law?
- (3) Do you remember the case of *Hassam v Jacobs* that we discussed in learning unit 2? What was the court's finding regarding the legislation under scrutiny? What does this say about the courts' testing powers?

FEEDBACK 7.1

- (1) When you read the scenario, the first thing you must pay attention to is, as always in legal history, the period. 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. 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. 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, because the prescribed procedure had not been followed.

- (2)
 - (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 on 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 therefore that sovereignty was not imposed.
 - (b) The Constitution, with the Bill of Rights, was the outcome of a democratic decision-making process and one may infer that it was willingly received and not imposed on the legal system.
- (3) In the case of *Hassam v Jacobs*, the Constitutional Court found that section 1 of the Intestate Succession Act 81 of 1987 was constitutionally invalid, because it excluded widows in polygynous marriages from the benefits of the Act. In terms of the 1996 Constitution, the South African courts have full testing powers. The *Hassam* case is an example of how the courts applied this full testing power in looking at the content of the legislation under scrutiny.

7.5 CONCLUSION

This concludes the discussion of the external history of South African law. You should now understand why South African law is characterised as a “mixed” or “hybrid” legal system and why the African, Western and universal components form an essential part of the law of South Africa. More importantly, you should appreciate that the Constitution and the introduction of a human-rights culture fundamentally changed the law of South Africa. In the following parts, we will discuss the internal history of South African law, focussing on the Roman foundations of the Western component of our law.

SELF-ASSESSMENT QUESTIONS

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

- How did the Age of Reason change the concept of natural law and how was this relevant to the development of the concept of human rights?
- How did ubuntu change the concept of human rights in Africa?
- What did the Court have to say about values in *S v Makwanyane*?
- Name three reasons identified by the Truth and Reconciliation Commission for the courts’ inability to take a stand against the onslaught of apartheid legislation.

PART 2

Historical foundations and development of the law of property and obligations

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LEARNING UNIT 1

Setting the scene



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- explain the relationship between the Constitution and the other sources of law in South Africa
- describe in your own words what you understand about “transformative constitutionalism” and the transformative constitutional project
- provide your opinion on the purpose of the Constitution in South Africa

1.1 INTRODUCTION

Welcome to the second part of this study guide, in which we look at the historical origins and development of certain legal rules. In this part we will put into focus what you have learnt about the external legal history, by exploring the internal history. Remember that we discussed the distinction between the internal and the external legal history in part 1 of this study guide. Let’s refresh our memories:

The external history of law examines the sources and factors that have contributed directly or indirectly to the development of a legal system. These include the political, socio-economic, religious and constitutional factors that have had an impact on the development of a legal system. Therefore, the external legal history provides insight into the internal history of law.

The internal history of law covers the origins and development of the legal rules and principles themselves, under the influence of external historical events.¹

Part 2 of the study guide (The historical foundations and development of the law of property and obligations) is rather fascinating, since we refer to Roman law principles from the Twelve Tables (450 BC),² as well as how they are dealt with by the Constitutional Court in 2017. The aim of this part of the study guide is to shape your understanding of the development of the legal rules and principles of South African law. We wish to show you that some legal rules have remained (because they are fair and just to all) and how some were discarded or developed by the Romans themselves, later by the Dutch and still later, by the South African courts. We would like you to note how and why legal rules change over time, and that these changes are guided by historical events (the external legal history) as well as the changing views and needs of society.

1 See 1.1 in learning unit 1 of part 1 of the study guide to revise these concepts and the examples provided there.

2 Revisit 3.2 in learning unit 3 of part 1 of the study guide for a discussion of the Twelve Tables.



NOTE

We will frequently be referring to historical events, fundamental principles, specific Roman codifications of law and the various sources of South African law that have already been discussed in detail in part 1 of this study guide. If you are uncertain about a term, please page back and read again the relevant pages. In order to master this module, you will need to build on your existing knowledge.

In part 1 of the study guide you were also introduced to the fundamental principles of the African customary law and its oral tradition. As we work through this part, it is important that you note instances where the common law and African customary law can apply simultaneously to a specific legal scenario. The Constitution of the Republic of South Africa, 1996³ instructs us to respect, apply and develop the customary law where necessary and applicable. We will also take a closer look at the African philosophical approach of ubuntu, which is one of the foundational principles of the customary law.

1.2 HOW TO APPROACH THIS PART

It is important for you to note how you should study and understand this part of the study guide. Since we will focus a lot of time on the impact of the Constitution, we expect of you to engage with the Constitution itself. You can only do this if you read the Constitution; you will therefore have to acquire a copy of the Constitution, if you do not already have one. It is the document that you will refer to most frequently during your studies, so it is a good idea to get a copy now.

There are several ways to get a copy of the Constitution. If you have access to the internet, you can download a PDF version from the Department of Justice and Constitutional Development's website,⁴ or from a free database of current legislation.⁵ Also take note that the Southern African Legal Information Institute (SAFLII) has a free database of legal sources, case law, government gazettes and academic journal articles from 16 southern African countries.⁶ The Constitution is also available electronically on UNISA's library website and it will be made available on this module's myUnisa page, under "Additional Resources". Hard copies of the Constitution are also available in all UNISA libraries. Alternatively, you can purchase a copy from a bookseller that specialises in legal sources and textbooks.

Each learning unit in this part of the study guide will require of you to read certain sections of the Constitution. Your understanding of the contents will be limited if you do not read the relevant sections as you work through the study guide.

Please note the following regarding the relationship between learning units 2, 3 and 4 of this part of the study guide. No piece of legislation, common-law rule or custom in indigenous law is an island. None of it stands alone, since all law applies at all times and in all situations. Some law is not relevant in certain instances and it is highly unlikely that a legal practitioner will simultaneously have to refer to the Performing Animals Protection Act⁷ and the Choice on Termination of Pregnancy Act⁸ in order to solve a

3 Hereinafter referred to as "the Constitution". Please note that the correct way to refer to the Constitution is always: "The Constitution of the Republic of South Africa, 1996" and not "The Constitution of the Republic of South Africa Act 108 of 1996".

4 <http://www.justice.gov.za/legislation/constitution/index.html>.

5 <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

6 <http://www.saflii.org/>.

7 Act 24 of 1935.

8 Act 92 of 1996.

single legal problem. But, the law of property and the law of contract are closely related, and there are also overlapping principles in the law of contract and the law of delict. Therefore, you have to understand the law set out in this part of the study guide as a whole. One field of law can affect another field, all while the Constitution applies as the supreme law to all fields of law. So when you get to the discussion of the law of contract, don't forget everything you have learnt about the law of property.

Lastly, be aware of what you are learning in this module. Never take the law as it is discussed (in any module) for granted, just because it is written down or because a court or a lecturer has stated it to be so. The law is a living, ever-changing entity (influenced by the Constitution) and it is your job as future legal practitioner to question what you read and learn. That is why this module expects you to think critically about everything you are learning.

1.3 WHY THESE LEGAL CONCEPTS?

In this part of the study guide we will be examining the foundations of the South African law of property and the law of obligations. We have specifically selected them, because these fields clearly illustrate that many of our legal rules stem from Roman law. However, we have only kept what is still just and fair in our modern society. We will, however, also be looking at a few legal principles that are outdated and need to be developed in order to contribute to the transformative-constitutional project. Court decisions on the law of property, contract and delict can also effectively illustrate the vital relationship between African customary law, the common law and the Constitution, and we will look at these cases towards the end of each learning unit that follows.

The purpose of this part of the study guide is not to make you an expert in property law or in the law of obligations. We merely wish to introduce you to some legal principles that you will explore in greater detail as you progress with your legal studies. The other important understanding that you should take away after completing this course, is that no law is ever set in stone (not even the Constitution). Laws must change along with a changing society. Be on the lookout for examples of legal development as you work through this part of the study guide.

1.4 THE IMPORTANCE OF THE TRANSFORMATIVE-CONSTITUTIONAL PROJECT

We keep on referring to the Constitution. Let's explain why.

The Constitution is the supreme law of the land.⁹ This means that any law – a rule of the common law that we inherited from Roman law, a custom or rule of customary law, or legislation (or a part thereof) – that does not reflect the values of our Constitution, is unlawful (invalid). Put differently, if the application of any legal rule has the effect that a person's constitutional right is unjustifiably infringed, this law must be scrapped or changed to align it with the Constitution.

Throughout the rest of this part of the study guide we will be pointing out legal rules that have been developed in order to better align them with what the Constitution

⁹ S 2 of the Constitution states that it is the supreme law of the Republic of South Africa.

demands of us. Another crucial legal process we will evaluate in case law, is that of legal interpretation. Perfectly transformed legislation, or even sections of the Constitution, are of no use if they are interpreted or applied in a conservative manner that does not take the values of the Constitution into consideration. But how can we further define exactly what it is that the Constitution expects of us?

In order to answer this question, we should explore the concepts of “transformative constitutionalism” or “the transformative-constitutional project”. These concepts seem complex, but spending some time critically thinking about them will help you to gain a better understanding of them.

“Transformative constitutionalism” has many definitions and many great legal thinkers of our time have written at length about this theory. Professor Karl Klare, an American legal philosopher with great respect for the South African Constitution and its purpose in our society, has defined transformative constitutionalism as follows:

a long-term process of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.¹⁰

That sounds rather complicated. We can also look at these “nonviolent political processes grounded in law” as a transformative-constitutional project. The easiest way to explain it is to ask you to picture it as a project or a mission. This mission is guided by the Constitution and the purpose thereof is to cause transformation. Let’s break it down by asking a few questions.

- ***What type of transformation are we talking about?***

Think about South Africa, the country that this Constitution serves. What do you feel should be transformed about our country? Different people would most certainly have different answers to this question, but all their answers would relate to society, or the lives of the people who live in the country. You might feel that the economy; land matters; sociological issues, such as healthcare or education; the political arena or its role players; or service delivery in your area demand the most urgent attention and transformation. The great thing about the Constitution is that it provides us with the tools and opportunities to transform society by grappling with all these problems facing South Africa. The Constitution, therefore, allows us to transform our society, and in this module we will be looking at socio-economic transformation, or the “large-scale social change” that Klare talks about.

- ***Why do we need transformation?***

In 1994 our new democratic Republic was born. This is an example of an external legal historical event that had an impact on the internal legal history. The Interim¹¹ and final Constitutions were enacted as a direct result of the political events that took place in the country. But the fact that a new government came into power did not automatically mean that all our socio-economic problems were solved overnight. The

¹⁰ Klare K “Legal culture and transformative constitutionalism” 1998 *SAJHR* 150.

¹¹ The Constitution of the Republic of South Africa Act 200 of 1993.

democratically elected government of 1994 inherited a political and legal system built on gross inequality and discrimination. We only have to think of the lack of access to electricity, water and sanitation under the apartheid government as one example of the effect of unjust policies and legislation.

In time, economic transformation has proven the hardest of all to achieve. Our society can only ever be really equal if it is transformed to the point where historical injustices have been acknowledged, and a heartfelt and valid attempt has been made to address and rectify them. As we have seen since 1994, this is no easy task, but rather an ongoing effort.

- ***How are we supposed to “cause” this transformation?***

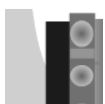
There are many ways to effect change, but, as scholars of law, we will be looking at how we can use the law to change, or uplift, our society. The Constitution allows us to change existing laws and it instructs us to pass new laws with which to transform our society. When you take your place in society as a legal professional, you will be working with the law daily and it will be the most powerful tool at your disposal.

- ***How does the Constitution guide this project of transformation?***

The Constitution prescribes that all law should be in line with it. This means that we have to apply the Constitution itself when we have complex legal problems to solve. When we interpret law, we are guided by the spirit and purpose of the Constitution, which is found in the Preamble (in the front of the document), in section 1 and in section 2 of the Constitution. Each of the remaining learning units in this study guide will end off with a discussion of how the Constitution is guiding social transformation. This is best explored by using case law to show how real changes have been made.

- ***How does this transformative-constitutional project affect me?***

The transformative-constitutional project we are referring to, is aimed at developing and building our society, by using legal resources and avenues. You, as a law student and future legal practitioner, are now automatically involved in this project. You might become a judge, a member of parliament, a social-rights activist, or you might run your own small law practice one day. Each of these provide you with the opportunity to interpret and apply the law in the lives of ordinary South Africans. All you have to do is to question whether these laws are fair and whether they serve the transformative endeavour of our country. Where can you start? Firstly, you will need to read the Constitution.



READING

Read the Preamble and sections 1, 2, 7 and 8 of the Constitution of the Republic of South Africa, 1996. These sections explain the purpose of the Constitution, as well as to whom it applies.



ACTIVITY 1.1

Read the Preamble and sections 1, 2, 7 and 8 of the Constitution and answer the questions that follow:

- (1) For which purpose was the Constitution adopted?
- (2) In which chapter of the Constitution is the Bill of Rights found?
- (3) Is the state subject to (bound by) the Constitution?

FEEDBACK 1.1

- (1) This can be found in the Preamble of the Constitution, which specifically lists its four aims. These are to –
- “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”
- (2) Chapter 2.
- (3) Yes, section 8(1) of the Constitution proclaims that all three spheres of government (the legislature (namely Parliament), the executive (the president and the cabinet) and the judiciary (the courts and judicial officials)), as well as organs of state, are all bound by the Constitution. This means that the Constitution applies directly to them and that they must do as the Constitution instructs and empowers them.

1.5 CONCLUSION

We will address the theories of transformative constitutionalism in much greater detail in the last part of the study guide, when we look at the Constitution again in greater detail. For now all there is to do is for us to get started. Make sure that you have your copy of the Constitution at hand as you work through the rest of this study guide.

SELF-EVALUATION QUESTION

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

The purpose of this first learning unit is to introduce you to the role of the Constitution in our society, the duty it imposes on legal practitioners, and the concept of transformative constitutionalism. Keep these concepts in mind as you work through the rest of this part of the study guide and try to identify the instances where the Constitution plays an important role in legal development, or where it should play a role. Also identify instances mentioned in the study guide where judges align their decisions with the aim and spirit of the Constitution, and identify the occasions where they fail to do so.

LEARNING UNIT 2

The law of property



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- identify the differences between a real right and a personal right
- explain why it was necessary to protect possession under Roman law and why it is still important today
- explain what a *iusta causa* is and why it was important where delivery of a thing was concerned
- discuss the impact of the Constitution and case law on the eviction of unlawful occupiers of land
- explain in detail whether or not you think the Constitution can be used to protect the various rights and claims to immovable property in South Africa today

2.1 INTRODUCTION

This learning unit will introduce you to the law of property, with all its virtues and flaws. We will discuss some basic principles of the Roman law of things, which has remained relevant in South African property law to this day. “The law of things” refers to the law governing specific legal objects and legal relationships, whereas “the law of property” is a wider concept, which also includes the law related to relational rights in property, as well as constitutional developments therein. The fundamental principles of rights and property are very important for our discussions on the law of contract and delict that will follow in learning units 3 and 4 of this second part of the study guide. We will evaluate the notion of ownership as it is understood under African customary law and compare this to the Western-based idea of ownership and rights to property. South African case law will be mentioned throughout to illustrate that these principles have remained part of our law, many of them exactly as they were more than two millennia ago.

Over the years, numerous changes have naturally been made to the Roman-Dutch legal principles that form the basis for our law of property. These changes were brought about by legislation, the judiciary and the Constitution, but the basic structure of the law of property remains the same, despite the influences mentioned. Whether it is acceptable that the law has changed so little is a good question, one which is hard to answer, but which we pose to you to think about as you work through this learning unit.

We will also discuss sections 25 and 26 of the Constitution and the impact these have had on our law of property. More importantly, we will also look at the gaps in our law – instances where the law can be developed further in line with the principles of the Constitution in order to bring about economic transformation in South Africa. We will then draw some conclusions on the good, the bad and the ugly of the Roman property law system that shapes our understanding of property in South Africa today.

2.2 UNDERSTANDING THE SCOPE AND FUNCTION OF THE LAW OF PROPERTY

The law of property comprises the system of legal principles or legal rules that regulate the relationship between legal subjects and a particular kind of legal object, namely a “thing”. The law of property is just as concerned with what other people may do with an owner’s thing as with what the owner can do with her own thing.

In the process of exploring these issues, we must bear in mind that the function of the law of property is to harmonise the great variety of individual rights that may exist in respect of specific things.



NOTE

A **legal subject** is a person who is subject to the laws that apply to him (so, an individual who has certain rights and duties, because a certain set of legal rules apply to him). Under modern South African law, natural persons (like us), juristic persons (for example, companies) and organs of state (such as a municipality) are all legal subjects. So, the law applies to, and protects, us all. You will learn more about this in the Law of Persons (PVL1501) and Introduction to Law (ILW1501). **Legal objects** are things that legal subjects can have rights to. Examples would be a chair, an apple or a house.

2.3 THE DEFINITION AND CLASSIFICATION OF THINGS

For the purpose of this module, we will be making use of the narrow definition of a “thing”. It simply refers to a corporeal object. Corporeal things are things that can be touched or observed by means of the senses (such as land, a dress, a book or a chicken). Therefore, these things can be seen, heard, tasted, smelt or touched.

Before we seriously delve into the law of property it is important to know that there were (and still are) various types of things. These distinctions are important, because different legal rules applied to different types of things.

2.3.1 Things in commerce (*res in commercio*) and things outside commerce (*res extra commercium*)

The most important distinction is that between things that are in the commercial world and those outside the commercial world. Things within the commercial world were important in the law of property, because these were the things that one could possess, of which one could obtain ownership, and in respect of which one could establish a limited real right.

Things that were outside commerce were beyond human control and private individuals could not obtain ownership over these things. Therefore, the Romans regarded these things as being legally insignificant as far as the law of property was concerned. Such things were either (1) things subject to divine law (temples, altars, religious objects, tombs and cemeteries); (2) things that belonged to everyone (the air, the sea and the beach, public roads, bridges, state mines and industries); or (3) things that belonged to the state or to a community (things that belonged to a city for the use and enjoyment of all its inhabitants, such as theatres, parks and sports stadia).

Today our law still regards several things as falling outside the realm of commerce, but these are not all the same as under Roman law. Modern law does not recognise things subject to the divine law.¹ Churches, temples and mosques are the owners of their buildings and all religious objects inside these buildings (think of the Roman Catholic Church – today it is one of the richest institutions in the world). South African law still regards property that is controlled by the state and which is used for the benefit of all people, (such as roads) as *res extra commercium* other things classified as *res extra commercium* that those that are available for the use of all people, such as air and water. South African law also excludes certain things from commerce due to their nature, such as corpses, human body parts or organs.² (And yes, this means that you do not own your body – no one does.)

We will now briefly discuss the various kinds of things that were within the commercial world.

2.3.2 Single and joint/composite things

Things such as tomatoes, an ox or a plank are regarded as single things, because in their natural form, they are unitary. However, a thing may be made up of multiple components, such as a ship or a house. These things are made up of several single things combined in such a way as to form a whole, and are called “composite” or “joint” things.

2.3.3 Consumable things (*res consumptibiles*) and non-consumable things (*res non consumptibiles*)

Consumables (such as sugar or flour) are consumed by normal use, whereas non-consumables (such as a hammer or an axe) are not consumed by use. When non-consumable things are used, they do not cease to exist, so they can be used again, but when you bake bread with flour (a consumable), you can never use that same flour again for something else.

2.3.4 Movable things (*res mobiles*) and immovable things (*res immobiles*)

Immovable things were land and everything permanently attached to it (for example buildings, trees and plants). Movable things were all things that were not immovable. A farm is an example of immovable property, because it cannot physically be moved and taken to another place – its location is fixed. The location of a pen or a dog is not fixed and these, therefore, movables.

2.3.5 Fruits

In law, the term “fruits” refers to the economic benefits that flow from the normal use of a thing. This means that there has to be a principle (main) thing that releases/produces or results in the fruits. The “fruits” become individual things when they are separated from the principal thing. *Fructus naturales* are distinguished from *fructus civiles*. The former were fruits produced in nature, such as fruits of an orchard, crops or young animals, wool or milk. The latter were fruits that were obtained only after the establishment of a contractual relationship, such as rent from a house or interest from an investment.

1 *Cape Town and Districts Waterworks Co (Ltd) v Executors of Elders* (1890) 8 SC 9.

2 Slabbert M “This is my kidney, I can do what I want with it – Property rights and ownership of human organs” 2009 *Obiter* 501-504.

2.3.6 *Res Mancipi* and *res nec Mancipi*

Before Justinian's codification of the *Corpus Iuris Civilis*, the Romans distinguished between *res Mancipi* and *res nec Mancipi* (things that were not *res Mancipi*). Different modes of transfer and delivery applied to the two classifications. In this module we do not expect of you to know this distinction. But we will mention that slaves qualified as *res Mancipi*, and some were regarded as extremely valuable property. Not all slaves were manual labourers; some were doctors or accountants and many were highly educated.



ACTIVITY 2.1

- (1) What is the difference between a legal subject and a legal object?
- (2) Provide one example of each of the following things:
 - (a) consumable thing
 - (b) single thing
 - (c) *res extra commercium*

FEEDBACK 2.1

- (1) A legal subject is a person (either natural or juristic) to whom the law applies. Legal subjects can have certain rights and duties as a result of the application of the law. A legal object is a thing that legal subjects can acquire a real right over, such as a table. The use or ownership of a legal object is determined by law.
- (2) Provide one example of each of the following things:
 - (a) This question has many correct answers. A consumable thing is a thing that does not exist anymore once it has been used or consumed (see 2.3.3 for a discussion of consumable things). Your answer could have been any example of something that you can eat or drink (eggs, meat, apples or juice), or something that can be used up, such as fire wood, candles or soap.
 - (b) Single things are discussed in 2.3.2 above. You could have mentioned one of millions of examples of single things, as long as your example illustrates that you understand that a single thing naturally consists of one thing and not a composite thing made up of many separate things. Here are a few examples of single things: a dog, a banana, a rock, a diamond, a leaf, a fish or a stick, to name a few.
 - (c) *Res extra commercium* are discussed in great detail in 2.3.1 above. There are many things that cannot be owned and that fall outside the commercial world. Your example could be air, a beach, a public road or a bridge, but there are many more correct examples.

2.4 SLAVERY

Let's take a moment to discuss the concept of people as property. The Romans believed that some people had the right to own other human beings. Slaves were therefore legal objects and not legal subjects. Owning slaves was the most important status symbol in ancient Rome. It is estimated that by the end of the Republican period, one in four people in the Roman areas were slaves.³ Some people were born to slavery (you were automatically a slave if your mother was a slave), others were sentenced to slavery for committing crimes or being unable to repay debts, many were victims of piracy and captured by their attackers, but the majority were prisoners of war.⁴

3 Bradley K "Slavery" in Hornblower S, Spawforth A & Eidinow E (eds) *The Oxford Classical Dictionary* 4th ed (Oxford University Press Oxford 2012) 1375.

4 Bradley "Slavery" 1375.

Various ancient civilisations were built on the backs of slaves. Some African societies had slaves – think of the Egyptians – but hundreds of thousands of Africans were also captured and sold as slaves all over the world, especially in North America. Also, early on, various religions accepted slavery as a part of life, such as Christianity, Judaism and Islam.⁵ These religious texts mainly referred to the humane treatment of slaves, but slavery was not banned outright.

In South Africa, slavery was brought to the country by the Dutch. The Dutch started importing slaves to the Cape almost as soon as they arrived.⁶ The first slaves came from Angola,⁷ but later they were brought from all over Africa and Asia (specifically Malaysia, Indonesia and, later, India). Over time, various laws were passed to improve the working conditions of slaves and improve their rights under the law.⁸ However, they were still regarded as property. The slave trade was abolished in the Cape Colony in 1807 and all slaves in the Cape were emancipated in 1834.⁹

Today, we are shocked and disgusted at the idea of our fellow human beings being traded for money and having no rights. Unfortunately, human trafficking is a real threat to the global understanding of human rights, and one which cannot be ignored. The United Nations (UN) has passed various resolutions aimed at combating human trafficking and modern-day slavery. In line with international standards, South Africa passed the Prevention and Combating of Trafficking in Persons Act.¹⁰ Section 13 of the Constitution also protects our fundamental human right to not be forced into slavery, servitude or forced labour.

Throughout history, many societies and religions accepted and promoted slavery, a practice that horrifies us today. However, today many steps have been taken to protect the human rights of all people around the world. This is an example of the law developing to protect all legal subjects as equal.

2.5 THE RELATIONSHIPS BETWEEN LEGAL SUBJECTS AND LEGAL OBJECTS

Up to this point we have discussed legal objects, by defining things and classifying them into different categories. We will now discuss the relationships legal subjects can have with specific things. These things can be their own property, or that of another. Before we continue, it is very important that you should be able to differentiate between real rights and personal rights.

A **real right** is a right in respect of a thing, which was enforced under Roman law by a real action, and this right could be enforced against any person who encroached on a

5 In this regard, see the Bible, the Tanakh and Mishneh Tohra, and the Qur'an. Interestingly, the Romans frequently captured entire Jewish communities for the slave trade. It is unclear whether Hinduist texts specifically referred to "slaves" or "servants". But social classism was a very real thing in Hindu societies, with the "Untouchables" as the lowest members of society. Buddhism has never supported slavery in any form.

6 Ross R *Cape of torments: Slavery and resistance in South Africa* (Routledge & Kegan Paul London 1983) 11.

7 Ross *Cape of torments* 11.

8 Mason JE *Social death and resurrection: Slavery and emancipation in South Africa* (University of Virginia Press Charlottesville 2003) 10.

9 Mason *Slavery in South Africa* 12.

10 Act 7 of 2013.

person's right to a thing. The real rights we will be discussing in the remainder of this learning unit are possession, ownership and limited real rights.

In contrast, a **personal right** is a right to claim performance that can only be enforced against a specific person, by means of a personal action. We will discuss the right to claim performance from another person or persons (in terms of the law of obligations) in learning units 3 and 4.

Both real and personal rights still exist under South African law, and in modern legal systems all over the world. They are also still protected in a similar fashion, but today the Constitution has an impact on how and when these rights may be protected or limited. Let's now have a look at the real rights that existed under Roman and Roman-Dutch law, and how these rights have survived to this day.



ACTIVITY 2.2

- (1) Provide three distinctions between a real right and a personal right.
- (2) Provide an example of a real right.
- (3) Which major religions supported slavery as a social necessity?
- (4) How did slavery come to South Africa?
- (5) By what modern name is the slave trade known today?

FEEDBACK 2.2

- (1) A real right is a right in respect of a thing, and a personal right is a right to claim performance from someone. Real rights are enforced by real actions, whereas personal rights are enforced by means of personal actions. A real right can be enforced against any person who infringes on a person's right to a thing, whereas a personal right can only be enforced against a specific person.
- (2) The best example of a real right, is ownership.
- (3) Christianity, Judaism and Islam all refer to the practice of slavery and none of the religious texts of these religions prohibited slavery.
- (4) When the Dutch arrived at the Cape in 1652, they brought the practice of slavery along with them. In order to answer this question you had to combine the knowledge you obtained in both the first part of the study guide (on the external legal history) and in this learning unit. Remember that nothing that you will learn in this module stands alone from any other information in the study guide. It is all connected and related.
- (5) Human trafficking.

2.6 POSSESSION (*POSSESSIO*)

In everyday language, the word "possession" is used somewhat loosely. A layman might easily say that he possesses a house, when he really means that he is the owner of that thing. In law, "possession" has a specific technical meaning. It signifies the physical and factual control a person has over a corporeal thing. In practice, the owner of a thing often has possession of his own thing (Tebogo can own his house and live in it), but it is also possible that a person who is not the owner of a thing, has control over it. If Tebogo leases his house to Christine, then Christine is in possession of the house, but Tebogo remains the owner. If Anita steals Barbara's ring, Anita becomes an unlawful and *mala fide* possessor of the ring, but Barbara still remains the owner. In other words, possession is obtained when a person established physical control over a thing, with the intention of controlling it.

Possession can be protected by law, by way of interdicts (which are a type of legal remedy). Possession also plays an important role in respect of limited real rights, as we will learn later in this learning unit. Being able to identify the factual situation of possession, is an important skill required for the study of the law of property. However, the law on possession is very complex and you will examine it again in the Law of Property (PVL3801). At this point in your studies we merely wish to point out that possession and ownership are not the same concept, and that the correct use of terminology is important, because possession and ownership have different legal consequences.

2.7 OWNERSHIP

2.7.1 What is ownership?

Ownership is the most important real right. But what is the true nature of ownership? Ownership is the fullest (strongest) possible right one can have over a corporeal thing.

The real right of ownership gave the holder of this right certain rights and privileges over her thing. Ownership implied that the owner of the thing had the right to use the thing (*ius utendi*), the right to become the owner of the fruits that the thing produced (*ius fruendi*) and the right to alienate or destroy the thing (*ius abutendi*).¹¹ We can explain this with an example: Thuli is the owner of a cow. She may use the cow in any way she wants (she may paint a picture of it, or attach a plough to it and work her land); she will automatically become the owner of the milk or any calf born from the cow; and she has the right to slaughter the cow or donate it to her brother. She can basically do whatever she wants with the cow (but today the laws against animal cruelty would limit her *ius utendi* in certain ways).

Under Roman law, ownership could only be exercised over corporeal things *in commercio*, in other words, that were part of the commercial world and without any defect (ownership could not, for example, be established over stolen goods). Our own Constitution provides (in section 25) for the protection of ownership as a fundamental right: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

2.7.2 Restrictions on ownership

The most general restrictions on ownership were either the existence of personal rights against the owner, or a restriction placed on the owner’s rights as a result of legal provisions.

- Restriction by personal rights: If the owner of a house leases a house to a lessee, the owner obviously cannot live in that house any longer. Therefore, the owner’s use and enjoyment is limited by the agreement between the lessee and the lessor.
- Restriction by provisions of law: The Twelve Tables made provision for restrictions on owners, based on public interest. It imposed restrictions intended to prevent a person from exercising her ownership over immovable property in a manner detrimental to her neighbours. For example, it was possible for a property owner to require his neighbour to remove the overhanging branches from a tree. Neighbour law is merely one example of how an owner’s rights can be restricted by law.

¹¹ Thomas PhJ, Van der Merwe CG & Stoop BC *Historical foundations of South African private law* 2nd ed (Butterworths Durban 2000) 134.

In *Gien v Gien*¹² the Transvaal High Court explained the restriction of ownership:

Ownership is the most complete right a person can have in terms of a thing. The person who is the owner of an immoveable thing can, in essence, do with his ownership as he chooses. This, however, is only partially true. The law does place certain restrictions on one's ownership. These restrictions can either flow directly from the objective law, or from the rights of other persons. Thus, no owner ever has the complete and absolute right to do with his property as he chooses.¹³

Since 1993 (when the Interim Constitution was enacted), the South African law has placed many further restrictions on the rights of owners, as we will discuss later in 2.13 and 2.14.

2.7.3 Indigenous property rights

As mentioned above, section 25 of the Constitution guarantees the individual's property rights. For a proper understanding of ownership in South Africa, it is necessary to establish the meaning of the concept "property" in indigenous law. Land, cattle and personal property are the most important categories of property in indigenous law. The individual's rights in respect of each of these categories are determined by his social status and position in the community.

It is easiest to explain the categories of property in the context of the indigenous marriage and the family. In this regard the following categories of property can be distinguished:

- ***Family property***

Customary marital law often provides for polygamous or polygynous marriages. This means that every man may have more than one legal wife. Each wife in a polygamous household has a specific rank or status in relation to the other wives. A particular wife, together with her children, forms a separate unit, that we can term a "household".

The husband is traditionally the head of the family and the control and administration of the family property is his responsibility. Family property includes all property of, and earnings by, the head of the family (things inherited by him or which he has received as gifts; income obtained from work; or goods received as *lobolo* or *lobola* (dowry given by the intended husband of his daughter or granddaughter).

Family property must be used by the head of the family for the benefit of the whole family. Each member of the family, depending on their status within the group, is therefore entitled to share in the property.

- ***Household property***

Gifts received by a woman, goods earned by her or by members of the household, *lobolo* given in respect of a daughter, and household things, such as furniture and utensils, are some examples of household property. Household property may also include the right to use specific agricultural land or to use a residence. In the case of household property, the interests of the household as a whole are paramount. The property must be used to the advantage of the wife and her children.

¹² 1979 (2) SA 1113 (T) 1120C.

¹³ Translated from the original Afrikaans.

- ***Personal property***

Goods that are only of use and value to a specific individual, and not to the group as a whole, can be described as personal property. The individual concerned has the exclusive right to use such property. Personal property is sometimes destroyed on the death of the individual – this illustrates the personal nature of the property and the minimal value that it has for the group as a whole.

Personal property appears to come closest to what Roman law regards as “ownership”, but these concepts are not the same thing.

2.7.4 A comparison: Roman-based and indigenous concepts of ownership

Laws passed by the apartheid government brought about an enforced separation of racial groups into different areas.¹⁴ In terms of this legislation, male family members who went to work in the cities, could not be accompanied by their wives and children. As a result, indigenous communities were disrupted and torn apart. There were implications for African customary law, such as the practice that developed in some areas that the woman, as head of the family, could control the property. Today, factors, such as urbanisation and the migratory labour system, influence the practicality of certain customs.

You will have to agree that it is almost impossible to understand or explain the indigenous concept of ownership and property rights when this is attempted from a Roman-based perspective. But the principal questions with regard to property are always the following: Who controls it, and who may use it? Regarding indigenous law, the answers to these questions must be sought in the broader family and marital relationship. In the case of the Roman law concept of property, on the other hand, the answers to these questions will generally depend on who the owner of the thing is, and whether other individuals have limited rights to it at the same time.

Although, strictly speaking, none of the indigenous rights to property fall within the concept of property as it was understood in Roman law, all these property rights fall within the scope of section 25 of the Constitution and, consequently, will be protected as fundamental rights.

We now move on to a discussion of acquiring (obtaining) ownership under Roman law. These ways of obtaining ownership are still relevant today, and some have changed very little since their inception.

2.8 THE ACQUISITION OF OWNERSHIP: DERIVATIVE ACQUISITION

There were various ways that ownership could be acquired under Roman law. The Romans distinguished original and derivative modes of obtaining ownership and this distinction is still followed in modern law.

Derivative modes of acquisition of ownership were those modes where ownership passed from one person to another, with the co-operation of the predecessor in title (the previous owner). This means that if Emile sells his house to Naledi, she will have

¹⁴ An example of such legislation is the Group Areas Act 41 of 1950.

derived her ownership from Emile. Under Roman law, *mancipatio*, *in iure cessio* and delivery (*traditio*) were available to the parties, and whether or not a thing classified as *res mancipi*, had an impact on the decision to use a specific method. But only *traditio* survived and forms part of South African law, and therefore we will only discuss that method.

In contrast, original modes of acquisition of ownership applied when a person acquired ownership of a thing independently and without the assistance of any other person. In the small number of cases where there was a predecessor, she had given no assistance in the acquisition of ownership. We will look at the most important ways in which ownership could therefore be acquired originally, namely appropriation (*occupatio*), acquisition of fruits (*acquisitio fructuum*), accession (*accessio*), creation of a thing (*specificatio*) and prescription (*usucapio*).

2.8.1 The *nemo plus iuris* rule

Before we discuss the different modes of transferring ownership in detail, we need to begin by examining a very important legal principle. The *nemo plus iuris* rule stated that no-one can transfer more rights in a thing to another person than she herself has.¹⁵ For the purposes of transfer of ownership, this meant that ownership can only be transferred if the person who transferred it was himself the owner of the thing.

2.8.2 *Traditio ex iusta causa* (delivery on a lawful ground)

Within the context of the acquisition of ownership, delivery (or *traditio*) indicated the transfer of ownership over a thing, through delivery of the thing by the owner (the transferor) to another person (the transferee). Although this transaction in essence consisted of the transfer of possession, it should be clear to you that ownership did not pass every time one person handed over a thing to another. In order to transfer ownership, the transferor (owner) must have intended to transfer ownership of the thing to the recipient, and the recipient must have had the intention of receiving ownership. Put differently, there had to be a valid legal reason (or *iusta causa*) for ownership to transfer.

What was a valid reason for transfer? For the purposes of transfer of ownership, one could say that it meant a transaction on the basis of which ownership would normally pass. The following transactions are examples of what was considered to be sufficient for the transfer of ownership: a contract of sale, a donation or the gifting of a dowry. The *iusta causa* requirement for the derivative transfer of ownership was met, for example, on the conclusion of a contract of purchase and sale.

This principle is still applicable in South African law today. In *Air-Kel (Edms) Bpk b/a Merkel Motors v Bodenstein*¹⁶ the judge referred to the *Corpus Iuris Civilis*¹⁷ and explained that “[o]wnership cannot be transferred by agreement alone: Delivery must also take place. The opposite is also true: Delivery alone is not sufficient. It must be accompanied by an agreement between the transferor and transferee that ownership will be transferred.”

There are various forms of *traditio*, all still applicable today. Let’s take a look at these.

¹⁵ *Digesta* 50.17.54.

¹⁶ 1980 (3) SA 917 (A).

¹⁷ *Codex* 2.3.20.

2.8.3 Simple delivery, or delivery from the one hand to the other (*traditio de manu in manum*)

This was the simplest form of *traditio* and it referred to the physical handing over of the thing from one person to another. For example, if Benjamin bought a loaf of bread from Carlos and Carlos handed the loaf to him over the counter, this was known as simple delivery. Billions of people across the world transfer ownership in this way every day.

2.8.4 Delivery with the long hand (*traditio longa manu*)

This form of delivery took place when the thing that had to be delivered or transferred, was simply pointed out, with the proviso that it was within sight of the parties and that the person acquiring it could immediately establish control over it.¹⁸ This was the logical method when the thing could not easily be handled. It was considered sufficient, for example, to point out the boundaries of a piece of land, or to point to a ship or a herd of cattle. Imagine selling cattle and having to physically hand over 1 000 individual animals to the purchaser.

2.8.5 Delivery with the short hand (*traditio brevi manu*)

There were also cases where delivery was even simpler and it was not necessary to physically hand the thing over to the transferee or to point it out. This was the case where the transferee was already in possession of the thing. Here is an example: Josephine borrows Annie's cooking pot. Josephine likes the pot so much (it is exactly the size she has been looking for) that she persuades Annie to sell it to her. Here it is not necessary that Josephine give the pot back to Annie so that Annie can deliver it to her again. As a result of the fact that the borrower (the new owner) already had control over the thing, an agreement between the parties was considered sufficient for the borrower to obtain legal control as the owner, and therefore to also obtain ownership.

2.8.6 *Constitutum possessorium* (delivery with the intention to possess forthwith on behalf of the transferee)

With this mode of transfer, physical possession was not handed over immediately. Let's use an example to explain this form of delivery. Steve buys a house from Juju. But the parties immediately conclude a lease agreement in terms of which the original owner, Juju, leases the house from the new owner, Steve for a period of time. So Juju does not move out of the house. Instead of the house being delivered to Steve first (when he buys it) and then returned to Juju (when he leases it), Juju retains uninterrupted control of the house. The mere intention of the parties allows possession of the house to pass.

2.8.7 Symbolic delivery (*traditio symbolica*)

In this instance, true control of the thing was not transferred, but the transfer of possession took place through a symbolic act. In Rome, it became increasingly common to record any legal act that had been performed in writing as evidence. Suppose, for example, that Brutus donated a horse to Julia. A document was drawn up as evidence

¹⁸ *Digesta* 41.2.1.21.

and handed to Julia. The delivery of this document gradually replaced the delivery of the thing as a means of transfer of ownership. The document was used by Julia as proof of ownership, which means that ownership passed by delivery of the document. Here the document simply served as a symbol of the thing.

In conclusion, *traditio*, as a mode of transfer of ownership, was and still is dependent on the existence of a valid reason or cause for the ownership to transfer. A contract of sale would be an example, but a contract of letting and hiring would not.



ACTIVITY 2.3

Which form of delivery is applicable in the following examples?

- (1) Otto buys a flock of sheep from James. The sheep cannot be taken to Otto's farm immediately and Otto therefore leaves a shepherd with the flock to look after the sheep.
- (2) Anthony leases a house from Una. Two years later, Una puts the house on the market and Anthony buys it.
- (3) Ettie sells her house to Charmaine, but the parties agree that Lettie will lease the house from Charmaine for a period of six months.

FEEDBACK 2.3

- (1) Delivery with the long hand.
- (2) Delivery with the short hand.
- (3) *Constitutum possessorium*.

2.9 THE ACQUISITION OF OWNERSHIP: ORIGINAL ACQUISITION

In the previous section we discussed the derivative methods of acquiring ownership, in other words, those cases where the co-operation of the predecessor in title (previous owner) was necessary in order for ownership to pass. It was, however, also possible for ownership of a thing to be acquired independently from another person. This is known as original acquisition of ownership. The Romans recognised a number of such original methods of acquiring ownership and these are recognised in similar forms in South African law. We will only be discussing some of these forms of acquisition of ownership in this module. You will learn about all of them in greater detail in PVL3801.

2.9.1 Appropriation (*occupatio*)

Occupatio or appropriation occurred when a person took possession of a *res nullius* (a thing that was owned by no-one), with the intention of becoming the owner.¹⁹

It is possible to distinguish between two kinds of *res nullius*:

- Things that have never before been owned by anyone. Examples of these are wild animals, bees, fish and things found on the beach (such as shells).
- Abandoned things, in other words, things that the owner had thrown away or discarded, with the intention of relinquishing her ownership (*res derelictae*). Things that were simply lost (*res deperditae*), in other words, things that the owner simply did not know where to find at that particular time, were not regarded as *res nullius*.

¹⁹ Gaius *Institutiones* 2.66.

In *Recke v Mills*,²⁰ Mills approached the court for an interdict against the defendants in respect of control over parts of a shipwreck, to which both Mills and the defendants laid claim. With reference to *Institutes* 2.1.47, the court decided that ownership of the thing is lost when an owner gives up or abandons his thing with the intention of no longer being the owner thereof. The person who then, by means of *occupatio*, acquires physical control over the thing with the intention of becoming its owner, becomes both possessor and owner of the thing. It is therefore clear that the modern understanding of the law of appropriation is in theory identical to that of the Romans.

In the past, appropriation was also applied to land with devastating consequences. When the Dutch arrived at the Cape in the mid-1600s, and they (and later the English colonisers) moved further inland, they claimed land for themselves. They based their legal right to do so on the fact that the land was supposedly *res nullius*. As we know today, this was certainly not the case in all instances. Many indigenous peoples were forced off their land, or returned after months of travelling (as part of their nomadic lifestyles), to find it occupied. These actions of the European settlers directly resulted in the dire need for the redistribution of land today. This is necessary to right the historical wrongs committed hundreds of years ago. We will discuss land reform in more detail later in this learning unit.

2.9.2 The acquisition of fruits (*acquisitio fructuum*)

The acquisition of ownership of fruits took place by means of separation from the fruit-bearing thing. While the fruits had not yet separated, they formed part of the principal thing. It was only on separation that they began to exist independently and were capable of ownership. There were some exceptions, however, like the position of the usufructuary, which we will discuss in 2.12.3.

In the case of civil fruits, such as rent from a house or farm, ownership of the fruits (such as rent) passed on delivery. The principles of separation that applied in the case of natural fruits could, therefore, not apply here.

2.9.3 The creation of a new thing from existing material (*specificatio*)

Specificatio occurred when someone, without authorisation, created a new thing from material belonging partially or entirely to someone else. Some examples of *specificatio* are the making of wine from grapes, a garment from wool or a bracelet from gold or silver.

If a person created a new thing partly from her own material and partly from that of another person (for example, if Sara baked a cake with her flour, sugar and butter, but used Diana's eggs), she would become the owner of the completed thing. After all, she had not only partly used her own material, but also supplied the labour. However, where all the material belonged to another person, there was disagreement among the Roman jurists as to who would own the thing.

This dispute was, however, settled in the classical period by a group of jurists who opted for a midway between the conflicting views. Their view was that the owner of the material also became the owner of the new thing, if the new thing could be reduced to its original condition. If this could not be done, the maker of the new thing became

²⁰ 1990 (1) SA 751 (A).

its owner. Justinian supported this viewpoint. According to him, a person who made wine from grapes or oil from olives became its owner. However, the owner of a piece of gold or silver that another person had melted down to make a ring became the owner of the ring, because it was possible to return the metal to its previous state by simply melting it down.

The party who had suffered a loss could obtain compensation by means of an *actio utilis* to claim the value of their thing (the material now part of the new thing) from the new owner. Therefore, a degree of fairness was ensured.

2.9.4 Prescription (*usucapio*)

This form of acquisition of ownership dates back to the Twelve Tables, but has undergone many changes over the years. Today, the Prescription Act²¹ regulates prescription in South Africa.

There are some instances where a person thinks that he becomes the owner of a thing after a transaction is completed, but this is not the case. Today the chief basis for prescription is where a person acquires a thing from a non-owner. Remember that the *nemo plus iuris* rule states that no-one can transfer more rights than they have. Prescription made it possible for a person to possess a thing that had belonged to another person, and to become its owner on expiry of a prescribed period. Accordingly, prescription ensured that the legal situation was brought into harmony with the factual situation (where someone who thinks he is the owner then actually becomes the owner).

There were five requirements that had to be met before a person could become the owner of a thing by means of prescription. If even a single one of these requirements were not met, no prescription could take place. First, a person (possessor) could only become the owner of property by means of prescription if the property itself was capable of being owned (*a res in commercium*, which had not been stolen). Secondly, it was required that the possessor of the property be in actual control of the property (and therefore have it in her possession) during the entire, uninterrupted period of time required by law. Thirdly, there had to be a valid *insta causa* (such as a contract of sale). The fourth requirement was that of good faith. The party, who received the property as a result of the transaction, should honestly have believed that she became the owner thereof and that the transaction had been completed successfully. Lastly, the requirement of the prescribed time period refers to the fact that the possessor's uninterrupted possession (physical control) of the property must continue for the required period of time. Under Roman law, different periods applied to movable and immovable things and today these periods are prescribed by legislation.



ACTIVITY 2.4

- (1) Chrissie, the owner of three oxen, decides to abandon the animals at the side of the road, since they have contracted foot-and-mouth disease and have become too weak to work. Magda walks past three days later and sees the oxen wandering around. She decides to take them for herself. Can Magda obtain ownership of the oxen by means of prescription? If not, can she obtain ownership of them by any other means? If so, name the relevant method of acquisition.

²¹ Act 68 of 1969.

- (2) Servus buys a farm in Italy from Cicero, the guardian of the nine-year-old boy, Paulus. Servus is under the impression that Cicero is the owner of the land and is only informed by a neighbour three months later that Paulus is the true owner. Could he become the owner of the land by means of prescription?
- (3) Refilwe, a celebrated winemaker, decides to make another batch of her popular blended wine and, as usual, uses her own cabernet grapes and the merlot grapes from Jacob's vineyard, which is next to hers. Who is the owner of the wine made from these grapes?

FEEDBACK 2.4

- (1) Magda cannot acquire ownership of the oxen by means of prescription. There is no cause here that is normally considered sufficient in law for the transfer of ownership. She can, however, acquire ownership of the oxen by means of *occupatio* (appropriation). After all, the oxen were abandoned by their owner (Chrissie) and have therefore, become *res derelictae* or *res nullii* (the plural of the term "*res nullius*"), which can be appropriated by a person with the intention of becoming the owner.
- (2) Yes, he can, because he bought the land in good faith, even if this was from a non-owner. At the time when Servus took possession of the land, he was under the impression that Cicero was the owner. His subsequent discovery that this was not actually the case does not detract from his initial good faith. If all the requirements for prescription are met, he can become the owner.
- (3) In the case of the making of a new thing from existing materials (such as wine from grapes), the person who makes the new thing from material belonging partly to herself and partly to another person, becomes the owner of the thing. In this case, Refilwe was the owner of the wine and Jacob is only able to claim compensation for the loss he has suffered. This is because the wine cannot be turned into grapes again.

2.10 PROTECTION OF OWNERSHIP

There were various remedies available to a Roman owner if his ownership had been infringed. A legal remedy is a legal tool available to the person who had been wronged by the actions of another. The specific remedy used, depended on the nature of the infringement and the facts of a case. Legal remedies could take on the form of actions, interdicts, conditions or exceptions. In this section we will focus on one action, namely the *rei vindicatio*.

If a thing belonging to a person had been stolen or incorrectly transferred to another person, he could claim his thing by means of the *rei vindicatio* (a real action which protects his real right in his property) from whomever was in control of the thing. This action could also be used where someone had unlawful possession of a thing (such as a lessee who refused to vacate a property that she leased after the contract had already expired).

2.10.1 The *rei vindicatio*

The *rei vindicatio* was the most important remedy available to the Roman owner. The owner could use this action to claim the thing (or its value) from whomever was in control of the thing. The owner had to prove his ownership of the thing in order to succeed with this real action.

If the owner could prove her ownership, she could recover the thing from the person who was in control of it. It made no difference whether the current possessor had acted in good faith (*bona fide*) or in bad faith (*mala fide*). The defendant had to be in factual control of the thing. The defendant could naturally avoid a conviction at any time by simply giving the thing back to the plaintiff.

The *rei vindicatio* still exists today and is probably the most important action to protect ownership in South African law. In 2.14, we will look at some constitutional developments in South African law and the restrictions these have placed on an owner's right to institute this remedy.

2.11 LIMITED REAL RIGHTS

Ownership is a real right that a person had over her own thing. In contrast, a *ius in re aliena* (directly translated as “a right in the thing of another”), was a real right that a person could have in respect of a thing whose ownership vested in another person. Ownership, as you will remember, was unlimited in principle, although it could be limited by the provisions of the law and by the rights of others. As we mentioned above, the owner had three rights that stemmed from his real right of ownership (the right to use the thing, the right to the fruits of the thing, and the right to abandon the thing – see 2.7.1). Limited real rights only permitted the holder of this right in the property of someone else, one or two of the three entitlements that an owner normally enjoyed. We discuss this in more detail in 2.12 and 2.13. The limited real rights we will be discussing (that have also become part of South African law), can be divided into two categories:

- real rights of enjoyment (such as servitudes) and
- real rights of security (such as the hypothec)

Limited real rights are also protected by real actions and are, therefore, enforceable against all third parties encroaching on a person's limited real rights.

2.12 SERVITUDES

A servitude was a real right exercised over a thing belonging to another person. The person who exercised the right was able to protect the right (with the use of actions), not only against the owner of the thing, but against all other persons. Because the right was over another person's property, we call this a limited real right. We distinguish between two kinds of servitudes, namely personal servitudes and praedial or real servitudes, but in this module we will only be examining the personal servitude.

2.12.1 General remarks on personal servitudes

A personal servitude was a real right that a person exercised to his own benefit over a thing belonging to another. This means that a specific personal servitude was only the right of one specific person. A personal servitude could apply to a movable or an immovable thing. It was a real right that was protected by a real action. Note that just because it is classified as a personal servitude, does not mean that it creates a personal right. Because the right created by a servitude relates to property (it is the right to a thing), a servitude creates a real right, which is limited.

Personal servitudes automatically ceased to exist on the death of the holder of the servitude. Although it usually terminated on death, it could also have been extinguished earlier if the servitude had only been granted for a specific period. The holder of a personal servitude could not transfer his real right to another person. Neither could the servitude be inherited. The holder of the servitude could, however, allow someone else to exercise the entitlements conferred on him by this right. The third party did not acquire a real right, but merely a personal right, which he could enforce against the holder of the real right (the holder of the personal servitude). This concept will become clear when we discuss usufruct below.

2.12.2 Characteristics of and requirements for personal servitudes

The requirements for the creation and continued existence of praedial servitudes were (and still are) complex. We will only mention them briefly to give you an idea of the scope of this right.

- (a) *The servitude had to be exercised in a reasonable manner*

The holder of the servitude had to exercise his right in a manner that would not cause the true owner of the property unnecessary inconvenience.

- (b) *A servitude was a right in respect of another's thing*

A servitude was a limited real right. This implied that no-one could exercise a servitude over his own thing.

- (c) *A servitude does not consist in doing something, but in allowing something or refraining from doing something*

A servitude did not imply that the true owner had to do something, but rather that she had to tolerate something or refrain from a particular action.

- (d) *There could be no servitude over another servitude*

The holder of the personal servitude could not grant a third party a servitude over land over which his own servitude extended.

- (e) *A servitude was indivisible*

If the property to which the personal servitude applied was subdivided, the servitude was retained and extended across all the portions. This means that such a subdivision would have no effect on the validity of the servitude.

We will now explore usufruct as an example of a personal servitude, in order to see how these principles work in practice.

2.12.3 Usufruct (*ususfructus*)

Usufruct was the right to use and enjoy another person's thing without altering its character. Usufruct probably originated as a means of providing for the maintenance of a wife after the death of her husband. The husband could, therefore, leave his property to his children, while he, at the same time, ensured that his surviving spouse would have the benefit and enjoyment of that property. This practice is still popular in South Africa today.

The person who inherited the property, obtained bare ownership, while the usufructuary obtained the limited real right to use the thing (*ius utendi*), and to take the fruits for

herself (*ius fruendi*). “Bare ownership” meant that the owner only had the right to alienate the thing (the *ius abutendi*), but he could not use it. If the property in question was sold, the next owner had to respect and uphold the servitude for the entire period it applied.

The object of usufruct was a thing, such as, a farm or a flock of sheep. The content of the right was, therefore, the use of the thing and the acquisition of the fruits it yielded. Fruits could be either natural fruits (such as wheat or lambs) or civil fruits (such as rental income). This means that the usufructuary could personally use the thing or rent it out to a third party.

The thing in respect of which the usufruct existed, had to be maintained and its nature was not allowed to be altered. The Roman jurists also held that usufruct had to be exercised *salva rerum substantia* (keeping the substance of the thing intact). This requirement had a number of consequences.

First, the usufructuary was not permitted to alter the nature of the thing. In other words, she would not be able to convert a wine farm into a cattle farm or a factory. Secondly, the usufructuary had to maintain the property in the condition in which she received it. For example, stock numbers had to be kept at the same level and buildings had to be properly maintained. Thirdly, the usufructuary had to use the thing in a reasonable manner. She had to display the carefulness of a diligent head of a household (*diligens paterfamilias*). In other words, she could be held responsible for any damage caused to the property through her negligence.

2.12.4 The protection of servitudes

The *actio confessoria* was available to all servitude holders and it could be used to enforce the servitude holder’s rights to the property against anyone who interfered with these rights (either a third party or the owner of the thing in question).

The *actio negatoria* was available to the owner of land over which another person unlawfully, and therefore incorrectly, claimed to have a servitude.



ACTIVITY 2.5

Johannes bequeaths his farm to his son, Karel, and establishes usufruct over the farm in favour of his wife, Gerty. Gerty decides to let the farm to Vuyani for a period of five years. What rights to the farm did Gerty acquire on the grounds of the usufruct? Was she entitled to let the farm to Vuyani? Would Vuyani have had any remedy if Karel had refused to allow him to exercise his rights as lessee?

FEEDBACK 2.5

Gerty was entitled to use the farm for the purpose for which it was intended and to enjoy the fruits (natural or civil), on condition that the nature of the farm remained unchanged. She was therefore entitled to let the farm to another person. Vuyani obtained no real right, but merely a personal right (created by the contract of letting and hiring) against Gerty, which he could use to enforce his rights. Therefore, Vuyani had to acquire the assistance of Gerty to enforce his right of legal possession against Karel.

2.13 REAL SECURITIES

In this section we will learn about the Roman law origin of real security. Today it remains a recognised and important legal institution.

What do you do if you want to buy a house or a car, but you do not have enough cash available to pay for these things in a single payment? What do we do in any situation where we need money urgently? The answer is simple: we borrow the money. Most people need loans at various stages of their lives. Not many people can pay cash for a house, a car, furniture or tertiary studies. In such cases they are obliged to approach a financial institution to obtain a loan.

But the desire to borrow money is just one side of the transaction. It has to be paid back. And in most cases the lender (creditor) would not lend the money without some form of security for its repayment. There are two ways in which the lender will be able to ensure that the debt will be recovered:

- By insisting that a third person should be held responsible for the debt along with the borrower (debtor). We usually say that the third person “stands surety” for another person (the borrower). This is known as “personal security” and it grants a personal right to the lender against both the lender and the surety. This means that if the borrower is unable to repay the loan, the lender may claim the money from the surety.
- By granting a real right over property belonging to the borrower. The lender then acquires a limited real right over property of the borrower. If the borrower is unable to repay the debt, the lender can sell the property and use the proceeds of the sale to discharge the debt. The debtor receives any excess, meaning that if there are any funds left after the debt is settled, this is paid to the debtor. This is known as “real security” and the lender enjoys greater security than when the debt is secured by a personal security. The best example is that of a home loan – if you do not repay your debt, the bank can evict you and sell your house. But when the debt is terminated (repaid), the real security automatically falls away and the creditor no longer has any right to the property in question.

In the course of Roman legal development there were three forms of real security, namely *fiducia*, pledge and hypothec. Both pledge and hypothec are part of modern South African law, but we will only take a closer look at hypothec here. We will discuss pledge briefly in learning unit 3 on the law of contract (see 3.5 in this regard), since it is a real security created by a real contract.

2.13.1 Hypothec (*hypotheca*)

Hypothec, as a legal institution, originated in a practice that gradually developed with regard to the leasing of land. On the one hand, the landowner or lessor desired security for the payment of the rent; the lessee, on the other hand, possessed certain movables such as livestock, slaves and agricultural implements. However, he needed these to work the land, in order to find the money to pay the rent. The landlord and tenant therefore agreed that the tenant’s *invecta et illata* (the movables that he had brought onto the leased farm) and the fruits from the leased farm (for example, a crop or livestock) would serve as security for the payment of the rent. Consequently the *praetor* granted to the landowner a real action, the *actio Serviana*, which he could use against the tenant if the rent was not paid.

Hypothec had a number of important advantages for the debtor:

- Virtually anything could be used: Movables, immovable, existing things or future things (such as a crop in the field, which has not yet been processed).
- The fact that the debtor retained both ownership and possession of the thing meant that he did not lose use and enjoyment of the thing.
- Further, because he retained possession of the thing, the debtor could offer it to more than one creditor as security. In such an instance, the creditor whose hypothec was established first, had the right to be the first to satisfy his claim from the proceeds of the sale of the hypothecated thing.

Today home loans (bonds agreements) are regulated by the National Credit Act,²² the Home Loan and Mortgage Disclosure Act,²³ the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act)²⁴ and several others. The legislation was passed to protect parties to these agreements, but also to protect individuals' right to access to adequate housing, as protected by section 26 of the Constitution. We will discuss the PIE Act in more detail below.

An outrageous case came before the North Gauteng High Court in 2017.²⁵ A couple was two weeks late with their bond repayment. In terms of their contract with Nedbank, the full outstanding amount of the loan would be payable when a payment is not made timeously, in terms of an "acceleration clause". Nedbank took the couple to court and claimed immediate payment of the sum of R2,5 million. The couple paid their instalment two weeks after the date on which it was due, and paid more than the required monthly instalment. The court granted no eviction order and indicated that the Constitution, the National Credit Act and the PIE Act protect debtors in terms of a bond agreement from exactly this type of unscrupulous action by creditors. This is clearly an example of the courts implementing legislation, specifically drafted to protect the consumer and those parties who are the weakest in a specific contractual agreement.²⁶

So far, throughout this learning unit, we have discussed certain aspects of the Roman origins of the South African law of property. We have made some mention of the Constitution, but we will now evaluate this in much more detail. In the next section of this learning unit we will discuss a few areas of the law of property that have been directly influenced by the Constitution and that have developed to suit the needs of our present-day society.

2.14 CONSTITUTIONAL DEVELOPMENTS OF SOUTH AFRICAN PROPERTY LAW

The enactment of the Interim Constitution in 1993 and the Constitution in 1996 resulted in a shift in the views around the superiority of the traditional Roman-Dutch basis of our law of property. The common law, as developed by the courts, and legislation,

22 Act 34 of 2005.

23 Act 63 of 2000.

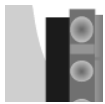
24 Act 19 of 1998.

25 Venter Z "Couple nearly lose home after bank wanted R2.5m bond payment at once" <http://www.iol.co.za/pretoria-news/couple-nearly-lose-home-after-bank-wanted-r25m-bond-payment-at-once-9632191> (date of use: 11 August 2017).

26 In this case the North Gauteng High Court relied on the Constitutional Court's decision in *Nkata v Firstrand Bank Limited & others* [2016] ZACC 12, in which it was held that a late payment reinstates the credit agreement between the parties.

passed over the years to expand on, or change the common law, were no longer the only sources of law on property.

Where applicable, the customary law specific to the parties in question, is a recognised source of law. As is now the case with all law, it should be interpreted and applied alongside the principles of the Constitution. The Constitution itself, and legislation that has flown directly from the Constitution, are now sources of law on property. That provided by the common law of property, which effectively protects the rights of those who are already owners, is not the only approach to property required in South Africa's new constitutional dispensation, where socio-economic transformation of our society is of the utmost importance. We will now explore only a handful of examples of the Constitution impacting on common-law principles to breathe a greater sense of justice, respect for human dignity and equality into the existing common law on property. We will be focussing on land reform and the eviction of illegal land occupiers.



READING

Read sections 7, 8, 9, 10, 25 and 26 of the Constitution of the Republic of South Africa, 1996. These sections illustrate the complex problem of protecting existing rights, while being able to limit them in order to benefit those without access to land or secure housing. After reading these complex rights, and all their subsections, think about the intricate task that courts have when interpreting and applying these sections.

2.14.1 Section 25 of the Constitution and land reform

Issues regarding access to land are some of the greatest legacies of colonialism and apartheid that still plague our society today. When we think of land, we think of “the haves and the have-nots”. The men and women who drafted our Constitution were acutely aware that the existing common law and the way the courts had traditionally interpreted and applied it, were not going to solve the problem of imbalanced land ownership. More drastic measures had to be taken to address the matter.

Section 25 of the Constitution specifically addresses land reform. The section protects the existing ownership of those who do have land, by setting down regulations and procedures addressing when and how land may be expropriated by the state, and how owners should be compensated for their land.

Section 25 also places a duty on the state to facilitate the redistribution of land. The state has a responsibility to pass legislation to protect and promote the rights contained in the Bill of Rights, and this includes the right to access to property. In this regard, Parliament has passed a great number of acts:

- Abolition of Racially Based Land Measures Act 108 of 1991
- Upgrading of Land Tenure Rights Act 112 of 1991
- Distribution and Transfer of Certain State Land Act 119 of 1993
- Provision of Land and Assistance Act 126 of 1993
- Restitution of Land Rights Act 22 of 1994
- Development Facilitation Act 67 of 1995
- Land Reform (Labour Tenants) Act 3 of 1996
- Communal Property Associations Act 28 of 1996
- Extension of Security of Tenure Act 62 of 1997²⁷
- Transformation of Certain Rural Areas Act 94 of 1998

- Restitution of Land Rights Amendment Act 48 of 2003
- Communal Land Rights Act 11 of 2004²⁸
- Spatial Planning and Land Use Management Act 16 of 2013
- Promotion and Protection of Investment Bill, 2013²⁹

That is a great deal of legislation. Clearly Parliament has tried hard to breathe life into section 25 of the Constitution. The purpose of this body of legislation is to provide legal recourse (protection) to those without land and to help them acquire land they would not have access to without legislative assistance.

This all looks really good on paper, but what has been the reality for those South Africans who do not have access to land? Can we really say that justice has been done and that the problem of landlessness has been adequately addressed in this country? If we follow the news or talk to our fellow South Africans, we see and hear that this is not the case at all.

More than two decades into South Africa's democracy many argue that land reform has been too slow and that the socio-economic transformation of our greater community has not taken place as promised. What do you think about this? We can certainly all agree that these are not easy problems to solve, and that transformation on a massive scale cannot happen overnight. But it is impossible not to sympathise with those who feel that the system has failed them.

Let's look at a case that was recently decided in the Constitutional Court. This case dealt with the right to lawfully occupy land and with the constitutional right to dignity that is directly related.

• ***Daniels v Scribante and another***³⁰

This case was about the dispossession of land and how it has resulted in the loss of human dignity in this country.³¹ The right to security of tenure is directly related to the constitutional right to human dignity.³² "Tenure", as protected by the Constitution and the Extension of Security of Tenure Act³³ (ESTA), refers to the right of an occupier of another person's property (who has permission to live on the property) to occupy such land legally.

In this case the applicant was Ms Daniels, a domestic worker who had lived on the farm in question for 16 years, and who shared her dwelling with her three small children. She approached the Constitutional Court, seeking an order to allow her to make improvements to her dwelling at her own cost and without the consent of the owner of

27 See the discussion of *Daniels v Scribante and another* 2017 ZACC 13 below.

28 This Act was never implemented and was scrapped by the Constitutional Court in 2010 for not being enacted in accordance with the prescribed procedures. The communities who would have been affected by the Act also argued that existing councils of traditional leaders would be granted too much power without oversight to determine who would be given access to land. This would have defeated the purpose of the Act.

29 At the time of writing this study guide, this Bill has not yet been passed into law by Parliament. It potentially caters for the expropriation of land without compensation.

30 2017 ZACC 13 (hereinafter referred to as the "*Daniels case*").

31 *Daniels case* para [1].

32 *Daniels case* para [2].

33 Act 62 of 1997.

the farm.³⁴ The Court described her intentions as follows: “Ms Daniels wanted to make certain improvements which were by no means luxury items. They included levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling. These are basic human amenities.”³⁵ She wrote a letter to the respondents, explaining her intention to have the maintenance done, but received no answer. After the work had already started, she received a letter demanding that the work be stopped, since no consent was given.³⁶ She approached three courts³⁷ before the Constitutional Court, none granting the order or even allowing her appeal.³⁸

The majority decision (written by Madlanga J) made several references to the importance of understanding, and responding to, the historical events that had led to the poor housing conditions and lack of access to land suffered by millions of black, brown (so-called coloured) and Indian people in South Africa today.

Some of the poorest members of our society only have rights to their homes under the protection of ESTA: “Needless to say, occupiers under ESTA are a vulnerable group susceptible to untold mistreatment. This is especially so in the case of women It is also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes.”³⁹

The court explained that, just because ESTA did not make specific reference to an occupier’s right to make upgrades, it does not mean that the right does not exist. The legislation must be seen in historical context and a narrow interpretation, which denies an occupier’s right to dignity, is not what was intended under ESTA or the Constitution.⁴⁰

The court explained how denying an occupant the right to make improvements, affects her dignity:

If you deny an occupier the right to make improvements to the dwelling, you take away its habitability. And if you take away habitability, that may lead to her or his departure. That in turn may take away the very essence of an occupier’s way of life. Most aspects of people’s lives are often ordered around where they live Take away the home that is the fulcrum of security of tenure, the way of life of an occupier will be dislocated. And that will offend her or his human dignity. So, permitting an occupier living in circumstances as we have here to make improvements to her or his dwelling will serve the twin-purpose of bringing the dwelling to a standard that befits human dignity and averting the indignity that the occupier might suffer as a result of the possible departure.⁴¹

The court concluded that Ms Daniels is permitted to make the proposed improvements as this is in line with what Parliament intended with ESTA.⁴² Therefore, an owner’s consent is not necessary before improvements can be made.⁴³ But the owner still has rights to his property: “The most obvious owner’s right that is implicated is the right to property under section 25 of the Constitution. If an occupier were to be entitled to act in an unbridled manner, that would mean an owner’s rights count for nothing.”⁴⁴ This

34 *Daniels* case para [4].

35 *Daniels* case para [7].

36 *Daniels* case para [9].

37 The Stellenbosch magistrate’s court, the Land Claims Court and the Supreme Court of Appeal.

38 *Daniels* case para [10].

39 *Daniels* case paras [22]-[23].

40 *Daniels* case para [29].

41 *Daniels* case paras [33]-[34].

42 *Daniels* case para [57].

43 *Daniels* case paras [59]-[60].

44 *Daniels* case para [61].

would also be unconstitutional. We must remember that any court has the complex task of weighing and balancing the conflicting rights of parties in a matter.

The second judgement⁴⁵ in this case highlighted that the Constitution instructs us to heal the historical divisions in our society and that continuing to allow people to live in inhumane and undignified situations on farms, does nothing to heal this division. The third judgement⁴⁶ added that it is crucial that courts take all the historical versions that relate to a case into account when they are relevant to a decision. In the fourth judgement,⁴⁷ the order made in the first judgement was supported, but the judgement differed on a point made about the respondent's positive duty to protect an occupier's right to dignity. Lastly, the fifth judgement⁴⁸ mentioned that although both parties have constitutionally protected rights, the improvements suggested will not in any way result in any undue infringements on the owner's rights to his property. Therefore, it would be unjust to deny the applicant the right to make improvements that will result in a more dignified life for her family.

Professor Pierre de Vos, a respected constitutional-law commentator from the University of Cape Town, made the following comments about the impact of the case:

This means that the Constitution now requires us to think differently about property rights and especially to reject the idea that property owners have rights that will always trump the rights of others in society. This has potentially radical consequences for many South Africans who live on land nominally "owned" by somebody else, who go to school in buildings on such land, or who make use of such land as a community. Depending on the specific facts, in all such cases the rights of the users of the land might be held to trump...the rights of the legal owner The judgment calls on us to think of land in terms of relationships, rather purely in terms of rights that owners can enforce to exclude others from using the land for any purpose.⁴⁹

What do you think about this statement? Land reform and access to land are clearly areas of law that need more development. We are obligated by the Constitution to question the owner's almost limitless power as land owner. Follow the news, stay updated on the matter, and keep forming your own ideas about whether the state is doing enough, or whether the processes in place are really solving the problems South Africans are facing. When considering land matters always keep the Constitution in mind.



ACTIVITY 2.6

- (1) Section 25 of the Constitution protects property rights and promotes access to property for all. Does this section only apply to land?
- (2) Name a piece of legislation that was specifically promulgated in terms of section 25(9) of the Constitution.

45 By Froneman J (*Daniels* case paras [72]-[108]).

46 By Cameron J (*Daniels* case paras [109]-[155]).

47 By Jafta J (*Daniels* case paras [156]-[204]).

48 By Zondo J (*Daniels* case paras [205]-[218]).

49 De Vos P "ConCourt judgment explicitly links access to land and housing with the protection of dignity" 18 May 2017 *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2017-05-18-concourt-judgment-explicitly-links-access-to-land-and-housing-with-the-protection-of-dignity/#.WVC8COuGPX4> (date of use: 26 June 2017).

FEEDBACK 2.6

- (1) No, section 25(4)(b) specifically states that, for the purpose of section 25, “property is not limited to land”.
- (2) You would only have been able to answer this question if you had read section 25 of the Constitution as you were instructed to earlier in this learning unit. Please read the whole of section 25 carefully. This question has two correct answers. You could have mentioned either one of the following: the Upgrading of Land Tenure Rights Act 112 of 1991 or the Extension of Security of Tenure Act 62 of 1997.

In the section that follows, we will look at the rights of unlawful occupiers of land and the rights of owners to evict the occupiers from their land.

2.14.2 Section 26 of the Constitution and eviction from unlawfully occupied land

A discussion of the law on eviction clearly illustrates that conflicting rights can exist in relation to specific immovable property. In 2.7.1 we explored the real right of ownership and all the rights this grants an owner. We also discussed the protection of ownership (2.10) and limitations on ownership (2.7.2). In 2.6 we discussed possession, and how it is frequently protected by law. Please page back and read these sections again before continuing your analysis of the rest of this learning unit.

Now that you are confident that you understand the owner’s rights and how she can protect these, we can investigate the position of a specific category of possessor under South African law, namely that of the unlawful occupier of the property of another person. Our previous discussion of the *Daniels* case related to an occupier who lawfully occupied another person’s land, where the owner gave consent to the occupation. We now move our discussion to people who have nowhere to live and then become unlawful occupiers. Homelessness, fuelled by the lack of access to land, is a serious social ill that leaves many people no other choice but to live illegally on land that does not belong to them. But how has, and how should, the law of property address this issue?

Professor André van der Walt was one of the greatest researchers on constitutionally related property matters in South Africa. He summarised the situation at hand as follows:

Apartheid land law allowed evictions and forced removals that uprooted millions of black South Africans and left them politically, socially and economically marginalised, insecure and vulnerable. The anti-eviction provisions in section 26(3) of the Constitution and in the land reform laws were promulgated with the explicit purpose of stopping, and where possible, reversing this process by subjecting evictions to rigorous justification and due-process controls. Clearly, these reforms restrict the common-law right with which land owners traditionally protect their property against unlawful occupiers.⁵⁰

Van der Walt is saying that, in order to address the legacy of apartheid, the common-law remedy available to the owner of immovable property (the *rei vindicatio*) must, in some instances, be restricted to protect the fundamental rights of those individuals who live on the owner’s land.

⁵⁰ Van der Walt AJ “Legal history, legal culture and transformation in a constitutional democracy” 2006 *Fundamina* 11.

In order to ensure the protection of the rights of unlawful occupiers, which are protected by section 26(3) of the Constitution, the legislature passed the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁵¹ (PIE Act). The PIE Act specifically provides procedures for when these individuals can be evicted, and how such evictions should be carried out if they are committed legally. The PIE Act is, therefore, legislation with not only a constitutional agenda, but also a political agenda. The Act aims to correct historical wrongs, in line with the objective of our new democratic political order. This means that the judges who apply these laws must do so by keeping in mind the political reason for which they were passed into law.⁵² Judges are therefore tasked with applying the law in a way that improves the day-to-day lives of South Africans.⁵³

Now, let's look at two cases where the High Court ignored the historical injustices of apartheid, and where the Constitutional Court stood up for the vulnerable members of society who were left unprotected.

2.14.3 *Port Elizabeth Municipality v Various Occupiers*⁵⁴

In this case the municipality applied for an eviction order on behalf of the owner of the property, in terms of the PIE Act. 68 people (23 of them children) lived in informal dwellings unlawfully erected on privately owned land. The municipality received a petition signed by 1 600 people (including the owner of the property) requesting the eviction of the occupiers.

The High Court granted the eviction order; the Supreme Court of Appeal overturned the decision; and then the municipality applied to the Constitutional Court. The municipality argued that it had no special obligation towards the occupiers, because it was already working on the problem of homelessness as best it could with the land and resources at its disposal.⁵⁵ The municipality argued that if it made alternative land available to the occupiers, they would be “jumping the queue” and be granted special treatment.⁵⁶

But the facts of the specific case must be considered. Some of the occupiers had been on the property for eight years and the majority moved there because they had already been evicted from other land.⁵⁷ The occupiers were willing to move “if they were given reasonable notice and provided with suitable alternative land on to which they could move”.⁵⁸ They rejected the land proposed by the municipality as “crime-ridden and unsavoury, as well as over-crowded”, and they feared they would be evicted again if they moved there.⁵⁹

Reminiscent of a judgement out of the days of apartheid, the High Court held that the occupiers were unlawfully occupying the property (because they did not have the owner's permission to live there) and that it was in the public interest that they be evicted. The court allowed the sheriff to demolish the dwellings, with the help of the police, if this was what it took to move the occupiers. As an even greater insult, the court ordered the

51 Act 19 of 1998.

52 Van der Walt 2006 *Fundamina* 13.

53 Van der Walt 2006 *Fundamina* 13, 17.

54 2005 (1) SA 217 (CC) (hereinafter referred to as the “PE Municipality case”).

55 PE Municipality case para [3].

56 PE Municipality case para [3].

57 PE Municipality case para [2].

58 PE Municipality case para [2].

59 PE Municipality case para [2].

occupiers to pay the legal costs of the proceedings.⁶⁰ Whether or not you agree with the court that the occupiers had to move, everyone can agree that the court's approach and demeanour lacked any concern for the well-being or human dignity of the occupiers.

The court came down on the occupiers with the full force of the common law, refusing to do anything but protect the owner's right to use and enjoy his property. This certainly does not seem fair to the occupiers, or take into consideration their situation or socio-economic rights at all. Do you agree that the High Court's decision is not aligned with the spirit of the Constitution?

In its judgement, the Constitutional Court stated that it is impossible to apply section 26(3) of the Constitution or the PIE Act without recognising the historical factors that gave rise to the protection that the law now grants to unlawful occupiers.⁶¹ The Court indicated that when the PIE Act is interpreted and applied, it should be done "within a defined and carefully calibrated constitutional matrix".⁶² This means that the facts of a specific case, the situation of the specific occupiers and owner, the purpose of the PIE Act and the values of the Constitution all have to be taken into consideration by the court.⁶³

The Court made the following statement regarding the socio-economic rights of the occupiers: "Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world."⁶⁴

Justice Sachs, on behalf of a unanimous court, came to the following conclusion after considering all the facts, the relevant law, the historical background of the occupiers' position and the spirit of the Constitution: "I am not persuaded that it is just and equitable to order the eviction of the occupiers."⁶⁵

Don't you think that this is a more just ruling than the one made by the High Court? It must be kept in mind that the owner has a common law and constitutionally protected right to ownership. But the mere fact that ownership exists, cannot be the only, or strongest, deciding factor when deciding whether or not to evict illegal occupiers.

Municipalities must do everything in their power to protect the rights of both owners and occupiers.⁶⁶ They should not just protect the rights and interests of the rich members of their communities.⁶⁷ This is surely an unenviable position to be in. We must never forget the virtually impossible task faced by local governments. Running a municipality is not an easy task, since they are responsible for the rights of millions of South Africans.

Let's have a look at another case on eviction that also went all the way to the Constitutional Court.

⁶⁰ *PE Municipality* case para [4].

⁶¹ *PE Municipality* case paras [9]–[10].

⁶² *PE Municipality* case para [13].

⁶³ *PE Municipality* case para [21].

⁶⁴ *PE Municipality* case para [16].

⁶⁵ *PE Municipality* case para [58].

⁶⁶ *PE Municipality* case para [60].

⁶⁷ *PE Municipality* case para [25].

2.14.4 *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet NO*⁶⁸

In this much more recent case, the Constitutional Court confirmed the importance of its decision in the *PE Municipality* case, by withdrawing an eviction order made by the South Gauteng High Court. In this case, neither the High Court, nor the Supreme Court of Appeal, based their decisions on the interest of justice. By applying the law in a clinical fashion they disregarded the constitutionally protected fundamental rights of the unlawful occupiers. Let's have a look at what the Constitutional Court had to say about that.

In this case, a new owner of a high-rise block of flats in Berea, Johannesburg, applied to the High Court for an eviction order in terms of the PIE Act to evict 184 unlawful occupiers from the building. Some had been living there for up to 26 years.⁶⁹ Maseko, the new owner, intended to inject R3 million into the building in order to upgrade it so that the flats could be leased.⁷⁰ All notices required by the PIE Act were served on the occupiers, but it is arguable that they were not fully aware of their rights. The occupiers sent their elected municipal-ward committee member and four of the occupiers to represent their interests in the High Court. The occupiers only instructed them to ask for a postponement in the matter.⁷¹

The High Court then granted the eviction order, because the applicant informed the Court that the occupiers had consented to the eviction and that the parties had reached an agreement. After realising that they had unknowingly agreed to the eviction, the occupiers sought legal representation from the Socio-Economic Rights Institute of South Africa (SERI).

In the Constitutional Court, the occupiers argued that there was no true consensus; so no valid consent was given and, therefore, the order (based on the supposed consent) cannot be valid.⁷² The Court agreed that their consent was not informed (they were not aware of the implications of that which they were agreeing to), and therefore the consent is not valid.⁷³ The Court overturned the eviction order, based on a common-law principle (we will discuss consensus in detail in the next learning unit). But when discussing the PIE Act, the Court confirmed its earlier position in the *PE Municipality* case.

The Court indicated that the availability of alternative accommodation must always be a consideration for any court contemplating an eviction order. It cannot be just or fair (as is required by the PIE Act) to evict unlawful occupiers if they have nowhere else to go.⁷⁴ The Court explained the “fundamental importance that a person’s home has to the realisation of almost all human rights”.⁷⁵ Therefore, if an eviction will result in homelessness, the local authorities (in this case the City of Johannesburg) must be made a party to the matter in order to assist with providing alternative accommodation.⁷⁶

68 [2017] ZACC 18 (hereinafter referred to as the “*Occupiers* case”).

69 *Occupiers* case para [3].

70 *Occupiers* case para [4].

71 *Occupiers* case para [7].

72 *Occupiers* case para [13].

73 *Occupiers* case para [73].

74 *Occupiers* case para [81].

75 *Occupiers* case para [67].

76 *Occupiers* case para [66].

Please remember that owners of property that has been occupied unlawfully have a right to evict the unlawful occupiers and claim their property, since they still remain the owners thereof. But it is no longer lawful to evict unlawful occupiers if this eviction will lead to any of them being homeless, even if all the requirements set out by the PIE Act or ESTA have been met. Alternative accommodation must be made available.

Let's have a look at a case in which an eviction order was granted after all the relevant facts and circumstances were taken into account.

2.14.5 ***Baron and others v Claytile (Pty) Limited and another***⁷⁷

It is important to note that it is not impossible or illegal to evict unlawful occupiers. In 2017, the Constitutional Court heard yet another crucial case on the eviction of occupiers from privately owned land. In this case, the owner of the land in question successfully applied to the magistrates' court for an eviction order in terms of the Extension of Security of Tenure Act⁷⁸ (ESTA). The Land Claims Court and the Constitutional Court confirmed that this eviction order was valid and lawful. Let's have a brief look at the facts and the Constitutional Court's reasoning for its decision.

The Constitutional Court stood by its judgement in the *Daniels* case that had been decided earlier in the same year and explained that this case focused on the state's duty (which falls on the relevant municipality in this instance) to provide unlawful occupiers with suitable alternative accommodation. The Court stated that:

ESTA forms part of the legislative measures envisaged in section 25 of the Constitution which is to form part of the land reform and redistribution program. Secure tenure on rural land is a vitally important part of the land reform scheme which is crucial to the balanced functioning of the property clause.⁷⁹

In this case, the first respondent was a company that ran a brick-manufacturing business on the farm in question and the second respondent was the City of Cape Town.⁸⁰ The applicants were former employees of the brick-manufacturing business. Their employment entitled them to live on the farm for the period that they worked on the farm. It is, however, important to note that some of these employees had lived on the farm before they were employees of the manufacturing business. The company found the applicants guilty of misconduct and their employment was terminated.⁸¹ The magistrates' court considered all the facts and found that the termination of the applicants' employment was fair and lawful.⁸² Because they no longer worked on the farm, they were not contractually entitled to live there. The company needed to evict the unlawful occupiers, because it was contractually obligated to provide housing, water and electricity to new employees. The company could not do so, because the housing it had available was occupied by the unlawful occupiers for more than three years longer than their contracts gave them the right to live there.⁸³ By the time the Constitutional Court heard this matter, it had already been five years. This resulted in the company, as landowner and its current employees suffering undue hardship.⁸⁴

77 [2017] ZACC 24 (hereinafter referred to as the "*Baron* case").

78 Act 62 of 1997.

79 *Baron* case para [3].

80 *Baron* case para [6].

81 *Baron* case para [8].

82 *Baron* case para [14].

83 *Baron* case para [16].

84 *Baron* case para [16].

The City of Cape Town has a constitutional duty to provide alternative accommodation to unlawful occupiers who are evicted. This duty does not fall on private citizens, such as the first respondent in this case.⁸⁵ The City made housing units available to the unlawful occupiers at Wolwerivier, which they rejected. They argued that the proposed housing at Wolwerivier was undesirable, because of its distance from the applicants' places of employment and their children's current school, but they did not provide any evidence in this regard. They also stated that the housing at Wolwerivier consisted of "inadequate structures", because these structures were made of corrugated cladding and they were currently living in brick buildings.⁸⁶

The units in question would only serve as temporary emergency housing, while the unlawful occupiers waited for permanent housing of a higher standard.⁸⁷ Of its own accord, the company offered to provide transportation to the children from Wolwerivier to their school until the end of the 2017 school year.⁸⁸

The Court also had to consider whether the proposed accommodation was adequate and whether it was within the City's available resources to provide anything else. Already in 2013, the City offered other accommodation to the unlawful occupiers, which they rejected. The Court agreed that what they were offered now was of a much higher standard than that previously offered to them and then questioned whether the City had a duty to keep on offering housing alternatives until the unlawful occupiers were satisfied.⁸⁹ It also stated that it was unjust to expect of the landowner to keep on providing housing indefinitely, since this was the duty of the City.⁹⁰ It was then concluded that the housing at Wolwerivier was adequate.

The Constitutional Court approved the eviction order and stated that the City had made suitable alternative accommodation available and that an injustice was being done to the current employees of the company who had a right to live on the farm.⁹¹

• *Criticism against the judgement*

After the Court approved the eviction order, several outcries of injustice came from civil society. These criticisms were based on the fact that the Court ignored the spirit of ESTA and the importance of providing secure land tenure to occupiers on farms. It has also been questioned whether those specific occupiers, who had lived on the farm before they became employees of the company, did not have a stronger right to tenure than those who did not. What do you think? Should the Constitutional Court rather have evicted some of the applicants, but not others? And would this have been fair to the current employees who also have a right to live on the farm? As you can see, deciding on these matters is never easy.

Let's now think back to everything we have discussed in this learning unit on the law of property and try to draw some conclusions.

85 *Baron* case para [17].

86 *Baron* case para [31].

87 *Baron* case para [33].

88 *Baron* case para [34].

89 *Baron* case paras [39]-[40].

90 *Baron* case para [46].

91 *Baron* case para [49].

2.15 CONCLUSIONS

With this learning unit we have aimed to illustrate that the law of property has changed greatly (from its inception under the Romans, to its inclusion in the Roman-Dutch law basis of the South African common law, to the law applicable now as affected by the enactment of the Constitution).

Human beings have gone from being property, to being equal before the law, with the rights of the most vulnerable in our community being the most cherished of all. What we have seen, is that legal development takes place in line with the needs of the society that the law serves. As society and its needs change, the law must be developed to remain relevant in that society. The South African Constitution has demanded a great deal of development of the common law of property in order to grow the law into a tool that can be used to better the lives of all South Africans, and not just a select few.

But this does not mean that everything encapsulated in the Roman-law-oriented common law is fundamentally bad, unfair or in need of development (right now). Yes, there is a need to restrict an owner's access to the *rei vindicatio* in some instances, in service of the greater good, but this does not mean that we should abolish the *rei vindicatio*. Don't you think that you would want to have this action at your disposal when someone steals your cellphone? You would most certainly want to claim your property back from the thief.

The law is in a constant state of flux (fluidity) and must continuously be developed and moulded to remain valuable in a society. It is the legislature's (Parliament's) right and duty to pass laws to transform society, and it is the courts' duty to interpret and apply the law in the service of what is best for our society. A court's duty to develop the law, or act as protector of the vulnerable, might be stronger in a case where a bank wants to repossess the house of a single mother of three small children, than it would be when a rich usufructuary has been so negligent that she caused the death of the animals in her care, thereby failing to act in terms of the common law governing personal servitudes. In the latter example, existing common-law remedies would be adequate to address the legal matter at hand. By applying the common law of property, the court would be protecting the true owner's constitutionally protected right to property without directly relying on the Constitution.

Where a dispute arises in terms of which a wife in a polygamous marriages seeks access to family property in order to support herself and her children, this matter would be regulated by the customary law on the topic. Depending on the facts, the existing legal principles, as applied in the community in question (the so-called living customary law), might be adequately just to result in a reasonable outcome for all the family members concerned.

Each case therefore demands that the relevant law be applied, always with the guidance of the Constitution. But it remains a court's duty to develop the applicable law if it is not reflective of the spirit of the Constitution and the Bill of Rights.

In the next learning unit we will look at the Roman origins of the law of contract, and evaluate how the South African legislature and judiciary has developed these legal principles in order to aid the transformation of our society. We will also consider the slow development of the South African common law of contract and the impact this has had on the socio-economic position of vulnerable South Africans.

SELF-EVALUATION QUESTIONS

Consider all that you have learnt in this learning unit and try to answer these self-evaluation questions to measure your understanding of the content discussed.

- (1) Explain how South African law on people as legal objects developed between the 1800s and the adoption of the Constitution.
- (2) What do you think are the differences and similarities between the customary-law concept of communal ownership, and the Roman personal servitude of usufruct?
- (3) Why do you think a home loan is a beneficial agreement for both the debtor and the creditor?
- (4) Write a paragraph, no longer than 300 words, in which you give your opinion on the government's approach to land reform. Do you agree with its approach? Provide reasons for your answer, and remember to consider the Constitution in your answer.
- (5) With reference to case law, explain how different courts have taken different approaches when applying the PIE Act in instances of evictions of unlawful occupiers of land. Which court's approach has been most consistent with the constitutional rights of unlawful occupiers?
- (6) Consider all you have learnt in this learning unit on the development of property law and explain why you think the Constitutional Court has taken such a strong stance against homelessness.

LEARNING UNIT 3

Obligations: The law of contract



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- explain the development of good faith in the law of contract in Roman, Roman-Dutch and modern South African law to date
- provide your own view on the continued role that freedom of contract should play in South African contract law
- explain the relationship between good faith, ubuntu and the Constitution
- discuss the purpose of the Consumer Protection Act 68 of 2008 (CPA)
- reflect on the link between wealth, power distribution and contracts

3.1 INTRODUCTION

This learning unit will introduce you to the Roman law of contract and some developments to these fundamental legal principles as they were taken up into Roman-Dutch and South African law. We will also examine the potential, and much needed, influence of African philosophy and the constitutional values on the law of contract in South Africa. In this learning unit you will see how interrelated and interdependent the law of property and the law of contract really are. Please make sure that you understand the principles of the law of property, as they are discussed in the previous learning unit, before you move on to this discussion on contract law.

In this learning unit we will explore the nature of obligations and the general principles of contract, whereafter our focus will be on the law of purchase and sale as an example of a crucial contract that affects the lives of everyone who lives, travels and trades within the South African borders. The (lack of) constitutional influence on the law of contract, as well as Parliament's intervention in the form of the Consumer Protection Act,¹ are both interesting topics, which we will address at the end of this learning unit.

Many students enjoy learning about contracts and the historical development of their fundamental principles. We hope you will too! But let's begin by looking at obligations in general.

3.2 OBLIGATIONS

The importance of the Roman law of obligations is clear from the fact that it forms the basis of the law of obligations of a number of modern legal systems across the world. The law of obligations differs from the law of property in that the law of obligations

¹ Act 68 of 2008.

has a personal character. We would like to remind you of the difference between a real right and a personal right (have a look at 2.5 in learning unit 2 of part 2 again).

Unlike property law, where a right to a thing is at issue, the law of obligations is characterised by a right to claim performance from a specific person. This right is a personal right, which can be enforced with the aid of a personal action.

3.2.1 What is an obligation?

An obligation can be defined as a legal bond (an invisible link created by law) between two or more parties, one of which (the creditor), has a personal right to claim performance from the other party (or parties – the debtor), who has the duty to render performance to the creditor. Let's look at the original Roman description of an obligation from the *Digesta*:²

The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.

This seems rather complicated, but in essence it means that an obligation creates a right and a corresponding duty: one party has the right to claim performance, and the other party has the duty to deliver that performance. The creditor may legally enforce his right, by using a legal action, to force the debtor to perform in terms of his legal duty. An easy way to remember this is to understand that the **C**reditor **C**laims and the **D**ebtor has a **D**uty.

3.2.2 Sources of obligations

The jurist Gaius stated that the sources of obligations were contracts, delicts and certain other causes. If we accept that a contract relates to a legally enforceable agreement, it is easy to see that a contract of purchase and sale, for example, would give rise to an obligation.³ In the case of a contract of sale of a house, two sets obligations and corresponding duties arise. The first object of performance is the house. The seller is the debtor who has the duty to deliver the house, while the purchaser is the creditor who can claim the house from the seller. The second object of performance is the money. Here the seller is the creditor who can claim the money from the purchaser, who has the duty to pay.

Delicts are wrongful acts committed against an individual, his property or his family, that result in damage. For example, if you negligently drop another person's tea cup, you have caused damage to the other person's property. In this case, only one obligation arises: the wrongdoer who dropped the tea cup, is the debtor with a duty to compensate the victim, who is the creditor with the claim. This obligation arises despite the fact that the parties have not agreed, and may not have any desire, to become bound to each other. In learning unit 4 you will learn more about the law of delict. In the case of a contract, the parties reach consensus (agreement) and therefore want to create a legal bond (obligation) between them.

Justinian considered that obligations arise from the following four sources:

² *Digesta* 44.7.3 pr.

³ *Institutiones* (III 88).

- contracts
- delicts
- quasi-contracts
- quasi-delicts⁴

Contracts

Justinian adopted the following fourfold classification of contracts:

- Contracts that came about through a mere agreement (consensual contracts).
- Contracts that came about as a result of agreement plus the uttering of certain formal words (verbal contracts).
- Contracts that came about through agreement plus delivery of a thing (real contracts).
- Contracts that came about as a result of agreement plus writing (written contracts).

We will explore examples of each of these types of contracts later in this learning unit.

Delicts

In Roman law, four delicts were recognised, namely theft, robbery, unlawful damage to property and insulting behaviour. Under modern South African law, theft and robbery are classified as crimes, not delicts. We will discuss Roman and modern delicts in greater detail in the next learning unit.



ACTIVITY 3.1

- (1) What is an obligation?
- (2) What is the difference between a personal and a real action?

FEEDBACK 3.1

- (1) An obligation is a legal bond between two or more parties, one of which, the creditor, has a personal right to claim performance from the other party, the debtor, who has the duty to render performance to the creditor.
- (2) A personal action is used to enforce a personal right, and can only be instituted against the specific person who has an obligation to perform to the claimant. A real action can be used to protect a real right and it can be instituted against any person who infringes on the real right.

3.3 GENERAL PRINCIPLES OF THE LAW OF CONTRACT

When you study these general principles of contracts, bear in mind that these principles apply to all contracts in Roman law and, most certainly, to modern South African contracts as well. We will deal with general principles as a background to our discussion of individual contracts. In our exploration of these general principles we will be asking the following questions:

- How is a contract concluded?
- What must be performed in terms of a contract?
- Who may be held liable in terms of a contract?
- When must there be performed in terms of a contract?

4 Quasi-contracts and quasi-delicts relate to situations that were not strictly speaking of a contractual or delictual nature, but had certain similarities with contracts and delicts. We will not be evaluating these in depth in this module.

3.3.1 Agreement (*consensus*)

How is a contract concluded? *Consensus* (*consensus ad idem*, literally “agreement on the same thing”) was a requirement for the creation of all contracts in Roman law, and the same is true today. In the absence of agreement, or where it was impossible to establish the intention of the parties, no contract came into being. This is the most fundamental principle of the law of contract. All contracts required consensus between the parties.

At first glance, it may sometime seem as if the parties have reached consensus, when they have not. There were factors that could influence the consensus between contracting parties. The main factors that could exclude or influence agreement between the parties were fraud (*dolus*), duress (*metus*) and mistake (*error*). We will explain these factors or defects in the will⁵ (of one or both of the parties) next. Before we look at these defects in the will, it is important to distinguish between void and voidable contracts.

Contracts that were void *ab initio* (void from the start) had no legal effect. In such a case there was no contract and no rights or duties were conferred on the parties. In contrast, voidable contracts were contracts that contained a defect, such as fraud or duress, which meant that the contract had been valid and binding *prima facie* (at first sight, initially), but that the injured party was entitled to have the contract declared void. This means that the contract could remain valid, or the injured party could decide to declare it void, depending on what she wanted to do under the specific circumstances.



NOTE

You must always be able to identify whether a contract is valid, void or voidable. It is important that you understand and remember that “invalid” is not a legal term and you should never use it in a legal context. This is because it is unclear. Does it refer to “void” or “voidable”? There is a big difference between these two concepts and their legal consequences. Therefore, you should never refer to an “invalid” contract, only a “valid”, “void” or “voidable” contract.

Let’s take a closer look at the factors that could exclude or influence consensus between contracting parties.

- **Fraud (*dolus*)**

Fraud includes any deceitful or misleading conduct, misrepresentation, action or statement that was intended to persuade the other party to conclude the contract. Fraud results in the contract being voidable.

But why is a contract based on fraud not automatically void? This seems rather odd. There are several exceptionally complex and technical reasons for this, but we will explain the essence of it. Under Roman law, a contract could either be regulated by good faith (like all consensual contracts, which we will discuss later) or the strict law. These two systems had different approaches to interpretation and application of the law, and they provided parties, who had suffered because of contracts (for example, contracts concluded as a result of fraud), with different types of remedies.

⁵ “Defect of will” refers to a problem with the understanding or intention of a party. This does not refer to the will of a deceased person in which he leaves his estate to his beneficiaries.

If a person concluded a contract, she automatically had legal protection if she was wronged in terms of the contract. This means that contract law provided legal remedies (for example, actions) to parties who had been wronged, as in the case of fraud. If the wronged party wished to cancel the contract or claim damages (compensation for financial loss), then she could rely on contractual legal remedies. This would not be the case if no contract ever came into existence, or if the contract was void from the start. If someone was wronged as a result of concluding a contract based on fraud, but there was no contract, it would be much more complex to claim any damages. If there was no existing legal bond (obligation) between the parties, it would be difficult to, for example, claim back the purchase price.

Look at this example of fraud: If Percy sold his horse to Zizi under the false and fraudulent representation that the horse was three years old, whereas the horse was in fact eight years old, and Zizi bought the horse after he had been given this impression (although he specifically stated that he wanted a young horse), the contract would be voidable on the grounds of fraud (*dolus*). In this example, Percy knows the true age of the horse and lies about it, therefore he is committing fraud and Zizi may decide to void the contract after claiming back her money. If she has suffered any other financial loss because of the transaction (for example, if she built stables for the horse that she will no longer need), she may also claim damages for that. But if she grew to love the horse, regardless of its age, she may keep the horse and not void the contract.

- **Duress (*metus*)**

Duress or intimidation becomes a factor when it is the means of persuading a party to conclude a contract. In such cases the duress should have been of such a nature that a reasonable person would fear for the immediate safety of his person, property or close family members. Should a party have concluded a contract through duress, such contract would have been voidable, meaning the contract was always voidable at the request of the victim. The same reasoning that applies to fraudulent contracts applies here.

An example of duress can be seen in the following situation: Ina works for Neli. Neli tells Ina that if Ina does not buy 50 kilograms of oranges from her, at a price much higher than market value, Neli will terminate Ina's contract of employment. Ina, who has no use for so many oranges, concludes the contract of purchase and sale, because she is afraid she might lose her job, and she has no other source of income. Clearly Neli has unduly influenced Ina into concluding a contract she would not have entered into of her own free will.

- **Mistake (*error*)**

Mistake refers to a *bona fide* mistake made by one or both of the contracting parties in the conclusion of a contract that was not due to fraud on the part of either contracting party. Mistake is therefore nothing other than an incorrect impression of the true facts. No party has intentionally tried to mislead the other; there is simply poor communication between the parties. The difference between fraud and mistake lies in the fact that fraud relates to deliberate misrepresentation, whereas mistake relates to an honest or accidental mistake, or a guess. It is important that you understand that the various kinds of mistake had different legal consequences, as will be illustrated below.

The following types of mistake were recognised in Roman law:

– **Mistake regarding the nature of the legal act (*error in negotio*)**

This mistake was made in regard to the type of agreement the parties had in mind. In this case no valid contract came into existence, because the mistake was material (substantial) and the contract was void *ab initio*.

Example: Ben and Sello concluded a contract. Ben was under the impression that he was selling his house to Sello, whereas Sello thought that he was concluding a contract of letting and hiring with Ben.

– **Mistake regarding the object of the contract (*error in corpore*)**

This type of mistake was made where one party had one thing in mind, and the other party an entirely different thing. No valid contract came into existence and the contract was void *ab initio*.

Example: Innocentia owns a horse and a donkey. She and Darius conclude a contract in terms of which Innocentia thinks she is selling her horse to Darius. Darius is under the impression, however, that Innocentia is selling him her donkey.

It is important to emphasise that the above types of mistakes, which were material, affected the validity of the contract.

– **Mistake regarding the name of the object of the contract (*error in nomine*)**

This mistake is made when the two parties have different names in mind for the thing in question. But since both contracting parties had the same object in mind, the contract remains valid.

Example: Aulus sells his only horse, Lightning, to Palesa. Palesa is under the impression, however, that Aulus's horse is called Thunder. This mistake is irrelevant, since both the buyer and the seller have the same horse in mind. The contract remains valid.

– **Mistake regarding the identity of the other contracting party (*error in persona*)**

An error as to the identity of the other contracting party usually had no influence, in principle, on the validity of the contract. It would be different, however, if the contract had been entered into specifically, because one party wished to conclude a contract with a certain individual.

Some examples: Angeline buys the red sports car of her dreams from a man she thought was called Mr Smith, but his name is actually Mr Schmidt. In this instance the contract remains valid, because Angeline wishes to purchase this specific car, regardless of who sells it to her. But the situation is different in the next example. Moithisi wishes to have a portrait of her son painted by the famous artist, Lesang Pule. Without knowing, Moithisi concludes the agreement with an artist named Lebogang Poole. Moithisi may, on discovery of this mistake, decide to declare the contract void. So, if an *error in persona* is material, which will depend on the facts of each case, the contract will be voidable.

– **Mistake regarding the nature or quality of the object of the contract (*error in substantia*)**

This mistake was present when the parties had the same object in mind, but each had a different understanding of its nature or qualities. It is not very clear whether a contract containing a mistake regarding the nature or quality of the object of the contract, was valid. It would appear that this form of mistake was not material during the classical Roman period, but that the position changed in later law. The

contract would have been void if the object of the contract differed “in essence” from what had been agreed to.

Example: Ophelia sells a silver vase to Bontle, under the impression that it is made of solid silver, but on closer inspection it turns out to be a bronze vase that had been silver-plated. Bontle can argue that this is an essential difference, because the quality of the object would have a serious impact on the purchase price, with the result that the contract is void.



ACTIVITY 3.2

Briefly discuss whether there was consensus between the parties in the following cases and the effect on the validity of the contract that was concluded:

- (a) Bertie is Casey's employer. They agree that Casey will rent Bertie's holiday home from him for a period of five years. Bertie makes it quite clear to Casey that he (Bertie) will ensure that Casey's service contract is not renewed the following year if she refuses to conclude the contract of letting and hiring with him.
- (b) Pitso enters into an agreement with Furius, a goldsmith, that Furius will make Pitso's wife a pair of earrings out of gold. In an attempt to make some extra money, Furius secretly makes the earrings out of an inferior metal and plates them with a thin coating of gold.

FEEDBACK 3.2

- (a) If Casey concluded the contract with Bertie under duress or for fear that his service contract would not be renewed, the contract would be voidable as a result of duress (*metus*). Casey therefore has the option of withdrawing from the contract without incurring any obligation or liability.
- (b) While at first sight these facts appear to suggest *error in substantia* (mistake regarding the quality or nature of the object of the contract), the key to the answer lies in the fact that Furius used the different metal on purpose – he knew what he was doing and that it was wrong. The contract between Pitso and Furius is voidable as a result of fraud (*dolus*). Pitso could therefore have the contract declared void.

You will have noticed that there is a lot of important information on consensus and everything that could potentially influence or exclude consensus. Since consensus is the foundation of every contract, it is important that you keep these important principles in mind as we continue to explore the other legal principles affecting contracts. Let's now move on to the content of contracts.

3.3.2 Performance in terms of a contract

When we speak of the content of contracts, we are referring specifically to the performance required to fulfil the terms of the contract. We can, therefore, ask: “What must be performed in terms of the contract?” An act or omission (not acting) could constitute performance as prescribed by a contract. This performance could be specified or unspecified. An example of a specific performance is where an exact sum of money is stipulated, such as R100. An example of an unspecified performance would be where Petrus undertakes to compensate a neighbour for any damages she may have suffered as a result of a rowdy party Petrus hosted, where his guests got drunk and damaged her property.

There were a certain number of requirements for valid performance:

- It should not be in conflict with good morals or a legal principle (Louis cannot agree with Adriaan that Adriaan will poison Louis's mother-in-law for a payment of R10 000).
- The content of the performance had to be determinable in monetary terms and could not be vague or imprecise (Dominic cannot agree with Matthews that Dominic will buy "some of his cattle for a good price").
- The performance had to be due to the other contracting party (the Romans did not recognise the principle of agency/representation).
- The performance had to be physically possible. The Latin maxim for this is *impossibilium nulla obligatio* (if it is impossible to perform, there is no contract). An example of physical impossibility would be if Gugu sold Cyril a house that had already burned down at the time they were concluding the agreement.
- The performance had to be legally possible. Performance would have been legally impossible if a thing that fell outside the sphere of legal commerce (*res extra commercium*) was sold.

The parties to a contract could agree on anything, as long as the performance was valid. This comes from the Roman law principle of freedom of contract. Lucy cannot force Katy to buy all her groceries from her (Lucy's) spaza shop. If Katy wants to go to the local Shoprite, because the quality of their products is better, then Katy may do so. Johnny may decide to employ Piet to work in his factory instead of employing Hans, even if he promised Hans the job last week. (Of course Hans is allowed to be angry, but this is not a matter that can be resolved in terms of the law of contract.) The notion of freedom of contract was taken up in Roman-Dutch law, and subsequently forms part of South African contract law. We will look at the problems with freedom of contract again later in this learning unit.



NOTE

One of the requirements for valid performance listed above, was that the performance had to be physically possible. Here we have to expand on this concept and look at "impossibility of performance" and "supervening impossibility of performance".

The term "impossibility of performance" is used in a case where it was impossible to perform at the moment the contract was concluded. In other words, this was a case of initial impossibility of performance. This resulted in the contract being void. If the debtor was aware, at the moment the contract was concluded, of the fact that it was impossible to perform in terms of the contract, she acted fraudulently and would be held liable. But if she did not know that performance was impossible, the maxim applied and no contract came into being.

"Supervening impossibility of performance" indicates those cases in which performance only became impossible after the contract had been concluded. In order to determine what the effect of impossibility in these cases is, one should enquire about the cause of the supervening impossibility. If it was caused by "an act of God" (*vis major*) or chance (*casus fortuitus*), the maxim applied and no contract was concluded. If the supervening impossibility was caused by the fault of the debtor (if he had malice or if he had acted negligently), the debtor would be held liable in terms of the contract.

Vis major, or "an act of God", refers to an irresistible force. This concept was not confined to natural forces, but included human acts as well. Some examples of *vis*

major are earthquakes, lightning, floods, storms, incursions by enemies, riots and robbery.

Casus fortuitus referred to inevitable accidents. In Roman law the most important forms of *casus fortuitus* were theft, death and disease. These incidents were less serious than *vis major*, but shared an element of unforeseeability with *vis major*.

It is a good idea to examine an example illustrating the concept of supervening impossibility of performance:

Burt and Ernie conclude a contract of letting and hiring in terms of which Burt may lease Ernie's wagon to deliver his (Burt's) goods to the market in the next town where he wishes to sell it to the public. War breaks out, however, and news is received that a hostile force has encamped virtually next to Burt's land. In this case, the consequence of the supervening impossibility of *vis major* (the hostile incursion) is that Burt need no longer deliver the wagon to Ernie. No one can expect Burt to travel through a dangerous area that armed soldiers have occupied to deliver the wagon. It has now become impossible to perform in terms of this contract. This does not mean that Burt becomes the owner of the wagon, only that he does not have to return it while it is impossible to do so.

3.3.3 Contractual liability

Contractual liability refers to whether or not a party can be held liable (be made to perform) in terms of a contract. We can therefore ask: Who must perform in terms of the contract? When parties conclude a contract, they anticipate rendering performance in accordance with the provisions of the contract. Parties are bound to perform what they have agreed to, because of the nature of a contract. Can you remember that we discussed the nature of a personal right as an outcome of the creation of an obligation? You can page back to 3.2.1 to refresh your memory. A contract is a source of an obligation. Therefore, a contract will automatically create personal rights and personal duties. This means that the party, who has a personal and contractual duty in terms of the contract, can be held liable and be forced to perform. But things do not always go according to plan – the debtor may malperform (not perform sufficiently or correctly).

In practice, the debtor may malperform, either by not fulfilling her obligations in terms of the contract at all, or by rendering an inadequate performance. In these cases, the law lays down certain standards or norms that are used to determine whether the debtor would have to pay compensation to the other contracting party. In contracts based on good faith (*bona fides*), it was self-evident that the parties had to perform in accordance with the dictates of good faith. A party who committed fraud would therefore have contravened the dictates of good faith. In practice, the result was that the party who had malperformed in a fraudulent manner, could have been held liable for the payment of compensation to the other party. We will look at good faith as a requirement for a valid contract of purchase and sale later in this learning unit.

Malperformance was also possible where there was no fraud on the part of the debtor, but where the debtor was negligent. The degree of care the debtor was expected to display, depended on the type of contract. In most cases, the contracting parties were expected to act with the utmost care or diligence. In Roman legal terms, it was said that they had to display the care of a *bonus et diligens paterfamilias*. If a party omitted to display the care of a *bonus et diligens paterfamilias*, she acted negligently or, to use the technical

term, she was guilty of *culpa levis in abstracto*. This means that the highest form of care was required from the contracting party. She was held liable even in the case of the slightest negligence. The *diligens* or *bonus paterfamilias*, which can be translated as “the careful head of a family”, corresponds to the fictional “reasonable person”, which is used as the criterion for negligence in modern South African law. We will look at the test of the reasonable person again in learning unit 4 on the law of delict.

3.3.4 Terms and conditions

We now get to the final question we would like to answer about the general principles of contracts: When must the party (or parties) perform?

You often hear or read that “Ts and Cs apply”. This means that certain terms and conditions are applicable to a specific contract, special offer or competition. These are legal terminologies with specific meanings, but they are frequently used in other contexts, which can lead to confusion.

First things first: Specific lines, agreements or sections of a contract are called “contractual clauses” or “contractual terms”. Do not get confused. A lawyer may say to her client “I am unhappy with the contents of clause 3.4 and clause 3.7.2, because I think these are favouring the other party too much. Let’s renegotiate these terms”. You may also say to the other party you are contracting with that “I agree to the terms of the contract. Let’s finalise the agreement and sign the contract”. Therefore, a contract may have clauses (separate sections) or terms (generally referring to the agreement as a whole or certain stipulations in a contract). Do not confuse the “contract terms” above with a resolutive or a suspensive term.

Specific contractual clauses may contain terms or conditions, and both terms and conditions may either be suspensive or resolutive. We will explain the four concepts separately, before we combine them.

- ***Condition***

A condition implies that something must first happen, before something else will/may happen. Let’s take plants, for example. The majority of plants can only survive and grow in certain conditions: they must get water and sunlight. Growth is therefore conditional to access to water and light. It is also important to remember that conditions might never be fulfilled. So if you buy your gogo a rose bush for Mother’s Day and she forgets to water it, it will die. The same basic concept applies to contracts: if a certain condition is not fulfilled, a certain contractual consequence will not take place. Conditions in contracts usually include the word “if”: “I will buy the calf that your cow is currently carrying if it is female.” Therefore, if a female calf is born, the contract of sale will be concluded, but if it is male, there will be no sale.

- ***Term***

A term refers to a period of time. We can think back to our school days: the four terms of the year referred to four fixed periods of time. Or, we can think of a terminally-ill patient, who only has a short period of time left before he dies. The important thing to remember here, is that a time period will always come to an end. Here are some examples of terms that may be included in contracts:

- “At sunrise” refers to a period of time that will come tomorrow morning. In the summer months, this time may be close to 05:00, and in winter it may be closer to 06:00, but we are certain that the sun will rise in the morning.
- “Twelve months after the conclusion of this agreement”.
- “Until 5 December 2025”.
- “Until the day the next president of the Republic is sworn in”.

A term comes to an end when a definite (certain) future event takes place.

Therefore, a condition refers to an event, happening or occurrence that may take place in future, and a term refers to a set period of time that will most certainly come to an end in the future (even if we do not know exactly when that will be).

- ***Suspensive***

This refers to the suspension of an event or action. If a naughty child is suspended from school, time must pass before she may be allowed back in class. So her access to class is suspended (put on hold). This refers to a future happening of an event or the taking place of an action.

- ***Resolutive***

This refers to the ending of something: “The parliament was resolved”, meaning its term came to an end and a new parliament will be sworn in. Can you think of other examples?

We will now combine these concepts and evaluate them in terms of contracts:

A resolutive term: “This rental agreement will be valid and enforceable until 31 December 2021, whereafter the parties may renew the contract if they wish.”

Here a specific time period is given: UNTIL the last day of 2021.

This term is resolutive, because it explains that after this period of time the contract will come to an end. So, on 1 January 2022 no contract will exist between the parties.

A resolutive condition: “If you get a job, our lease agreement ends and you must move out.”

Here a condition is included: “If you get a job”. The condition is resolutive, because once the condition is filled (getting a job), the lease agreement ends.

A suspensive term: “I promise to donate my horse to you when I retire at the end of December 2027.”

Here the contract immediately becomes valid, but performance may only be claimed when the term has passed: 1 January 2028.

So the enforceability of the contract is suspended until a specific time in the future.

A suspensive condition: “I will buy your house if my brother donates R300 000 to me.”

Here the condition (if the donation takes place) has an impact on whether the contract will ever become enforceable. If my brother does not give me the money, you can never

force me to buy the house, because the condition (which delays the enforceability of the contract) was never fulfilled.



ACTIVITY 3.3

- (1) What were the legal requirements for valid performance in Roman law?
- (2) What is the difference between void and voidable contracts?
- (3) Name the factors that preclude or influence consensus between contracting parties.
- (4) Briefly discuss the legal consequences of the following situations:
 - (a) Vukosi and Mary conclude a contract in terms of which Vukosi buys a house from Mary. When Vukosi wants to take delivery, however, it appears that the house had burned down quite some time ago.
 - (b) Wetive and Mpho agree that Wetive may borrow Mpho's wagon for a week. Three days later, when Mpho wants to deliver the wagon to Wetive, Mpho's wagon is stolen.

FEEDBACK 3.3

- (1) Performance should not be in conflict with good morals or the law; the content of the performance had to be determinable in monetary terms and could not be vague or imprecise; the performance had to be due to the other contracting party; the performance had to be physically possible; and it had to be legally possible.
- (2) A contract that is void never came into existence, meaning it was void *ab initio*. A voidable contract was concluded validly, but the injured party has the option to declare the contract void.
- (3) Fraud, duress and mistake.
- (4)
 - (a) In this case, performance was impossible *ab initio*, since the house did not exist at the time when the contract was concluded. Therefore no valid contract came into existence.
 - (b) These facts are an example of where performance became impossible after the contract had been concluded. The theft of the wagon is an example of supervening impossibility of performance as a result of *casus fortuitus* and, consequently, Mpho is released from his obligation under the contract.

We have now completed our exposition of the general principles of the law of contract, which applies to all contracts. As we have already explained, contracts recognised by Roman law were classified into four categories on the basis of their *causae*. These categories were verbal contracts, written contracts, real contracts and consensual contracts. Let's explore these now.



NOTE

Before we continue with our discussion of the different types of contracts, it is important to explore the concepts of "unilateral contracts", "bilateral contracts" and "imperfectly bilateral contracts". These terms refer to how many obligations a contract creates.

A unilateral contract is one-sided and this means that only one obligation is created by the contract. This means that one party has a right to claim performance and the other party has a duty to perform.

A bilateral contract (also called a "reciprocal contract") gave rise to two obligations. Both contracting parties enjoyed rights and had duties. Each of the parties to the contract was a creditor and a debtor at the same time. This is by far the most common

form of contract. The fact that it was “bilateral” meant that one party’s right was the other’s obligation.

Imperfectly bilateral contracts gave rise to only one obligation, in principle, but there was the possibility of a counterclaim. The contract of loan for use is a good example of an imperfectly bilateral contract, because the borrower always incurred certain obligations in terms of the contract, whereas the lender only incurred an obligation in exceptional circumstances.

3.4 VERBAL AND WRITTEN CONTRACTS

Although Justinian does mention written contracts as one of the four categories of his fourfold classification of contracts, these contracts were not of much importance in Roman law. In ancient Rome, few people could write, and by far the majority of contracts were concluded via oral agreement. This is also how agreements were (and frequently still are) finalised under African customary law.

How did verbal and written contracts come into existence? Remember that we mentioned above that no contract came into existence without there being consensus between the parties. But here something more was required. In the case of a verbal contract the contract came into existence once the parties had uttered specific formal words. This meant that the preceding agreement and the formalities (uttering of formal words) were equally important. The verbal contract can be explained with the following equation:

agreement + uttering of formal words = *contractus verbis*

Written contracts came into existence once the parties had formally expressed their agreement in writing:

agreement + written record of agreement = *contractus litteris*

From your own experience you will know that almost no contract of any importance is concluded today without it being written down, finalised and confirmed by affixing the signatures of all parties to the document in question. There are several reasons for the importance of written contracts today. Obviously contracts have become much more complex than they were thousands of years ago, with many contracts between large corporations consisting of hundreds of pages. Written contracts are also regarded as constituting a true reflection of what the parties intended to agree on, and serves as proof of this.

To conclude, both verbal and written contracts still form part of South African law today, but for obvious reasons we generally prefer to make use of written contracts. It is important to note that the only contracts under South African law that have to be concluded in writing are those related to the purchase and sale of immovable property. The Deeds Registries Act 47 of 1937 determines that these contracts must be included in the documentation registered with the Deeds Office on the transfer of any immovable property.

3.5 REAL CONTRACTS

The third category of Roman contract law was real contracts. These contracts were *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (deposit) and *pignus*

(pledge). How were these contracts concluded? Of course consensus was required, but there was more. The word “real” is derived from the Latin word *res*, which, as you know, means “thing”. These contracts therefore owe their name to the fact that they only came into existence when the thing, which was the subject of the contract, was delivered by one of the parties to the other.

The basic requirements for the creation of the four real contracts were an agreement between the parties (consensus) and delivery of the object of the contract to the recipient. After delivery of the object, the recipient was obliged to return the same object or (in the case of loan for consumption) a similar object.

We still use the majority of these contracts, almost daily or weekly. We don't think of them as contracts, but rather as favours, because no money changes hands and we usually conclude them with friends. Let's look at an example of each.

- Loan for consumption: Jenny wants to bake a cake, but she has no flour. She goes to her neighbour, Alice, and borrows a cup of flour. Jenny uses the flour to bake the cake. She cannot give back the same cup of flour, since she has consumed it, but she returns a different cup of flour of similar quality to Alice, to release her of her obligation in terms of the contract. It is important to note that if Alice agrees to give Jenny the flour, that agreement does not create a contract. Remember, there is a second requirement for a real contract to come into existence, namely delivery. So only once Alice hands the flour over to Jenny does the contract arise, in terms of which Jenny has to return a similar cup of flour to Alice. Also take note that only Jenny acquires a duty (to return the flour), so a loan for consumption is a unilateral contract.
- Loan for use: Jonathan borrows Simon's axe to chop wood. Jonathan uses the axe and is contractually obliged to return the same axe to Simon. This is an imperfectly bilateral contract. In theory only one duty is created (Jonathan must return the axe), but there may be circumstances where Simon could also be held liable. What if Simon knew that the wooden handle of the axe was infested with termites and he fails to tell Jonathan about this? If Jonathan suffers any termite damage to his wooden things Simon has a duty to compensate him for his loss.
- Deposit: Khensile goes on holiday and asks Cleo to watch her dog. Khensile takes the dog, and the food it will eat during the period she is gone, to Cleo. Cleo feeds and walks the dog while her friend is away and is contractually obliged to return the dog to Khensile once she has returned from holiday. Deposit is also an imperfectly bilateral contract. Can you think of a situation where a second obligation would be created?
- Pledge: Retief gambled away his money, but he has to pay his rent before he receives his next salary. He goes to his friend, Riaan, for money. Riaan knows Retief and his tricks and says that he will lend him the R3 000 he needs to pay his landlord, if Retief gives him his bicycle as pledge. Retief hands the bicycle to Riaan as pledge. Retief repays the money and Riaan is contractually obligated to give back the bicycle. (If Retief had not repaid Riaan at the agreed-upon time, Riaan could have sold the bicycle to get his money back. If the sale made more money than R3 000, Riaan would have to return the remaining money to Retief.) Again, pledge is also an imperfectly bilateral contract, which means that circumstances may result in an additional duty arising as a result of the contract.

Our discussion will now move on to consensual contracts. These contracts can be of great financial importance today, specifically the contract of sale.

3.6 CONSENSUAL CONTRACTS

Consensual contracts were created solely by agreement between the parties and no additional element or action was required before it was enforceable. The four consensual contracts were letting and hiring, partnership, mandate as well as purchase and sale. We will introduce you, very briefly, to the first three, and spend more time on the contract of sale, due to its great importance in South African law.

3.6.1 Contract of letting and hiring

Letting and hiring (*locatio conductio*) was a consensual contract in terms of which one party, the lessor (*locator*), hired out a thing, his service or a piece of work to another person, the lessee (*conductor*). The contract of letting and hiring was a reciprocal (or bilateral) contract. Both parties had legal remedies with which to ensure that the other party perform if he did not.

Three forms of letting and hiring came into existence:

- ***The hiring of a thing***

The contract of letting and hiring of a thing, or a contract of lease (*locatio conductio rei*), was a contract in terms of which the lessor (*locator*) undertook to allow the lessee (*conductor*) to use and enjoy a specific thing in return for paying a fixed amount of money.

The contract of letting and hiring was concluded when there was consensus between the lessor and the lessee on the lease transaction (the fact that they are letting and hiring), the thing leased and the rent payable. Any movable or immovable thing could be the subject of a contract of letting and hiring. Rent had to be paid in the form of a pre-determined sum of money.

The thing being leased is in two real relationships with the two different parties. The lessor (who is usually the owner) has the real right of ownership over the thing, while the legal contract of letting and hiring makes the lessee a possessor of the thing. Regarding ownership and possession, you can page back to learning unit 2 on the law of property if you want to refresh your memory.

- ***A contract of service***

A contract of service (*locatio conductio operarum*) involves an employee performing her duties for a fixed wage (for example, weekly or monthly). The work was done under the employer's supervision and with his tools. Under modern South African law, the employment contract is regulated by a vast body of labour law, aimed at protecting the rights of employees, while balancing these rights with the expectations of employers. Section 23 of the Constitution relates to labour relations. The most important pieces of legislation in this regard are the Basic Conditions of Employment Act,⁶ the Employment Equity Act⁷ and the Labour Relations Act.⁸ The fundamental elements of the rights and duties of employees and employers have remained the same, but our legislature has transformed the law to a great extent, attempting to create better working conditions and create equitable employment opportunities.

- ***A contract for undertaking a piece of work***

The letting and hiring of a piece of work (*locatio conductio operis*) involves a contractual party completing a once-off job (piece of work) for the other party, such as fixing

6 Act 75 of 1997.

7 Act 55 of 1998.

8 Act 66 of 1995.

a leaking pipe, painting a wall or designing a house or a piece of jewellery. Today, where workmen and -women have to guarantee the standard of their work, these contractual agreements are partially regulated by the Consumer Protection Act.⁹

3.6.2 Partnership

A partnership (*societas*) was a contract in terms of which two or more persons undertook to join in a common venture for their mutual economic benefit. Certain essential characteristics were laid down as conditions for the creation of a partnership. There had to be agreement between the partners about the conclusion of the contract of partnership, their common venture (the purpose of the partnership) and what contribution each of the partners should make. These contributions could be in the form of goods, capital (money), labour or expertise.

A partnership contract was a bilateral contract and each partner had to act in accordance with the dictates of good faith (*bona fides*).

3.6.3 Mandate

In terms of a contract of mandate (*mandatum*), the mandatee undertook to perform a service gratuitously for another, the mandator. Mandate had its origin in the Roman custom that imposed a moral duty on friends to perform certain services for each other. The best-known example in Roman law was the action of erecting a tombstone on behalf of a friend, once she was deceased.

The essential requirements for the creation of a contract of mandate was consensus regarding the nature of the contract, the action to be performed and also the fact that it would be performed gratuitously. The tasks performed could take the form of any activity that was possible, lawful and clearly defined. A contract of mandate (like the real contracts of loan for use, deposit and pledge) resulted in an imperfectly bilateral contract. This means that the mandatee always incurred obligations whereas the mandator only incurred obligations in certain cases.

The most important consensual contract is the contract of purchase and sale and we will now explore this in more detail.

3.7 THE CONTRACT OF PURCHASE AND SALE

The contract of purchase and sale (*emptio venditio*) is also a consensual contract. This means that the only requirement for the conclusion of this contract is consensus between the seller and the purchaser regarding the three material elements (*essentialia*) of the contract of purchase and sale, namely:

- an agreement between the purchaser and the seller regarding the nature of the contract (the fact that they want to buy and sell);
- the object of sale, which had to comply with certain requirements; and
- the purchase price, which had to comply with certain requirements.

A contract of sale could therefore be defined as an agreement according to which one party, the seller (*venditor*), agreed to deliver vacant possession of the object sold to the

⁹ Act 68 of 2008.

other party, the purchaser (*emptor*), who, in turn, undertook to pay the purchase price. “Vacant possession” refers to the fact that the purchaser must have exclusive use of the property after the completion of the sale.

3.7.1 Elements of the contract of sale

The contract of sale is a reciprocal contract, based on good faith. The *essentialia* of the contract of sale will now be briefly discussed.

- ***Agreement (consensus) on the nature of the contract***

As explained above, a contract of sale only came into existence when there was agreement between the buyer and the seller regarding the purchase and sale, the object of sale and the purchase price.

It is very important that you remember that neither the delivery of the thing sold, nor the payment of the purchase price, was required for a valid contract to come into existence. It is also crucial that you understand that a valid contract of sale does not result in the transfer of ownership from the seller to the purchaser. This sounds strange, we know. But let’s look at what you have learnt in the previous learning unit on the law of property.

In the previous learning unit we mentioned that the delivery of a thing, together with a valid reason for the transfer of ownership (the *insta causa*), was required to transfer ownership. In the case of a sales agreement, the contract of purchase and sale is the *insta causa*. Neither the contract, nor the delivery alone can result in the ownership of the thing sold transferring from the purchaser to the seller. Only once the delivery takes place, can ownership be transferred. Remember that delivery can take on any one of the five forms discussed in 2.8 in learning unit 2 on the law of property. It might be a good idea to read this paragraph again, to make sure that you grasp the concept that the contract of sale does not automatically result in the transfer of ownership.

- ***Object of sale***

Only things that were susceptible of private ownership (*res in commercio*) could be the subject of a contract of sale.

The object sold had to be specific (*certum*). This meant that a sale by kind, where the contract only referred to the kind of object sold and not to a specific object, was not permissible. Examples of contracts that were inadmissible would include those for the sale of “the best firewood” or “five litres of red wine”. But the item of sale could be semi-specific. With a semi-specific sale, the object of sale was not precisely identified, but there was an indication of where it came from and what distinguished it from an inadmissible sale by kind. An example of a semi-specific sale was where the object sold was described as “ten young colts *from my stable*”.

It was not a requirement that the object of sale should be the seller’s own property. A seller could sell the property of another person (*res aliena*) and this would still give rise to a legally valid contract, but this did not mean that the ownership in the thing would pass on delivery. It was therefore not a requirement for a valid contract of sale that the seller should transfer ownership of the object sold to the purchaser.

- **Purchase price**

Just as there were certain requirements with which the object sold had to comply, there were five requirements concerning the purchase price.

(a) *No price, no sale*

The first requirement was that for a valid sale to take place, there had to be a specified price. Determination of the price by one party (unilaterally) was not permitted.

(b) *Money required*

The second requirement was that the price had to be in money, in other words, it had to be a sum of money that could be physically counted (or weighed on a scale in Roman times). A sale does not consist of the exchange of two things (this is called barter).

(c) *The price had to be specific (certum)*

Like the object of sale referred to above, the price had to be specific and if a price was not agreed on, the contract was void. A price was still specific if it was ascertainable, but unknown. Let us examine the following examples:

A price given as “a reasonable price” is not specific and the contract of sale would be void. An example of a price that is certain, but not known, would be if Tabatha agreed to pay Gabriella the same price per bag of wheat “as she paid last year”. Although this amount is unknown, it can easily be determined.

(d) *The price had to be genuine (verum)*

This means that the parties must have intended that it should be paid; the price determined could not be a sham. If the price was merely a sham, the contract was regarded as a donation. If Orpa sold her farm to her daughter for one cent, the intention is clearly to make a donation and not to create a contract of sale.

(e) *The price had to be just (iustum)*

A fifth requirement that was introduced during the post-classical period, was that the price had to be just and reasonable. Charging R500 000 for a banana is clearly not a reasonable price – unless of course it is an artwork produced from gold and diamonds! (But who would want a diamond banana?)

3.7.2 Duties of the contracting parties

Both the seller and the purchaser acquire certain duties as soon as the contract of sale becomes *perfecta* (when the parties have reached consensus on the *essentialia*, but before the thing is delivered or the purchase price is paid).

- **Duties of the seller**

(a) *The duty to care for the property before delivery*

The seller was expected to display the same degree of care as a *bonus paterfamilias*. This means that the seller was liable for *culpa levis in abstracto* and had to display the care of a reasonable person in looking after the object of the sale. The purchaser could recover damage caused by the seller’s negligence with the aid of an action known as the *actio empti* (the general legal remedy available to parties to a contract of sale).

(b) *Delivery of vacant possession to the purchaser*

The seller had to deliver the object of the sale to the purchaser immediately after the conclusion of the contract or at a later date, as agreed. Delivery could take place in any of the different ways in which possession could be transferred. Remember

that the seller did not have to transfer ownership of the thing sold to the purchaser, but the purchaser had to be placed in effective and exclusive control of the object of sale. If the purchaser was willing to pay, but the seller had not delivered the thing or had not delivered the thing timeously or properly, the purchaser could raise an *actio empti* against the seller to claim damages suffered as a result of the non-delivery or improper delivery.

(c) *Guarantee against eviction*

The seller had to give the purchaser a guarantee that nobody with a better title or stronger right (such as an usufructuary or the true owner of the thing) could evict the purchaser from the thing or a portion of it. A guarantee against eviction did not mean that eviction would not take place, since nothing could prevent a true owner from instituting a *rei vindicatio* for the return of her thing. But, if this were to happen, the purchaser could institute the *actio empti* against the seller for the damage suffered as a result of eviction. An example of such damage would be where a purchaser built a house on a farm, only to be evicted from the farm by the true owner. The purchaser could then claim compensation for the financial losses he had suffered as a result of building a house that was no longer his property.

(d) *Guarantee against latent defects*

A latent defect was a hidden defect in the object sold that diminished or affected its value or utility. Here “hidden” implies that neither the seller, nor the purchaser, could reasonably have been expected to have been aware of the defect at the time when the contract was concluded. This is important to understand. If the seller knew about a defect, it was not a latent defect, and if she hid the defect and sold the item, she was committing fraud. But what was the position when the seller herself was not aware of the presence of a latent defect in the thing sold?

As you have learnt in learning unit 3 of part 1 of this study guide, the *aediles curules* was the official who was tasked with keeping order and settling disputes in the market place in ancient society. They stepped in and decreed in their edicts that when slaves or draught animals¹⁰ were sold on the market in Rome, the seller had to disclose any physical or character defects of the object of sale that had a negative impact on the use of the thing. If it later transpired that the object sold had latent defects that had not been declared by the seller, the seller could be held responsible through one of the aedilitian actions (named after the *aediles curules* who created these actions). In the case of the sale of slaves and draught animals, it later became irrelevant whether or not the seller was aware of the defects. The seller was presumed to have provided a tacit (unspoken) guarantee that there were no latent defects present in the object sold. The *aediles curules* made two actions available to the buyer:

- The *actio redhibitoria*, which had to be instituted within six months after the latent defect became known, and enabled the purchaser to claim repayment of the purchase price and to return the object of the sale to the seller (in other words the contract was cancelled);

or

- The *actio quanti minoris*, which enabled the purchaser to claim a reduction in the purchase price within twelve months after he became aware of the latent defect. This action was used when the purchaser wished to keep the item and pay less for it because of the defect.

¹⁰ A “draught animal” is a working animal, usually used to draw something behind it, like a cart or a plough.

During Justinian's reign, it was decreed that in all cases, and not just where slaves and draught animals were being sold, the seller was held to have given a tacit guarantee against latent defects, no matter where the sale took place. In addition to the above two aedilitian actions, the purchaser was also entitled to use the *actio empti* to claim return of the purchase price or a reduction in the purchase price in the case of latent defects. This is an example of how the law was developed to result in more just and fair legal solutions.

Now let's have a look at a Roman-Dutch development of the law on latent defects. The Roman-Dutch jurists wrote that sellers were allowed to include a *voetstoots* clause in a contract of sale. "*Voetstoots*", a Dutch term, roughly translates to "push with the foot". Including a *voetstoots* clause in a contract of sale meant that a seller excluded his liability for latent defects if they were later found. This meant that the purchaser bought the item exactly as it was and that he would not have any claims for latent defects. This clause is still allowed in terms of the South African common law of contract today.

We will discuss the guarantee against latent defects and the Consumer Protection Act again later in this learning unit.

(e) *Conduct in accordance with good faith*

The consensual contract of sale in developed Roman law was a contract governed by the principles of good faith (*bona fides*). The seller was obliged to act in accordance with the encompassing demands of good faith. An example of an act contrary to good faith would be if Stichus sold Brutus a horse that he (Stichus) knew belonged to Aulus. If Brutus could prove that he had suffered a loss (for example, if Aulus claims back the horse with the *rei vindicatio*), he could sue Stichus with the *actio empti* for damages.

• ***The duties of the purchaser***

(a) *Payment of the purchase price*

The purchaser had to pay the purchase price at the agreed time or, if no time was decided on, on delivery of the object of the sale. It is important to note that the purchaser could not enforce any of the duties of the seller with the *actio empti* before he had paid the purchase price.

(b) *Acceptance of delivery of the object of sale*

The purchaser had to take delivery of the object sold at an agreed time and place. Unless otherwise agreed between the buyer and the seller, the buyer had to take delivery immediately or within a reasonable time. The seller could force the buyer with the *actio venditi* to take delivery of the object sold.

(c) *Reimbursement of expenses*

The buyer had to reimburse the seller for necessary costs incurred in respect of the thing sold from the time the contract was concluded to the time the thing was delivered.

(d) *Conduct in accordance with good faith*

The contract of purchase and sale was a contract based on *bona fides*; therefore, both parties had to act in good faith.

3.7.3 The duties of parties and the good-faith requirement today

In modern South African law the seller's obligation to care for the object of sale like a *bonus paterfamilias*, still applies and if he neglects to do this, the purchaser can hold him liable for damages. The seller is still obliged to guarantee that no-one with a stronger

right to the thing will partly or wholly deprive the purchaser of the use and enjoyment of the object of sale. The seller's warranty against latent defects still exists in modern South African law, in a slightly modified form. The above duties of the purchaser and the seller (except for the requirement of good faith) have been confirmed in modern South African law.

Unfortunately, the requirement that the parties to sales agreements should act in good faith in their dealings with each other, was never taken up into Roman-Dutch law. This naturally meant that the requirement of good faith never become part of the South African common law of contract. We will discuss this unfortunate situation again later in this learning unit.



ACTIVITY 3.4

- (1) During the reign of Justinian, Cassius and Brutus concluded a contract of purchase and sale in terms of which Cassius sold Brutus his two ploughs and his wagon. After paying the purchase price and delivering the implements and oxen, Brutus discovered that the animals were suffering from a lung disease that would cut short their lives and render them unfit for work. To make matters worse, Stichus turned up at Brutus's house and reclaimed the implements that Cassius had sold to Brutus, saying that they were his (Stichus's) property. Stichus then claimed his implements from Brutus with the *rei vindicatio*.
 - (a) Was a valid contract of sale concluded between Cassius and Brutus?
 - (b) What remedies were available to Brutus regarding the sick oxen?
 - (c) What remedies were available to Brutus regarding the implements?
- (2) What was the effect of a *voetstoots* clause in a contract of sale?

FEEDBACK 3.4

- (1)
 - (a) The contract between Cassius and Brutus was valid. There was agreement between the two of them on the transaction, the price and the object of sale. The seller does not have to be the owner of a thing to be able to conclude a valid contract of sale.
 - (b) The lung disease could be regarded as a latent defect. In Justinian's time it was accepted that the seller provided a tacit guarantee against latent defects in the thing sold. Brutus could have availed himself of the *actio redhibitoria* to return the draught animals to Cassius and reclaim the purchase price. Alternatively, he could have claimed the repayment of the purchase price by Cassius with the *actio empti*, together with damages for the loss he may have suffered as a result of the draught animals' lung disease (if it was an infectious disease and had spread to his other livestock or if the seller knew about the lung disease and committed fraud).
 - (c) The owner, Stichus, had a stronger title to the implements and he was entitled to claim them with the *rei vindicatio*. If this were to happen, Brutus could claim compensation from Cassius with the *actio empti* for any loss he had suffered as a result of the eviction, as well as for the repayment of the purchase price.
- (2) Including a *voetstoots* clause in a contract of sale meant that a seller excluded his liability for latent defects if they were later found in the thing sold. This meant that the purchaser bought the item exactly as it was and that he would not be able to claim any damages from the seller if any latent defects were later found.

In the remainder of this learning unit we will be looking at the development of the South African law of contract, with specific focus on the influence of the Constitution.

3.8 THE CONSTITUTIONAL DEVELOPMENT OF THE LAW OF CONTRACT IN SOUTH AFRICA

Section 2 of the Constitution states that the Constitution is the supreme law of the country and that any law that is not aligned with its principles, is invalid. This also applies to the law of contract. In this discussion we will focus on the relationship between the Constitution and the common law of contract. The Roman-Dutch law, on which our law of contract is built, has been described as rather flexible, because it can change along with the demands of society, but also conservative, because these changes are made so slowly. In the previous learning unit we have explored how the Constitution has had an impact on the law of property with regard to access to land, land reform and eviction. Unfortunately it is not as easy to discuss the Constitution's effect on contract law, because, sadly, there has been very little constitutional influence on this area of law. We will now point out some problems with the law of contract, its negative impact on the socio-economic status of many contracting parties, as well as some constitutionally inspired solutions that will hopefully be implemented to solve these problems in future.

South Africa's legal culture (the way courts and legal practitioners interpret and apply the law) has been described as a system that does little to address poverty, because it protects a conservative vision of the distribution of wealth, power and resources in our society.¹¹ This view most certainly applies to the law of contract.

3.8.1 The problem with freedom of contract

The foundation of the South African common law of contract is based on the principle of *pacta servanda sunt*, which is translated as "freedom of contract".¹² This sounds harmless, and in many cases it is, but this approach to contracting also has the potential to protect only certain parties to a contract, instead of all parties. Because we have the freedom to contract, derived from the Roman contractual principle of consensus, you may buy your shirts from any store you want. If you don't want to buy something from a certain store, you just walk out – no one is forcing you to conclude a contract of sale with anyone. We can all agree that this is a good thing. But freedom of contract is based on the presumption that the parties to a contract are in an equal bargaining position, meaning that both parties are free to negotiate as they want and that the consensus reached reflects the true intentions of both parties.

But unfortunately it is not always as simple as this. Often the greatly unequal socio-economic situations of the parties in question have a direct influence on their bargaining power. Some examples are when we contract with our local municipalities or with mobile service providers. If Thandi lives in Mamelodi, she is forced to conclude an agreement with the Tshwane Municipality if she wants water, electricity and refuse removal. There

11 Van der Walt AJ "Legal history, legal culture and transformation in a constitutional democracy" 2006 *Fundamina* 1-47.

12 Barnard AJ *A critical legal argument for contractual justice in the South African law of contract* (LLD thesis University of Pretoria 2002) 213. Barnard now publishes under the name "Jaco Barnard-Naudé".

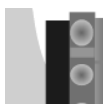
is no one else who provides these services in that area and therefore there is no real freedom of contract or true consensus. Thandi has to take it or leave it and she is in no position to negotiate a specific rate for the service she receives. So when she is unhappy with poor service delivery, there is little she can do about it from a legal perspective. Another example is where Joe wishes to buy data or airtime for his cellphone. There are only a few mobile service providers in this country (in some other African countries even fewer) and we, as customers, are in no situation to debate the price we are willing to pay for the services we receive. Joe is allowed to cancel his contract, or to buy a new sim card from another provider and rather use their services, but the mobile providers all charge similar rates and we are effectively at their mercy.

As consumers, we have little or no choice when it comes to concluding contracts for certain goods or services. We are not as financially strong as the entities that provide these services, so we are forced to buy what they are selling at the prices they set. We cannot really reach true consensus and therefore freedom of contract as a fundamental legal principle is perpetuating injustice and social inequality in South Africa. Have a look at the following statement and decide whether you agree:

Attaining substantive (true) equality requires engagement with the disregard for the reality of the vulnerable. This reality is that the most disadvantaged individuals in our society never attain the economic status which empowers them to take part in market transactions as true equals with equal bargaining power. Because of this, freedom of contract provides no freedom at all.¹³

The legal practitioners who are interpreting and applying the law of contract are not purposefully trying to be unfair or to protect the rights of wealthy parties above the rights of the poor, powerless or uninformed. However we can argue that they might not be trying hard enough to take the time to consider whether or not the way things have always been done is the best way forward if the aim is to transform our unequal society. The doctrine of freedom of contract seems to be value-neutral, meaning that it appears to be objective in the sense that it does not seem to be hurting or benefiting anybody specifically. But this is a dangerous assumption in light of South Africa's transformative project.

3.8.2 The constitutional rights of contracting parties



READING

Read the Preamble and sections 9, 10 and 12 of the Constitution of the Republic of South Africa, 1996.

The rights to equality and human dignity are those that have the most direct influence in contractual disputes. Social justice is incompatible with a rigid approach to interpreting and enforcing contracts, as it does not allow us to determine what is fair and just. The result is the denial of equality and human dignity as protected by the Bill of Rights.¹⁴ The contract is a primary tool at our disposal with which to distribute wealth, power and

¹³ Bauling A & Nagtegaal A "Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 156.

¹⁴ Bauling & Nagtegaal 2015 *De Jure* 165.

resources in a society (examples are employment contracts, contracts for the purchase and sale of land or even an agreement with a bank to open a savings account).

In order to ensure that the most vulnerable have the opportunity to beat poverty, distributive concerns must be considered. Former Deputy Chief Justice Moseneke (who studied law through UNISA) has stated that equality is central to the legal transformative endeavour.¹⁵ This is a powerful statement. How can we ever develop, uplift and transform our society in order to improve the lives of its poorest and weakest members, if we do not aim to bring about a more equal distribution of wealth and power? The question that we have to ask is how can the law of contract be re-evaluated to make sure that it has a positive impact on the drive to better the lives of poor South Africans? In order to answer this question we will look at the importance of the *boni mores*, the Constitution and the principle of ubuntu.

The *boni* (good) *mores* (morals) are the legal convictions or beliefs against which a society measures conduct in order to determine whether such conduct is acceptable in that society. The majority of societies around the globe have determined that murder, rape and theft (as a few examples) are against their *boni mores*. As a society develops and transforms over time, so does its *boni mores*. Our constitutionally democratic society and government have a different standard of acceptable and reasonable conduct than the apartheid government had. We also have a different outlook than the ancient Romans had. The Constitution has been described as a “repository of the *boni mores*”¹⁶ in South Africa today. This means that the Constitution embodies our idea of what is fair, reasonable and respectful.

3.8.3 What about good faith?

In certain situations, freedom to contract may be limited by public policy or the *boni mores*. Legislation, which is an expression of public policy, can also be passed specifically to impact on contracting parties’ freedom to include specific provisions in a contract. It has been argued that public policy is closely related to the fundamental principles of good faith in the law of contract.¹⁷ Good faith has been discussed earlier in this learning unit, specifically as it relates to the contract of sale. If a Roman contract of sale was against the *boni mores* or contrary to the principles of good faith, it was voidable. In this regard, think back to our discussion of the impact of fraud and duress on consensus (in 3.3.1) or the requirements for valid performance in terms of a contract (in 3.3.2). But, as we know, the requirements and principles of good faith are not part of South African law. We can, however, see that the *boni mores* (as found in the Constitution) and public policy (as sometimes expressed in legislation), can influence what a society will view as ethically acceptable to include in a contract.

Professor Jaco Barnard argues that we, as a South African society, committed to the upliftment of our weakest members, should try to negotiate, conclude and enforce contracts in an ethical way. He makes the persuasive statement that in order to respect the right to human dignity of the other contracting party, the common-law right to freedom of contract must *be exercised in good faith*: “[The] collective achievement of freedom

15 Moseneke D “The Fourth Bram Fischer Memorial Lecture – Transformative adjudication” 2002 *SAJHR* 316, 318.

16 Davis D “Where is the map to guide common-law development?” 2014 *Stell LR* 14.

17 Davis D “Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution” 2011 *Stell LR* 847.

cannot be attained where a claim to freedom violates another's claim to dignity".¹⁸ He argues that freedom of contract has an associated responsibility and it is therefore an ethical freedom, meaning that this freedom must be exercised thoughtfully and with the welfare of others kept in mind.¹⁹ If our whole society commits to contracting in good faith, it could ultimately result in a measure of contractual justice.²⁰ But this is only the opinion of a handful of legal academics – this is unfortunately not (yet) law.

As discussed in 3.7.3, good faith never became part of the South African law of contract. This means that we cannot enforce it in court. Even worse, several attempts to revive good faith have been shot down by the courts. The so-called freedom of contract cases²¹ are some of the most criticised judgements of our courts in recent years. You will learn about these cases in greater detail in your further studies.

This leaves the South African contract law with a problem, one that the common law cannot solve. But we know from our discussions throughout this study guide that the common law is not the only source of South African law, and that ignoring other equally important and similarly valuable sources would be foolish and arrogant and constructed a conservative approach to addressing legal problems. Regarding the problematic aspects of freedom of contract, which is protected by the common law, our salvation might come from African customary law.

3.8.4 Ubuntu and the law of contract

What is your understanding of ubuntu?²² According to Barnard, the norms and values of the Constitution and the mutually supporting nature of a community create the obligation to contract in an ethical manner.²³ For Barnard, contractual justice involves each individual taking responsibility for the advancement of his own needs and welfare, as well as those of the other members of the community, who are in turn potential contracting parties.²⁴ This means that contractual justice could be achieved by means of a lived experience of ubuntu.²⁵

Ubuntu and the law of contract was discussed by the Constitutional Court in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.²⁶ It is unfortunate that the applicant in this case did not bring the argument of the applicability of good faith from the beginning of its legal battle, but only as a last resort when it appealed to the Constitutional Court. Due to legal procedural issues, this argument could not be heard in relation to the facts of the case. However, in the minority judgement the Constitutional Court did discuss the importance of the relationship between ubuntu's focus on the worth of the community and the principle of good faith in contracts. The fact that it was discussed by the court means that it could be a serious consideration in

18 Barnard *Contractual justice* 237.

19 Barnard *Contractual justice* 229-237.

20 Barnard *Contractual justice* 241.

21 *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

22 We will discuss ubuntu in greater detail in learning unit 3 of part 3 of the study guide.

23 Barnard *Contractual justice* 212.

24 Barnard *Contractual justice* 243.

25 Bauling & Nagtegaal 2015 *De Jure* 165.

26 2012 (1) SA 256 (CC) (hereinafter referred to as the "Everfresh case").

future cases, but because it was not part of the judgement handed down by the majority of the judges in this case, it has not become part of our formal law.

The heart of this minority judgement, handed down by Yacoob J, centres around the fact that the time has come for certain common-law rules of contract law to be updated and influenced by the principles of good faith and ubuntu, in order to reshape the way we think about contracts under the Constitution.²⁷ Many ordinary people conclude contracts every day and each of these contracts could potentially be performed in bad faith, which would have a negative impact on the lives of vulnerable contracting parties.²⁸

Yacoob stated that it would benefit the community as a whole to incorporate the principle of good faith into the law of contract.²⁹ The Court also confirms that the principles of ubuntu should inform any decision made on reinstating “the important moral denominator of good faith”.³⁰ Here the Court is making an important point that the underlying principles of good faith (and acting in an ethically and morally acceptable way) are similar to the fundamental principles of ubuntu. This is because both systems seek justice and fairness.

The importance of the unequal bargaining power between poor individuals and financially strong companies is raised by the Court, as well as the value ubuntu would have in disputes of this nature.³¹ The Court therefore confirms Barnard’s theory that the introduction of the ethical element of contract is vital. The Constitution imposes a positive duty on the state to “combat poverty and promote social welfare”.³² The state has the duty to attempt to achieve this goal in every manner possible. Examples include the enforcement of the Bill of Rights in dealings between citizens themselves (when they conclude contracts with each other), as well as the promulgation, interpretation and enforcement of legislation done with this goal in mind.

In light of our discussion above, consider the following quote as a summary before we continue with our discussion of the Consumer Protection Act (CPA):³³

The traditional notion that neither judicial decision-making nor legislation should interfere with the almost religiously defended notion of the freedom of contract, results in the reproduction of social inequalities and the domination and exploitation of one contracting party over another. This view that contracts play no role in the socioeconomic and political sphere of society leaves no room for the acknowledgement of the importance of the distribution of wealth. Such disregard would imply that protecting the most vulnerable members of society (who are automatically the weakest role-players in the economic market) from the effects of poverty is of no importance, and this view cannot be supported in light of South Africa’s constitutional dispensation and disparate socio-economic situation. The consumer contract’s potential impact on poverty in South Africa, illustrates the reason legislative intervention was required in this area of the law. As social justice legislation, the CPA shines the spotlight on the importance of addressing poverty in South Africa. The fundamental consumer rights protected by the Act provide the roadmap for achieving ethical contracting in consumer agreements.³⁴

27 *Everfresh* case para [36].

28 *Everfresh* case para [22].

29 *Everfresh* case para [23].

30 *Everfresh* case para [36].

31 *Everfresh* case para [24].

32 Klare 1998 *SAJHR* 154.

33 Act 68 of 2008.

34 Bauling & Nagtegaal 2015 *De Jure* 166.

3.9 THE IMPACT OF THE CONSUMER PROTECTION ACT ON THE LAW OF SALE

Judge Dennis Davis states that the highest courts in the country have not yet embraced the distributive power of the law of contract. As the law applies now, it protects some legal subjects while suppressing others.³⁵ He welcomes the important developments in the law of contract that the CPA appears to institute. He argues that “[i]nequality of bargaining power and the consequences thereof lie at the heart of the considerations of which the court is required to take into account in terms of [the CPA].”³⁶

Davis clearly demonstrates the relationship between constitutional rights, distributive justice, the law of contract and consumer agreements. The anticipated change our society rightly demands after the fall of apartheid can only be achieved by changing the courts’ current outlook on wealth distribution. Political change means almost nothing if it cannot also create real socio-economic change in the lives of poor, and traditionally disregarded, members of society.³⁷

Many consumer contracts are concluded out of necessity, as life-sustaining products and essential services are purchased by means of consumer contracts. Usually consumers cannot bargain on the terms of these contracts. Because of this, the legislature decided that the common-law remedies available to address unfair contracts and contractual terms were not powerful enough to protect consumers.

The CPA, as social-justice legislation, is the state’s answer to this problem. It aims to promote the transformation our Constitution requires in order to drive socio-economic change in our unequal South African society.³⁸ The CPA highlights the position of the vulnerable party in a consumer agreement, as well as how this vulnerability is directly related to the socio-economic position a person fills in the community. Socio-economic rights are constitutionally protected and the state must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”, as instructed by section 27(2) of the Constitution. Consumer legislation does not put money or property in the hands of the poor, but attempts to reduce the possibility that they are manipulated by more powerful parties in the consumer market.³⁹

In 3.8.3 we discussed the concept that legislation often embodies public policy and the *boni mores*. The CPA is an example of legislation that limits freedom of contract in order to protect the consumer. The CPA follows a rights-based approach, structuring the protection granted to consumers in terms of specific consumer rights. The broad aim of the CPA relates to the transformative goals of the Constitution and the desire to bring about social and economic transformation across South African society. Section 4(2)(b)(i) of the CPA clearly states that the Act must be interpreted in a way that protects the most vulnerable of consumers in our socio-economic community. These vulnerable persons include poor individuals, those who live in remote communities, minors, seniors, those with no or poor literacy and those with impaired vision.⁴⁰

35 Davis 2011 *Stell LR* 845-846.

36 Davis 2011 *Stell LR* 861.

37 Van der Walt 2006 *Fundamina* 1-2.

38 Bauling & Nagtegaal 2015 *De Jure* 151.

39 Bauling & Nagtegaal 2015 *De Jure* 154.

40 S 3(1)(b).

The consumer rights are provided in Parts A to H of Chapter 2 of the CPA. They are the following: the right to equality in the consumer market, the right to privacy, the right to choose, the right to disclosure and information, the right to fair and responsible marketing, the right to fair and honest dealing, the right to fair, just and reasonable terms and conditions and, lastly, the right to fair value, good quality and safety.

Each of these consumer rights has an impact on the common law of sale. As an example, we will be looking at the guarantee against a defect in the thing sold, as one example of the impact the CPA has had on the common law.

- *Defective goods under the CPA*



NOTE

Not all sales agreements are automatically consumer agreements in terms of the CPA. This means that in certain instances only the common law of contract will apply when goods are sold.

Let's explain this with an example. Lerato owns a second-hand car dealership. She sells cars for a living. If she sells a car to Jabu from the premises of her business, this transaction would be regulated by the CPA (it would be seen as a consumer agreement) and Jabu would be protected by both the CPA and the common law of sale. If Jabu, who works as an advocate, later sells this same car to his friend, Peter, he is not doing this in the normal course of his business, since he is not a car salesperson. So this sales agreement does not qualify as a consumer agreement under the CPA.

Part H of Chapter 2 of the CPA protects the consumer's right to fair value, good quality and safety. This right has a drastic impact on the common law of latent defects. Section 56(1) read together with section 55(2) of the CPA creates the following warranty:

When the CPA applies to a transaction, there is an implied (assumed)⁴¹ provision that the producer, importer, distributor and retailer each warrant that the goods comply with requirements and standards of good quality. This standard of quality includes a guarantee that the goods are reasonably suitable for the purposes for which it is generally intended; that it is in good working order and free of **any** defects; that it will be useable and durable for a reasonable period of time; and that it complies with any applicable standards set under the Standards Act⁴² or any other public regulation.

The CPA regards a defect as “any material imperfection” associated with the manufacture of the goods, or the components thereof, which causes the goods to be less acceptable, useful, practical or safe than one would expect in the circumstances.⁴³

In order to extend the consumer's protection even further, section 56(4) states that the legislative warranty of quality applies “in addition to any other implied warranty or condition imposed by the common law, the CPA itself, any public regulation or express

41 An “implied warrantee” means that the warrantee is automatically applicable, because of the working of the law – the supplier of the goods does not have to state (verbally or in writing) that the goods are guaranteed.

42 Act 29 of 1993.

43 S 53(1)(a)(i)–(ii).

contractual warranty or condition”. Page back to 3.7.2 to refresh your memory of the common-law guarantee against latent defects.

Under the CPA, all defects are taken into consideration, regardless of whether they are latent (hidden) or patent (obvious).⁴⁴ This means that the consumer is awarded much greater protection under the CPA than under the common law on latent defects. Let’s consider the possibility of a *voetstoots* clause in a consumer agreement. We can apply the knowledge we have about the purpose of the CPA, and the relationship between the law of contract and the Constitution, to answer the question of whether or not such a clause would be allowed.

In 3.3.2, we mentioned that parties may include any terms or conditions into their contracts, unless they are unlawful. If the CPA applies to a transaction, and it protects a consumer from any defect, don’t you think it would be unlawful to include a *voetstoots* clause in a consumer agreement? The purpose of the CPA is to protect vulnerable consumers and if a supplier excludes his liability by including a *voetstoots* clause, this would certainly not be fair to the consumer. There is another way we can approach this question. Don’t you think that this is an excellent example of an instance where a supplier’s right to freedom of contract (which would mean that she is free to include a *voetstoots* clause in the agreement) should be limited, in order to conclude consumer agreements in a way that is in line with the *boni mores*, as it is expressed in the CPA’s desire to protect the most vulnerable consumers?

The role of the CPA, as it attempts to protect the consumer from the economic effects of unfair consumer agreements, should therefore be considered together with the constitutionally imposed duty to continually evaluate the fairness and legitimacy of laws, and subsequently also the common law of contract. Due to its importance and frequency in the marketplace, the consumer agreement, in terms of which goods are purchased, might be a means to introduce members of the community to a more ethical manner in which to transact with each other in the marketplace.⁴⁵



ACTIVITY 3.5

- (1) The CPA provides a consumer with better protection than the common law when a defect is found in an item purchased. Explain why this is so.
- (2) What is an “implied warrantee”?

FEEDBACK 3.5

- (1) The CPA provides more protection than the common law not only in relation to the type of defect that is found in the goods, but also as to whom the consumer may claim from if a defect is found. Under the CPA, all defects are taken into consideration, regardless of whether they are latent or patent. Under the common law, the definition of a “defect” is stricter and narrower than is the case under the CPA. These are not the only ways in which the CPA provides better protection. Just think of the possibility of including a *voetstoots* clause into a sales or consumer agreement. Go back to the relevant discussions and create your own summary of the differences between the protection provided by these legal rules.

⁴⁴ Ss 53(1)(a)(i)-(ii) & 55(5)(a).

⁴⁵ Bauling & Nagtegaal 2015 *De Jure* 170.

- (2) An “implied warrantee” is a warrantee (or guarantee) that is automatically applicable, because of the working of the law and where such a warrantee is applicable, the supplier of the goods automatically guarantees that the goods are free.

3.10 CONCLUSIONS

Let’s look back at what we have learnt about the origins and development of the South African law of contract in this learning unit. If a branch of the law, especially one as important as the law of contract, does not reflect the values of our society or the principles of ubuntu (in situations where these principles could easily and effectively be applied), how will we be able to transform our society? We must continuously try to develop the common law of contract, because there are many aspects of it that do not yet reflect the values of the Constitution.

When it came to the element of good faith, Roman law of contract was more just than Roman-Dutch law on the topic. This is an example of a development of the law that did not make it any better. Today, we wait for South African courts to change our legal position in an attempt to make it more reasonable. And maybe (we can only guess at this point) the courts might utilise the principles of ubuntu to reinstate a measure of contractual protection that the Romans enjoyed, but which never became part of South African law. As you continue your studies, keep your eyes and ears open for any exciting developments in the law of contract.

SELF-ASSESSMENT QUESTIONS

Answer the following self-assessment questions on the material that you have just studied in this learning unit. Make sure that you answer these questions to the best of our ability.

- (1) What is the foundational principle of all contracts?
- (2) Explain the difference between impossibility and supervening impossibility of performance.
- (3) Provide one example of an imperfectly bilateral contract.
- (4) How do the duties of the purchaser and the seller differ under Roman law and modern South African law?
- (5) Has the law of contract been sufficiently transformed by the values of the Constitution? Provide reasons for your answer.
- (6) Do you think that the principles of freedom of contract should be entirely removed from the South African law of contract? Explain your answer.
- (7) Discuss in your own words the relationship between good faith, ubuntu and the Constitution as they relate to the South African law of contract.
- (8) Why do you think it is important that the role of the contract in South African society should be re-evaluated?

LEARNING UNIT 4

Obligations: The law of delict



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- identify the delictual elements that have to be present before an action based on unlawful damage to property and *iniuria* could be instituted
- explain whether it is possible to commit the delict *iniuria* in a negligent manner
- identify the three categories of *iniuria* recognised by the Romans and explain their relevance today
- distinguish between damages and satisfaction
- discuss the effects of recent case law on the law of *iniuria* and *damnum iniuria datum*

4.1 INTRODUCTION

In this learning unit you will be introduced to the concept of a delict. As mentioned earlier, the law of delict and the law of contract both form part of the law of obligations.¹ This is because both a contract and a delict create a legal bond between parties and as a result rights and duties arise. What makes a delict different from a contract, is that a delict does not involve consensus between the parties, but rather a wrongful act by one that causes the other to suffer damage (sometimes called “harm” or, less commonly, “injury”).

We will begin by exploring what a delict is and why it creates an obligation. Thereafter, we look at the five crucially important elements of a delict. We will then introduce you to two Roman delicts (damage to property and insulting behaviour), their development over time, and the remedies available to the injured party in each instance. We will then examine how these delicts have translated to modern South African law under the Constitution and, in conclusion, we will take a look at an extraordinary case that will soon be before the courts, and how this relates to social justice and the spirit of the Constitution.

The discussion that follows focusses on how the sources of law, and various legal rules, have changed over time in the interest of justice and in order to serve the interests of society.

4.2 WHAT IS A DELICT?

A delict may be described as wrongful, culpable conduct that causes damage to a person’s property, personality or body, and creates an obligation.² This seems like a mouthful,

¹ See 3.2 in learning unit 3 on contracts to refresh your knowledge on obligations.

² Du Plessis P *Borkowski’s Textbook on Roman Law* 5th ed (Oxford University Press New York 2010) 325.

but once we have analysed the five elements of a delict you will easily be able to define a delict in your own words.

You already know that an obligation is a legal tie between a debtor and a creditor. In the case of a delict, the victim (the injured party) is the creditor with a claim against the wrongdoer (the party who caused the damage), who is the debtor with a duty.³ Because an obligation arises from a delict, the victim/creditor has a personal right to claim performance from the wrongdoer/debtor. In the case of a delict, this performance is in the form of damages. Damages usually refers to a sum of money, which compensates the victim for the loss she has suffered.



NOTE

You will see that we sometimes use the word “damage” and sometimes “damages”. There is a distinction and these two terms do not have the same meaning. “Damage” refers to the harm that is suffered by the victim, and “damages” is the sum of money that the wrongdoer must pay to compensate for the harm she has caused.

To illustrate this, let’s take the example of a familiar delict in modern society: a traffic accident. Suppose Andile omits to stop at a red traffic light and collides with Mapula’s vehicle. The legal position of the parties would be as follows: Mapula would be the creditor, because she suffered damage, for which she can claim damages from the other party to the obligation, Andile, the debtor. Andile therefore has a duty to compensate Mapula for the damage caused by her actions.

4.3 THE DIFFERENCE BETWEEN A DELICT AND A CRIME

This is something you may well have asked yourself: Didn’t Andile in the example in 4.2 commit a crime by ignoring the red traffic light? What do you think? The answer is yes, Andile was guilty of both a crime and a delict. She contravened a traffic rule, which is a criminal offence and one for which the state may prosecute and punish her. But she also caused damage to Mapula’s vehicle, for which Mapula could claim damages with a delictual action. So one harmful act can lead to both a delict and a crime.

Roman law differed significantly from modern South African law in the way it distinguished between a crime and a delict. The Romans only classified as crimes those offences in which the state had a direct interest. High treason (plotting a military coup to overthrow the government, for example) and murder were examples of Roman crimes. The Romans classified other cases where one person injured or wronged another as *delicta privata* or “private delicts”. In such cases the injured party recovered damages or satisfaction from the wrongdoer. They were of the opinion that it was the injured party who had suffered the damage, and should therefore have the benefit of a monetary penalty. In Roman law, the example in 4.2 would have given rise to a delict, but not to a crime. In this module we only examine delicts, and not crimes, but it is important to understand that these two types of legal infringements are closely related.

³ Remember that the debtor has a duty and the creditor has a claim.

4.4 ELEMENTS OF A DELICT

The five elements of a delict are the specific components necessary to make up a delict. It is really important to understand that all five elements have to be present before you can speak of a delict. In the absence of even a single one of these elements, no delict had been committed. The position is the same in modern South African law. We proceed to discuss the delictual elements from the perspective of Roman law.

4.4.1 Conduct

Naturally, the wrongdoer is held liable for some form of conduct, because a delict is defined as culpable, wrongful conduct, which causes damage. Originally, the Romans only regarded a direct positive action as “conduct” for the purposes of delict. During the classical period the *praetor* extended the law so that indirect causation of damage also complied with the requirements for the act. In Justinian’s time an omission (a failure to act) was also regarded as conduct in certain circumstances.

An example of an indirect act would be where Adriaan bumped into Jerome and Jerome then bumped a glass off the table. Adriaan indirectly caused the glass to break. An example of an omission is where Lucky asks Dudu to take care of his dog. Dudu forgot to give the dog food and water and as a result the dog died. Here Dudu’s omission (the fact that he did nothing) is seen as conduct under law.

4.4.2 Wrongfulness

Before a certain action could create a delict, that action had to be wrongful. Wrongfulness literally meant “against the law”. The law forbade certain things, such as murder, theft, damaging another person’s property and insulting a person, to name a few. Both a delict and a crime require that the act in question must be wrongful. Can you think of other examples?

4.4.3 Fault (*mens rea*)

The element of fault can be a bit tricky to understand at first. “Fault” referred to the blameworthy attitude of the wrongdoer – meaning, can we blame her for what she has done? It is important to remember that fault could take one of **two forms**, namely intent or negligence.

In order to establish whether a person acted with **intent** (deliberately), it was necessary to establish the wrongdoer’s **subjective** frame of mind while committing the act. This means that we try to put ourselves in the shoes (and the mind) of the wrongdoer to understand what she was thinking at the time the act was committed. An example of a person acting with intent would be someone acting out of anger. Here is an example: Annette gets home after a long day’s work and finds her husband drunk on the couch for the third day in a row. She picks up his beer bottle and throws it against the TV. She is clearly acting intentionally.

The second form of fault was **negligence**. The establishment of negligence on the part of a person, however, requires an **objective** test. In Roman law there were three degrees of negligence, namely *culpa levis in abstracto*, *culpa levis in concreto* and *culpa lata*.⁴ In

4 Remember that we also discussed *culpa levis in abstracto* in learning unit 3 (3.3.3).

the first place a person was considered negligent if he did not display the degree of care of a diligent *bonus paterfamilias*. This yardstick for negligence gave rise to the modern test of the reasonable person. We will see how the Constitutional Court applied the “reasonable security-guard test” in 4.7.1 below. The question is whether a reasonable person would have acted differently and more carefully or, in Roman terms, would the attentive and careful *paterfamilias* have been more cautious than the wrongdoer? In the example above in 4.4.1 Dudu is negligent because a reasonable person would realise that animals must be fed or the result could be the death of, or serious harm to, the animal.

The law on the element of fault, both Roman and modern South African law, developed significantly, as will become clear from our coming discussions.

4.4.4 Damage

To establish a delict, the wrongful, culpable conduct would need to have caused the victim some form of damage. Always remember that the damage should be to someone else’s property, body or personality. It is not possible to claim damages from yourself. Thinking of examples of damage a person can suffer is easy. Can you think of some? In 4.3 above Mapula suffered damage to her vehicle (her property), which would cost money to repair. Shooting another person would cause damage to their body. Calling someone a thief, when that is in fact not true, could constitute a personality infringement. We will discuss these types of delicts in more detail further on.

4.4.5 Causation

The last element is that of causation. Remember that there had to be a causal connection between the conduct of the wrongdoer and the damage suffered by the victim. This means that the damage had to have been **caused** by (be a result of) the wrongdoer’s conduct. Therefore the act must lead to the damage. Let’s take the example of Annette in 4.4.3: the fact that she threw the bottle directly resulted in the TV being broken. So her act caused the damage. If she did not throw the bottle, there would be no damage.



ACTIVITY 4.1

Identify whether or not a delict has been committed in each of the following instances, and give reasons for your answers:

- (1) Manoko visits the home of her friend Busi. Manoko does not know that an expensive vase had been placed under the coffee table and kicks it over by accident. The vase breaks.
- (2) Johannes cleans his gun and while doing so, he fires it without planning to. The bullet goes through his neighbour’s barn and kills the neighbour’s cow.
- (3) Sally wants to steal her grandmother’s ring. The ring is locked in a beautiful jewellery box. She breaks open the box to steal the ring.

FEEDBACK 4.1

- (1) No, Manoko could not be held liable for damage to property. She acted neither intentionally, nor negligently and therefore the element of fault is absent. Manoko would not reasonably be able to foresee that someone would put a glass object under a table. Since all five of the elements are not present, there can be no question of a delict.

- (2) Yes, Johannes has committed the delict of damage to property. His act of cleaning the gun was done in a negligent manner (a reasonable person would have realised that a gun is a dangerous object and that special precautions should be taken to prevent harm, for example by making sure that the weapon was not loaded). This conduct directly resulted in the death of his neighbour's cow and therefore the neighbour is entitled to claim damages.
- (3) Yes, Sally is guilty of the delict of damage to property. She had the intention of breaking the jewellery box (because she had to open it to get to the ring).



NOTE

It is important that you are able to understand each of these elements and be able to identify whether or not they are present on a set of facts, as we just did in Activity 4.1. This is necessary to determine whether or not a delict has been committed.

We now move on to our discussion of two specific Roman delicts. The Romans originally had a closed set of only four delicts, namely theft, robbery, damage to property and insulting behaviour. Since we do not treat theft and robbery as delicts under South African law today, we will look at the two delicts that are still South African delicts and, more importantly, how the law on these delicts has developed to suit the needs of our complex modern society.

4.5 DAMAGE TO PROPERTY (*DAMNUM INIURIA DATUM*)

Dr Paul du Plessis explains the complex history of the delict of damage to property as follows:

The history of the delict of wrongful damage to property (*damnum iniuria datum*) followed an interesting path: fragmented beginnings, succeeded by legislative reform that was eventually extended well beyond its original framework by praetorian intervention and juristic interpretation.⁵

Under South African law this delict has evolved even more (and will continue to do so), taking it further and further from its original purpose. This delict very clearly shows that the law is not static, but rather an ever-changing system that is very much alive and kicking.

4.5.1 Origins and early development

In the early days the different cases of *damnum iniuria datum*, together with the fine payable for each, were listed individually in the Twelve Tables.⁶ One example was the burning down of another person's vineyards. Pay close attention to the words that are used. If a person suffered damage that was not mentioned in the Twelve Tables, he had no remedy. So if John purposefully sent a stampeding herd of cattle through Jack's vineyard, Jack would not be able to claim damages, because the trampling and stampeding of a vineyard was not specifically described by law: only "burning" constituted a delict. Obviously this was unfair. It therefore became necessary to create a general delict of wrongful

⁵ Du Plessis *Roman Law* 327.

⁶ For more details on the origin of the Twelve Tables, page back to 3.2 in learning unit 3 of part 1 of the study guide.

damage to property on the basis of which a victim could claim for any damage that was wrongfully done to his property.

In 287 BC the *lex Aquilia* was promulgated (enacted) with the intention of creating a uniform delict of wrongful damage to property.



NOTE

“Uniform” as it is used in this sense refers to one legal model or conception of a delict of damage to property that could apply in all instances.

This statute was divided into three chapters, but only chapters 1 and 3 related to delict. They mentioned the following:

- ***Chapter 1***

Anyone who wrongfully slew⁷ the slave or *pecus* (four-footed grazing animal) belonging to another, had to pay to the injured party the highest value of that slave or *pecus* during the past year.

- ***Chapter 3***

Any person who wrongfully burned, broke or fractured a thing belonging to another person (other than a thing mentioned in chapter 1), had to pay the injured party the highest value that the thing had during the past 30 days.

The point of the *lex Aquilia* was to broaden the application of the law, but the result was a law that still had severe limitations. Only two kinds of things are mentioned in chapter 1, namely slaves and four-footed grazing animals, which still limited the scope of the application of this remedy. Also, the only injurious action mentioned in chapter 1 is slaying. Chapter 3 is also narrow in the sense that only three injurious acts are mentioned. Remember that these rules were interpreted and applied strictly and if the damage that a victim suffered was not caused by one of these actions described, there could be no claim for damages. It is clear from this that the *lex Aquilia* did not initially succeed in its purpose of creating a uniform delict to cover wrongful damage to property, but at least it was a step in the right direction. Often, even today, developing the law can take time.

4.5.2 Elements of a delict as applied to the developed *lex Aquilia*

The original *lex Aquilia* then underwent a long development. The developments continued over a long period, because the lawmakers and jurists were constantly trying to make the law as fair as possible and to ensure justice for all those parties who suffered damage caused to their property. Let’s have a look at these extensions.

- ***Conduct***

A direct or an indirect act was recognised by the *praetor* as conduct for the purposes of damage to property. Justinian later also regarded an omission as conduct.

⁷ “Slew” is the past tense form of the word “slay”. This specifically means to kill by beating.

- ***Unlawfulness***

Over time, grounds of justification developed. If the wrongdoer was able to prove a ground of justification, this excluded unlawfulness. An example would be where Brutus killed Julius's slave in self-defence, because the slave was attacking Brutus with a knife. Although killing another person's slave was forbidden by law, Brutus did not act unlawfully here, since he was defending his life.

- ***Fault***

A wrongdoer could have damaged a thing belonging to another person, either intentionally or negligently. As you already know, the establishment of intent involves a subjective test. The degree of negligence that operated here was *culpa levis in abstracto*. So if the perpetrator caused damage in circumstances where she had not acted like a *diligens paterfamilias*, she would be liable for damage to property.

- ***Damage***

After the extension of this delict, it also became possible to claim for damage to a free person's body, even though neither a free person, nor her body, was regarded as property.⁸ We will look at injury to a person's body again when we discuss the delict of *iniuria*.

After the developments, "the highest value" in chapters 1 and 3 was interpreted as full damages. Full damages could be made up of two categories, namely consequential damage and loss of profit. Consequential damage (*damnum emergens*) was the damage that followed naturally from the wrongdoer's actions. Loss of profit (*lucrum cessans*) was the loss of income that the victim suffered as a result of the damage or destruction of his property. Today we refer to full damages as patrimonial loss.

Let's illustrate these forms of damage by means of an example: Sandra is the owner of a race horse. The horse is the fastest and the most beautiful in all of Rome, and every time it wins a race, Sandra brings home a small fortune in prize money. Sandra's sister, Mia, is furious at Sandra and cuts the throat of the horse out of spite. The value of the horse is the consequential damage, and the future income that Sandra would have made by racing the horse again, is the loss of profit.

- ***Causation***

This element remained unchanged: The damage had to be the result of the wrongdoer's action.

4.5.3 The *actio legis Aquiliae*

The *actio legis Aquiliae* (created by the *lex Aquilia*) was the action that could be instituted against the wrongdoer on the grounds of the delict of *damnum iniuria datum*.



ACTIVITY 4.2

- (1) In 250 BC, Simon kicks Joseph's calf to death. Would Joseph have a claim against Simon in terms of the *lex Aquilia*?

⁸ Du Plessis *Roman Law* 335.

- (2) Cathy takes a load of vegetables to the market. In town she visits a bar and drinks too much wine. She is slightly tipsy when she climbs onto her horse-drawn cart and starts the trip home. She is not fully in control of the cart. The cart rolls backwards down a slope and knocks over Jane's lamb, killing it on impact. Would Jane have a claim against Cathy under the original *lex Aquilia*? Would your answer have been different if Jane had claimed under the extended *lex Aquilia*?

FEEDBACK 4.2

- (1) No. Joseph would only have had a claim under chapter 1 of the *lex Aquilia* if the calf had been beaten to death. Originally there was strict adherence to the letter of the law.
- (2) Under the original *lex Aquilia*, Jane would not have had a claim. In terms of chapter 1, "beat to death" was the only action that was punishable. Initially only a direct positive act was recognised as an act for the purposes of damage to property. Under the extended *lex Aquilia* Jane would have had a claim. "Beat to death" in chapter 1 was interpreted as meaning "to kill in any manner". An indirect act, such as the act in question (hitting with a cart), also qualified as an act for the purposes of the *lex Aquilia*.

Recent developments and the influence of the Constitution on the delict of *damnum iniuria datum* will be discussed in 4.7 and 4.8. We will now discuss the second Roman delict that has become part of South African law.

4.6 INSULTING BEHAVIOUR (*INIURIA*)

The delict of *iniuria* originated in response to physical attacks on the body of a free person, long before this was covered by the *lex Aquilia*. Over time, and through various developments, the law on *iniuria* had moved far beyond injuries to a person's body and later encompassed all infringements on a person's personality. Therefore, *iniuria* came to be defined as any conduct that intentionally injured the body, dignity or reputation of another person.⁹

4.6.1 Development of the delict

Under early Roman law, the Twelve Tables listed specific categories of insulting behaviour, along with the specific value of the penalties payable in each case. But, as happens in all societies, money devalued – eventually to the point where these penalties were no longer a deterrent. The historian, Aulus Gellius, tells the story of a Roman senator who wished to illustrate how silly the penalties had become. He walked around slapping people in the face, and immediately his slave would compensate them by paying the small penalty prescribed for the assault.¹⁰ Clearly the law had to be developed to ensure that justice was served. In response to the problem, the *praetor* created the *actio iniuriarum*, by means of which the injured person could claim satisfaction from the perpetrator on the grounds of any insulting behaviour.

⁹ Du Plessis *Roman Law* 347.

¹⁰ Thomas PhJ, Van der Merwe CG & Stoop BC *Historical Foundations of South African Private Law* 2nd ed (Butterworths Durban 2000) 134; Du Plessis *Roman Law* 347.

4.6.2 What qualified as infringement of the person (*iniuria*)?

The Romans recognised three forms of *iniuria*, namely physical attacks on the body, attacks on a person's dignity, as well as damaging a person's reputation.

- ***Physical attack on the body (corpus)***

Any unlawful physical attack on a free person's body constituted infringement of the person (*iniuria*). The mere threat of physical violence was also sufficient.

- ***Attack on a person's dignity (dignitas)***

A person's dignity refers to her self-worth, meaning how she feels about herself. An example of an attack on someone's dignity would be if one person tore another's toga off in public. To the Romans this was an exceptionally indignifying act. But we can relate to that – imagine if someone walked up to you in the street and tried to rip off your clothes! Another example would be where a person was subjected to vulgar verbal abuse.¹¹

- ***Damaging a person's reputation (fama)***

Fama refers to what other people think of a person, or how society regards him. If Andrew spreads false rumours about Bongi to the detriment of her good name, then her reputation has been injured. The Romans considered it a typical case of an attack on a person's *fama* if a virgin was subjected to pregnancy tests, because this insinuated that her word was not to be trusted or that she acted in a scandalous or promiscuous manner.



NOTE

Today our constitutional rights to equality, human dignity, freedom and security of the person, as well as privacy strengthen these common-law rights we inherited from the Roman law of delict.

4.6.3 Elements of the delict as applicable to *iniuria*

- ***Conduct***

Any act that infringed the physical integrity, dignity or reputation of the victim qualified as conduct for the purposes of *iniuria*. Attacks on a person's dignity or reputation could be committed directly (insulting a person in public) or indirectly (insulting a man's wife and thereby insulting him too).

- ***Wrongfulness***

For the delict of *iniuria* to be committed, the action must have been unjustifiable (there should not have been any justification for the wrongdoer's actions). This means that if Alice injured Jacob's body because he was attacking her, her actions were justifiable and no delict was committed. Similarly, if Zama talks about Xolile's extra-marital affair

¹¹ Thomas, Van der Merwe & Stoop *Historical Foundations* 381.

in public, but everyone already knows about the affair, Zama is not damaging Xolile's reputation.

- ***Fault***

Intent was a requirement for the commission of *iniuria*. The wrongdoer had to have had the *animus iniuriandi* (intention to injure). It was, therefore, not possible under Roman law to commit *iniuria* in a negligent way.

- ***Damage***

The damage suffered here was hurt feelings and the victim who claimed that her feelings had been hurt, had to furnish proof in this regard.

- ***Causation***

The general rule of causality applied: the damage suffered had to have been caused by the action of the wrongdoer.

4.6.4 The *actio iniuriarum*

Where an individual's personality rights are wrongfully and intentionally infringed, the general remedy is the *actio iniuriarum*. It is not really possible to place a monetary value on hurt feelings and the injured party therefore claimed satisfaction with the *actio iniuriarum*, and not damages. Satisfaction can be described as "comfort money" or solace (*solatium*), which was intended to soothe the feelings of the injured party. The South African Supreme Court of Appeal explained very aptly what the Roman notion of satisfaction was all about. The Court stated that, in the case of *iniuria*, the principal purpose for awarding damages is "not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings".¹²



ACTIVITY 4.3

Freddy and Neo are two business partners. However, they become involved in a dispute. Freddy shouts loudly in the middle of the local market that Neo has committed fraud, which is totally untrue. After that, Neo's friends want nothing more to do with him. Does Neo have a remedy against Freddy?

FEEDBACK 4.3

Freddy has committed *iniuria* against Neo by deliberately making remarks that damaged or besmirched his good name (*fama*). Therefore, Freddy's wrongful conduct of shouting the remarks resulted in Neo suffering damage to his reputation. Neo could institute the *actio iniuriarum* against Freddy to claim satisfaction to soothe his hurt feelings.

Recent developments of and the influence of the Constitution on *iniuria* are discussed in 4.7 and 4.8 below.

¹² *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) 93C–D.

4.7 THE CONSTITUTIONAL DEVELOPMENT OF THE LAW OF DELICT IN SOUTH AFRICA



READING

Read sections 9, 10, 12 and 14 of the Constitution.

We now turn to the South African law on these two delicts. Many developments of the original Roman law happened during the development of Roman-Dutch law. The South African common law developed (through the decisions of judges) over many years. “Our common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another, remains lively.”¹³ So, the Roman law on these delicts remains the basis of our law of delict, but it is most definitely not identical to the original Roman law. Unfortunately, we cannot look at all of these developments, but you will learn much more about these in the Law of Delict (PVL3703) in your later studies.

We will be looking at two cases that have been decided after the enactment of the Constitution and at how the law has been developed to bring it in line with the needs of our society. We will also look at an ongoing case that will be in the courts for many years to come, due to the nature and scope of the case.

4.7.1 *Damnum iniuria datum* and *Loureiro and others v iMvula Quality Protection (Pty) Ltd*¹⁴

In *Loureiro* one of the legal questions before the Constitutional Court was whether or not iMvula, a private security company, was delictually liable for the financial (patrimonial) losses suffered by the Loureiro family as a result of a housebreaking that the company did not prevent.

The respondent provided a 24-hour armed guard at the home of the applicants. One night, robbers, impersonating police officers, drove up to the house and demanded entry. The guard on duty opened the pedestrian gate, allowing the robbers to apprehend him and to gain access to the home. They detained family members and their staff and stole goods allegedly worth R11 million.¹⁵ The applicants applied to the courts and instituted the *actio legis Aquiliae* against the respondent.

All five elements of a delict had to be present on the facts before the respondent could be held vicariously liable. We will only be looking at what the Court said about negligence.



NOTE

In this case, the applicants instituted action against the company and not against the security guard (a company is a juristic person with legal rights and duties). The guard was acting within his scope of employment and as an employee of the company (the respondent). Remember: a company is an abstract entity and cannot act without the assistance of human beings. When the employees of a company act in the course

¹³ *Carmichele v Minister of Safety and Security and others* 2001 (4) SA 938 (CC) para [58].

¹⁴ [2014] ZACC 4 (hereinafter referred to as the “*Loureiro* case”).

¹⁵ *Loureiro* case para [5].

and scope of their employment, they could cause the company to be delictually liable. Therefore, in this case, the respondent is liable for the conduct of the guard. This type of liability is known as vicarious liability.

The Court stated the following: “Negligence ... focuses on the state of mind of the [respondent] and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault.”¹⁶ Let’s look at how the Court determined whether or not the security guard was negligent.

The test for negligence always has various parts, and in this case the questions that had to be answered were whether:

- (i) “a reasonable person in the position of [the guard] would have foreseen the reasonable possibility of his conduct injuring another’s person or property and causing loss;
- (ii) a reasonable person in the position of [the guard] would have taken reasonable steps to guard against that loss; **and**
- (iii) [the guard] failed to take those steps.”¹⁷

These are difficult questions to answer, and the High Court and the Supreme Court of Appeal differed in their conclusions. The Constitutional Court ultimately found that a reasonable person would have foreseen the possibility that the person at the gate was an imposter. The Court explained as follows: “The robbers drove up in an unmarked car. While the car had a flashing blue light, the light was fixed to the dashboard of the car, not to its roof. Underneath his reflective vest, the man who walked up the driveway was dressed in a blazer of a type that an on-duty police officer would not usually wear. He did not announce his identity or his business. And a reasonable person in his position as a security guard on duty would have foreseen the possibility that an unauthorised person might try to gain access by purporting to be someone that he is not.”¹⁸ As you can see, the determination of negligence will always be highly fact-sensitive.

Next, the Court investigated whether it would have taken unreasonable effort to prevent the risk. The Court found that it would not have been exceptionally hard for the guard to take steps to prevent unknown persons from entering the premises:

A reasonable person would have taken steps to ascertain the identity of the man at the gate including, for example, determining whether the card flashed was a legitimate police identity card and at least enquiring why the man sought access to the premises ... If he could not satisfy these enquiries, a reasonable person would not have opened the gate. [He] failed to take any of these fairly easy precautions.¹⁹

His actions did not meet the standard for reasonableness, and he failed to take the appropriate steps and he was, therefore, negligent.

The Court ruled in favour of the applicants, declaring the company vicariously liable, since the security guard was negligent, because he failed to anticipate the reasonable possibility of damage. He further failed to take the steps a reasonable person in his position would have taken to prevent the damage.²⁰

¹⁶ *Loureiro* case para [53].

¹⁷ *Loureiro* case para [58].

¹⁸ *Loureiro* case paras [60]-[61].

¹⁹ *Loureiro* case para [63].

²⁰ *Loureiro* case para [67].

This case illustrates a few interesting things about the law on *damnum iniuria datum*. The five elements of a delict, as determined by Roman law, were applied to the facts and the various courts that heard the matter came to differing conclusions. This shows that it is not always easy to determine whether a delict was committed, and that even courts can make mistakes. The Constitutional Court provided clarity in the matter. In the interest of justice, and in line with the convictions of the South African society,²¹ the Court decided to interpret and apply the rules on negligence in a way that will, in future, hold private security companies liable for the losses of their clients, if they could have prevented the losses. The Court expanded our understanding of these principles, thereby developing the common law on delict in order to protect citizens and their property.

4.7.2 *Iniuria and Le Roux and others v Dey*²²

This case is of great importance to the law of delict and contained an interesting discussion of Roman-Dutch and African customary-law principles. The case also provides the opportunity to illustrate that the courts can be biased, judgemental and influenced by their personal belief systems. Due to the subject matter of the case, it has received much attention from legal academics, with many strongly criticising the judgement. We will discuss some of these opinions, but first, let's review the facts.

In the *Le Roux* case, the Constitutional Court awarded damages of R25 000 to a teacher who was defamed by the conduct of his pupils. Three schoolboys created a digital image, in which they put images of the faces of the principal and deputy principal (Dey) on the bodies of two naked men who were seated next to each other. The men's hands were in the area of their own genitals. The picture was then distributed among learners in the high school. Dey argued that the actions of the pupils defamed him and injured his feelings, as he was "offended by being depicted as a *moffie* [homosexual man]".²³

But the payment of damages was not the only thing the Court ordered: "In addition, the defendants are ordered to tender an unconditional apology to the plaintiff for the injury they caused him."²⁴ In terms of traditional Roman law, a defendant did not have to deliver a formal apology, but this does not mean that the concept of an apology in the case of defamation is totally unheard of in our law. The *amende honorable* (translated as "making amends honourably") was a Roman-Dutch remedy for defamation and it made its way into the South African common law.²⁵ But by 1865 it fell into disuse and was again replaced by the Roman *actio iniuriarum*. Recent case law has, however, discussed the *amende honorable* and whether or not it has a place in South African law.²⁶

The notion of apologising for an insulting action or behaviour is not foreign under customary law either. Ubuntu forms the basis of African customary law and the principles that underlie it.²⁷ Ubuntu has been described as denoting "humaneness and personhood" and as describing "a humane, kind-hearted person".²⁸ If a defamatory act is viewed from

21 These convictions are called the "*boni mores*" of a society.

22 *Le Roux v Dey* 2011 (3) SA 274 (CC) (hereinafter referred to as the "*Le Roux* case").

23 Zitzke E "Stop the illusory nonsense! Teaching transformative delict" 2014 *Acta Academia* 69.

24 *Le Roux* case para [206].

25 Van Niekerk GJ "*Amende honorable* and *ubuntu*: An intersection of *ars boni et aequi* in African and Roman-Dutch jurisprudence?" 2013 *Fundamina* 402.

26 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *Mineworkers' Investment Company (Pty) Ltd v Modibane* 2002 (6) SA 512 (W).

27 Van Niekerk 2013 *Fundamina* 399.

28 Van Niekerk 2013 *Fundamina* 399–400. For a more detailed discussion, see learning unit 3 in part 3 of the study guide.

this approach, then it is clear that restoring relationships is important. The African notion of justice is fundamentally restorative²⁹ and an apology would therefore have the potential to restore a relationship and soothe the hurt feelings of the person who has been injured. Not all individuals regard money as equally important and the payment of a sum of money as damages does not allow for justice to take on any other form.³⁰

The Court's decision to order an apology, and not just the payment of monetary damages, is based on the overlapping underlying principles of justice and fairness found in both Roman-Dutch and African customary law principles.³¹ There are instances where legal and communal principles and remedies are similar or driven by the same values of justice and fairness; the *Le Roux* case illustrates this.

Now we turn to some harsh criticism of the judgement. These critiques are not based on the legal rules applied or on the outcome of the case, but on the attitude of the Court towards homosexual people (as it was expressed in the majority judgement). It is important to understand that the justices certainly did not all agree, and the judgement also contains two separate minority judgements. The Court did state that it is not defamation to call a person gay, but Dr Emile Zitzke (a specialist on the constitutional impact on delict) argues that the way in which the majority described the image, says a lot about their views.³²

The Court stated the following regarding the picture: “[T]he vision created is one of two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality, which would be embarrassing and disgraceful to the ordinary members of society.”³³

Those are some strong words. It sounds as if the Court is indirectly describing homosexual conduct as promiscuous, immoral, embarrassing and disgraceful. Bear in mind that the people depicted in the photograph were sitting next to each other with their hands on their own bodies. How can a reasonable observer conclude that the two men are homosexual, let alone promiscuous? When courts make statements like these, they further ingrain a heteronormative construct in our society. This means the idea that only heterosexual people are normal or good, is being supported and strengthened. This is in direct contrast with constitutional principles – the exact constitutional principles the Constitutional Court is tasked to uphold.³⁴ Homosexual individuals are protected from discrimination by section 9(3) of the Constitution.

What do you think about the words the Court used? Remember that the question is not what your personal views are on the matter of homosexuality. Considering the law, do you think that the Court was blatantly disrespectful and discriminatory toward homosexual individuals? And do you think that is acceptable?

Look at all the interesting things that happened in this case. For the sake of our discussion on *iniuria*, it is important to see that the Court ordered restitution in a different form than we usually see in courts, namely as an apology (accompanying a payment of satisfaction). The Court based its decision on both the Roman-Dutch-based common law and the principles of African customary law. This is another powerful example of how the influence of the Constitution is shaping our idea of justice.

29 Van Niekerk 2013 *Fundamina* 400.

30 Zitzke 2014 *Acta Academia* 65-66.

31 Van Niekerk 2013 *Fundamina* 397-412.

32 Zitzke 2014 *Acta Academia* 70.

33 *Le Roux* case para [98].

34 Barnard-Naudé J & De Vos P “The heteronormative observer: The Constitutional Court’s decision in *Le Roux v Dey*” 2011 *SALJ* 407-419.

In the next section of this learning unit we take a look at a landmark case that has recently come before our courts. We will also discuss future litigation and potential repercussions for the law of delict.

4.8 **SOCIAL JUSTICE, THE CONSTITUTION AND THE LAW OF DELICT: *NKALA AND OTHERS V HARMONY GOLD MINING COMPANY LIMITED AND OTHERS***³⁵

In this historical judgement, the South Gauteng High Court granted an application for the certification of a class-action law suit. The Roman-Dutch-based common law does not allow for class actions, but section 38(c) of the Constitution does. Once judgement in this matter is finally handed down, it could have major implications for the law of delict in South Africa.

The applicants (69 mineworkers) applied to bring a class action on behalf of current and former underground mineworkers employed in the gold-mining industry, who had contracted silicosis or pulmonary tuberculosis (TB).³⁶ The estimated class (present and former mineworkers, as well as the dependants of deceased workers) may range in numbers from 17 000 to approximately 500 000 mineworkers. The potential defendants in this class action are 32 mining companies who represent virtually the entire South African gold-mining industry.³⁷ The scope of such a claim has never been seen in South Africa, and depending on the final number of members in the class, this could be the largest class action in the world.

We now provide a brief outline of the facts. From as early as 1902 it has been known that the inhalation of excessive silica dust causes silicosis. At the time, it was recommended that mines put in place measures that would limit the exposure of mineworkers to this dust.³⁸ Crystalline silica (also known as quartz) is a common mineral found in gold mines. Silica dust is produced and circulated in the air when blasting and drilling occurs underground.³⁹

Silicosis is an incurable and painful lung disease that impairs lung functioning. It may, in some cases, lead to disability or death of the patient. A person may for the first time, be diagnosed with silicosis long after he has worked in the gold mines, sometimes up to fifteen years later. Exposure to the dust also creates a lifelong risk for the development of TB.⁴⁰ Migratory labourers from various African countries work in South African gold mines and many of them go home to areas where there are no medical facilities or care.⁴¹

The Court also addressed the situation of the dependants and explained why they should form part of the class:

The mineworkers and their dependants form part of the most vulnerable and marginalized members in our society. Such injustice as there may be extends to women and children living in geographical localities of mining and rural communities. These communities are home to individuals (mostly relatives) upon whom ailing mineworkers would have

35 [2016] ZAGPJHC 97 (hereinafter referred to as the “*Nkala* case”).

36 *Nkala* case para [5].

37 *Nkala* case para [7].

38 *Nkala* case para [3].

39 *Nkala* case para [12].

40 *Nkala* case paras [14]-[15], [18].

41 *Nkala* case para [16].

relied on for the provision of accommodation and food as well as maintaining the quality of life of terminally ill mineworkers.⁴²

The mineworkers indicated that their claim will be based in the law of delict. The Court explained that “[f]or a delictual action to be successful it will have to be shown by a plaintiff that (i) the defendant acted or failed to act, and (ii) the defendant’s action or omission was wrongful (often dealt with under the rubric ‘breach of a legal duty’), and (iii) the defendant was at fault (often captured under the head ‘negligence’), and (iv) the act or omission of the defendant caused the damage suffered by the plaintiff, and (v) the damage endured by the plaintiff is capable of quantification”.⁴³ (Quantification simply means that it must be able to determine the monetary amount of damages that should be awarded.)

The mineworkers assert that the companies breached their legal duties (created by the common law, certain legislation and the Bill of Rights) to protect them from the effects of inhaling the dust.⁴⁴ They also accuse the mining companies of not acting in good faith and “doing all to escape justice”.⁴⁵ They allege that the failure to protect them was “on-going, relentless, intense and profound in its impact”.⁴⁶

The legal representatives of the mineworkers argued that, for the victims of these illnesses, and their dependants (some of whom are spread across rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland), a class action is the only way to get justice.⁴⁷ The Court agreed that

for them ... it is class action or no action at all ... It is the only way they would be able to realise their constitutional right of access to court bearing in mind that they are poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases.⁴⁸

But remember that this specific case in the High Court was not about proving delicts or claiming compensation. In it the Court only had to determine whether the mineworkers may institute their claims in one case. Yes, they have a strong case against the mining companies, and (if we dare to speculate) they will most certainly be able to prove that the companies are liable for some parts of the claim. At the time of writing this study guide (2017), the process was underway to identify all the individual members of the class. But watch this space. Once finally in court, this case will most probably unfold over many years. Who knows, the Court may even order an apology along with the payment of damages, but we will have to wait and see. As and when more information becomes available and, the case progresses, we will post information about it on myUnisa and in tutorial letters.

4.9 SOME REFLECTIONS IN CONCLUSION

Let us now end our discussion on the law of delict and consider everything we have explored in this learning unit, from its humble beginnings under the Twelve Tables

⁴² *Nkala* case para [242].

⁴³ *Nkala* case para [57].

⁴⁴ *Nkala* case para [58].

⁴⁵ *Nkala* case para [102].

⁴⁶ *Nkala* case para [60].

⁴⁷ *Nkala* case para [103].

⁴⁸ *Nkala* case para [100].

to the impact the Constitution has had on its application, scope and development. We can conclude that the law has transformed greatly, and that with each development the aim has been to make the law fairer and more accessible to victims of wrongful and culpable conduct.

As you can see from these discussions, one of the Roman legal remedies that was once available to the owner of a slave, the *actio legis Aquiliae*, is being used in a South African court thousands of years later to right a horrifying and atrocious wrong. The failure of mining companies to act in terms of their legal duties has led to the furthering of the socio-economic struggles of many of the poorest and most vulnerable members of the sub-Saharan African society. Don't you think that is progress? It also shows that with developments, the constitutional aims of social justice, access to justice and protecting the dignity of people, are realised. But this certainly does not mean that the law of delict could not be transformed even further.

In conclusion of this learning unit, we challenge you to think about everything you have learnt here. As you work through this learning unit again, try to identify all the developments to the law that helped to transform it into what it is today.

SELF-EVALUATION QUESTIONS

Consider all that you have learnt in this learning unit and try to answer these self-evaluation questions to measure your understanding of the content discussed.

- (1) Discuss in detail the delictual elements that had to be present before an action based on *damnum iniuria datum* and *iniuria* could be raised.
- (2) What is the modern test for negligence? Also explain the historical origin of this test.
- (3) Explain vicarious liability and why it forms part of South African law.
- (4) Provide your opinion on the value of the role ubuntu could play in cases of *iniuria*.
- (5) Why do you think legal rules change over time? Substantiate your answer.
- (6) Which constitutional rights could be infringed by the delicts of *damnum iniuria datum* and *iniuria*? You should be able to list the rights separately for each of the two delicts.

PART 3

The role of the Constitution in South African legal development

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LEARNING UNIT 1

Setting the scene: The supremacy of the South African Constitution



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- explain the importance of questioning the relevance of the Constitution
- discuss your understanding of the concept “supremacy of the Constitution”
- explain why South Africa has a supreme Constitution and not a political system based on the supremacy of Parliament

1.1 INTRODUCTION

Welcome to the third part of this study guide, in which we will be exploring the role of the Constitution in South Africa’s legal development. Here we will also reflect on the first two parts of the study guide. In part 1 of the study guide you were acquainted with the historical and social context in which the Constitution was born, as well as the role of the Constitution in determining a new framework for the sources of South African law. Our discussion of the internal history of the South African common law (part 2 of this study guide) focused on an analysis of the development of aspects of our law on property and obligations. These discussions included expositions of case law, in which the Constitution influenced the relevant common law as it has been inherited from Roman-Dutch law. We also discussed why these developments of the common law are so important in light of the ever-transforming society we live in today.

In this part of the study guide (On the role of the Constitution in South African legal development), we will be focusing more on the Constitution itself and its role in South African society. Some of the interesting topics we will investigate include the Constitution as the supreme law of South Africa; the philosophy behind transformative constitutionalism as a mandate received directly from the Constitution; the relationship between the common law, the courts and the Constitution; and the impact of ubuntu on South African law. The aim of this part of the study guide is to highlight the importance of the Constitution in the development of constitutionally sound legal rules and principles.

In this learning unit, we will explore the notion of the Constitution as the supreme law of South Africa. We have touched on this in part 2 of the study guide and you were able to see this supremacy in action when we discussed case law in learning units 2, 3 and 4 of part 2 of the study guide. Did you see that in all of the cases we discussed, the courts based their rulings on the Constitution? We will now explore why this is the case and why courts are bound by the Constitution.

As we work through this part of the guide, it is important that you take note of why it is that the Constitution has played such a pivotal role in our law, and why it must continue

to do so in future. After all, the law is alive and should constantly develop to remain relevant in, and continue to serve, the South African society.

1.2 HOW TO APPROACH THIS PART OF THE STUDY GUIDE

It is important that you take note of how you should study and understand this part of the study guide. Here your task is to ask questions and think critically about the Constitution. It is only by challenging our understanding of something, that we truly engage with it in a meaningful way. As you work through the study material, ask yourself the following questions:

- Can it be said that the Constitution is a strong legal tool with which the law can be developed?
- Should the Constitution guide the legislature that drafts and passes legislation, as well as the judges who interpret and apply the law?¹
- Do you think transformative constitutionalism has a permanent place in the South African legal environment?
- Do you think the underlying principles and practices of ubuntu should play an even greater role in our courts' interpretation and development of the existing law?

It is important that you remember that the final assessment for this module at the end of the semester takes the form of a written portfolio, which you will prepare at home. You will not have to study the contents of the study guide off by heart and complete a written examination. This means that we will be expecting something more from you than just copying the answers from the study guide. In fact, that is the worst thing you can do! Remember to read the University's Plagiarism Policy and make sure that you understand what plagiarism is.

When answering the portfolio questions, you will need to illustrate that you understand the content of the study guide as a whole. You will also be asked to formulate your own opinions on the historical development of the South African law and how this process has been guided by the Constitution. Therefore, as you work through this last part of the study guide, page back to previous learning units and think about what you have already learnt in this module. In the portfolio you will be expected to show that you can integrate information from various sections of the study guide.

Make sure that you have your copy of the Constitution at hand as you work through the rest of this study guide. As you continue to develop a greater understanding of the Constitution in this last part of the study guide, keep in mind that you need to develop your own understanding of the purpose of the Constitution in our society and its role in legal development. We hope you will enjoy this part of the study guide – it will challenge you to do a bit of thinking and perform some mental gymnastics. Good luck!

We will now evaluate the founding constitutional principles on which the Constitution has been built, what the Constitution itself states about the role of the Constitution, as well as what the Constitutional Court has said about the Constitution.

¹ In this regard, go back to learning unit 7 of part 1 of the study guide.

1.3 THE SUPREMACY OF THE CONSTITUTION



READING

Read the Preamble and sections 1, 2, 7, 165, 167 and 172 of the Constitution.

The readings you have just done should have reminded you that the Constitution is the supreme law of South Africa and that the Bill of Rights binds all three spheres of government. These sections also touch on new content we have not yet explored in this study guide. What do you think about the constitutional duty placed on all courts by sections 165, 167 and 172 of the Constitution? Let's look at why these provisions were included in the Constitution.

The Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) contained 34 constitutional principles that had to be embodied in the final Constitution. Subsequently, the Constitutional Court undertook the task of examining whether the 1996 Constitution met the standard set by the constitutional principles. The results of this enquiry were handed down by the Constitutional Court in *Certification of the Constitution of the Republic of South Africa, 1996*.²

In this learning unit, we will only be focusing on the following three constitutional principles:

- 4: The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
- 6: There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 7: The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

In the *Certification* case, the Constitutional Court had to investigate whether or not the “basic structures and premises” of the new text (now the Constitution) were in compliance with those envisioned by the constitutional principles.³ The Court stated the following:

It seems to us that fundamental to those structures and premises are the following:

- (a) a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary;
- ...
- (c) separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness;
- (d) the need for other appropriate checks on governmental power;
- (e) enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions in the [new text].⁴

² 1996 (4) SA 744 (CC) (herein after referred to as the “*Certification* case”).

³ *Certification* case para [44].

⁴ *Certification* case para [45]. The Court asked several more questions, but only these listed here are applicable to our discussions in this module.

Clearly, the drafters of the Constitution felt strongly about the fact that the three spheres of government (the executive, legislative and judicial authorities) should work independently from each other, and that there should be systems in place to make sure that they do not interfere with each other. In the *Certification* case, the Court explained this as follows:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.⁵

Many years later, the Constitutional Court explained that being the overseer of this separation is not easy, and that the Court itself cannot overstep:

The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.⁶

Now, let us draw some conclusions from what we have just discussed. According to section 2, the Constitution is the supreme law of the country and it binds all spheres of government, as well as all individuals. The Constitution places a specific duty on the courts to uphold the Constitution in all matters. The Constitution can also be used as a tool to keep any of the three spheres of government in check, meaning each sphere can be measured against the guidelines and principles of the Constitution, in order to determine whether the required standard has been met.

1.4 THE CONSTITUTIONAL COURT ON THE CONSTITUTION

Our discussion now moves to an evaluation of some crucial Constitutional Court decisions that have discussed the supremacy of the Constitution, the importance and implication of the separation of powers and the rule of law. Read each of the following excerpts from Constitutional Court cases and evaluate for yourself whether or not the Constitutional Court correctly understands its role in South African society.

- **Doctors for Life International v Speaker of the National Assembly and others⁷**

In this case it was stated that it is the Constitutional Court's duty to enforce the Constitution and to uphold the values and principles contained therein:

Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled.'⁸

5 *Certification* case para [109].

6 *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others* 2016 (3) SA 580 (CC) para [92].

7 2006 (6) SA 416 (CC).

8 Para [38].

The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court ... must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme ... law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.⁹

- **S v Makwanyane**¹⁰

This case was decided; based on the Interim Constitution, but the same constitutional principles apply today. In this case, capital punishment (the death penalty) was abolished in South Africa. It is one of the most influential decisions ever handed down by the Constitutional Court and you will come across it often during your studies. It is famous all over the world and thousands of international law students also study it. Let us look at what the Court had to say about the supremacy clause:

The preamble to the Constitution refers to the creation of a new order in a state, which, amongst other things, is described as a 'constitutional state.' Section 4(1) declares the Constitution to be the 'supreme law of the Republic' which by virtue of section 4(2) 'binds all legislative, executive and judicial organs of state at all levels of government'.¹¹

- **Pharmaceutical Manufacturers Association of South Africa and another: In re Ex Parte President of the Republic of South Africa and others**¹²

In this case, former President of the Republic of South Africa, Thabo Mbeki, was represented in the Constitutional Court, because action was brought against him in his official capacity as president. He was, therefore, embodying the executive branch of the state. The case was about the separation of powers and the Constitutional Court's role in reigning in executive powers. Former Judge President Chaskalson stated as follows:

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.¹³

- **Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others**¹⁴

In the opening lines of this case, the Constitutional Court clearly stated the purpose of constitutional supremacy and the drafters of the Constitution's purpose with breaking from historical tradition:

9 Para [201].

10 1995 (3) SA 391 (CC).

11 Para [155].

12 2000 (2) SA 674 (CC).

13 Para [44].

14 2016 (3) SA 580 (CC).

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy.¹⁵



ACTIVITY 1.1

- (1) What does it mean when we say the Constitution is “the supreme law” of South Africa?
- (2) Do you think the Constitutional Court takes its duty, to act as guardian and enforcer of the Constitution, seriously? Provide reasons for your answer.

FEEDBACK 1.1

- (1) This means that the Constitution is the highest law of South Africa. It binds all spheres of government and all organs of state. All law incompatible with the Constitution is invalid and it must therefore be scrapped or amended to be brought in line with the principles of the Constitution.
- (2) In this question you were expected to give your own opinion. There is no right or wrong answer, but regardless of whether you said “yes” or “no”, you had to explain why you said so. If you said that the Court does take its role seriously, you could have referred to the statements made by the Court (using your own words of course), as discussed in 1.4 above. If you disagreed, you should have provided evidence for your statement, or explained your argument. Remember, when answering questions that ask for your opinion, you are welcome to give any answer, as long as you are able to explain it. You do not have to give the answer you think the lecturer wants. If you can explain your point of view you will get marks for your answer.

1.5 CONCLUSION

In this learning unit we explored the Constitution as the supreme law of South Africa. We looked at why this is the case, as well as why it is important in a newly democratic society like that of South Africa. By evaluating some of the Constitutional Court’s cases, we have developed an idea of the high regard the Court has for its duty as protector of the Constitution, but also how difficult this task is.

This reminder about the utmost importance of the Constitution was necessary before we move on to the next learning unit. In learning unit 2 we will explore the legal duty imposed by the Constitution to transform law that is inconsistent with the principles of the Constitution. We have already touched on this throughout part 2 of the study guide, but we will now take a closer look.

SELF-EVALUATION QUESTIONS

- (1) What are “checks and balances”?
- (2) If you were asked to draft one difficult question from this learning unit for the portfolio examination for this module, what would that question be? Once you have formulated this question, also prepare your answer to this question.

¹⁵ Para [1].

LEARNING UNIT 2

Transformative constitutionalism: The duty to transform society through law



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- describe in your own words what you understand transformative constitutionalism to be
- explain why transformative constitutionalism places a duty on legal scholars and legal practitioners
- discuss why it is important that judges consider the legacy of apartheid when deciding on matters related to socio-economic transformation

2.1 INTRODUCTION

Welcome to the second learning unit of the final part of this study guide. In this part of the study guide (on the role of the Constitution in South African legal development), we are concentrating on the Constitution and its crucial role in the transformation of South African society. As mentioned before, the aim of this part of the study guide is to highlight the importance of the Constitution in the development of constitutionally sound legal rules and principles. We now focus on how and why these legal developments should transform the lives of individuals.

In learning unit 1 of part 2 of the study guide you were introduced to the concepts of “transformative constitutionalism” and the “transformative-constitutional project”. We explained, merely as an introduction, that these refer to a project or mission, which is aimed at transforming South African law so that it is more representative of the values of the Constitution, in order for our society to be transformed. There is, therefore, a direct link between the transformation of law, and the transformation of society and the socio-economic position of all South Africans. This is so because this transformation was what was envisaged for South Africa when the Constitution was drafted. In this learning unit we will discuss transformative constitutionalism in greater detail, as well as the implications it has for all jurists and, more specifically, for you.

2.2 AN EXPLORATION OF TRANSFORMATIVE CONSTITUTIONALISM

In learning unit 1 of part 2 of the study guide (see 1.4), we provided Professor Karl Klare’s original definition of transformative constitutionalism, as well as five questions about constitutional transformation. Page back and read this part of the study guide again.

After having worked through part 2 of the study guide, you now have a much better idea of how the Constitution has influenced certain common-law principles. Can you think of one example from each of the law of property, contract and delict? These examples will guide you in answering the five questions we asked in 1.4 of part 2 of the study guide in a much more comprehensive way than we initially did.

So many judges and academics have written on the topic of transformative constitutionalism that it is impossible to name them all. Let's look at three of the most influential of these.

• ***Former Constitutional Court Judge President¹ Chaskalson***

Justice Chaskalson highlighted the direct influence of the fundamental right to dignity on the transformative constitutional project. Of dignity he said:

[T]he 1996 Constitution now refers to the 'inherent dignity' of all people, thus asserting that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the state.²

He is saying that it is **because** we are human that we have the right to be treated with dignity and that this dignity implies a great number of other rights. He further explains that dignity is closely related to equality:

The Constitution refers to 'the achievement of equality' as a founding value. Ours is an unequal society and the Constitution recognises that positive action is necessary to establish conditions in which there is not only equality of rights but also equality of dignity. To this end the Constitution provides that the state must take action to achieve the progressive realisation of socio-economic rights to housing, health care, food, water and social security. It recognises the nation's commitment to 'land reform, and to reforms to bring about equitable access to all South Africa's natural resources' and requires the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.³

He also explained that there will be times when the courts are required to weigh and balance the conflicting rights of individuals and groups and that in these cases judges should be guided by the transformative purpose of the Constitution and its foundational values of democracy, dignity, equality and freedom.⁴ If possible, judges must strive to bring these conflicting rights in harmony with each other and with the Constitution's foundational principles.⁵

Now, think back to the cases on property we discussed in learning unit 2 of part 2 of the study guide. All these cases concerned conflicting rights to property. Do you think the Constitutional Court succeeded in balancing the conflicting rights in these cases, if you take into account that the Court considered the legacy of apartheid in each of them?

1 Initially the most senior justice was called the "judge president", but under the final Constitution we refer to him or her as "chief justice".

2 Chaskalson A "The Third Bram Fischer Lecture: Human dignity as a foundational value of our constitutional order" 2000 *SAJHR* 196.

3 Chaskalson 2000 *SAJHR* 203.

4 Chaskalson 2000 *SAJHR* 204.

5 Chaskalson 2000 *SAJHR* 204.

- ***Former Constitutional Court Chief Justice Langa***

Justice Langa declares that he regards the fact that we, as people, must change, as the core principle of transformative constitutionalism.⁶ He describes the transformation in question as “a social and an economic revolution”⁷ and declares the objective of the Constitution to be the creation of “a truly equal society”.⁸ He further explains that transformation is a complex term and that, in this context, it has a specific meaning:

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.

Do you not think that these are powerful words with which to describe transformation? He perfectly summarises the idea that transformation must never stop; an aspect of transformative constitutionalism that is important to understand and remember. He sees the true challenge of transformation as being the fact that it can never be complete and that legal scholars and legal professionals must never forsake this national project, or stop imagining the transformation we can bring about in South African society.⁹

- ***Former Constitutional Court Deputy Chief Justice Moseneke***

Justice Moseneke agrees with Justice Langa that equality and dignity are central to the transformative project. He states that emphasis on equality and socio-economic rights is required to focus effectively on the constitutional aim of social justice.¹⁰ He states that the purpose of the Constitution is transformation and that “[c]entral to that transformation is the achievement of equality”.¹¹ He explains that transformation will only be achieved through “the attainment of collective good, through redistributive fairness in an open and accountable society”.¹² In order to restore equality, the Constitution must be applied for its “primary purpose”, namely “to intervene in unjust, uneven and impermissible power and resource distributions”.¹³

Do you agree with him? We agree that the most troubling inequality is based on unequal positions of power and unequal resources, financial or otherwise. What do you think? Moseneke also makes several references to “the collective” or to society as a whole. Here he illustrates that the rights of an individual may have to give way to the rights of many. This links directly to the underlying principles of ubuntu. We will explore ubuntu in more detail in the following learning unit.



ACTIVITY 2.1

Read the discussion of Chaskalson’s, Langa’s and Moseneke’s views on transformative constitutionalism again. Which one of these justices’ discussion of the transformative-constitutional project did you like best? Provide reasons for your answer.

6 Langa P “Transformative constitutionalism” 2006 *Stell LR* 352.

7 Langa 2006 *Stell LR* 352.

8 Langa 2006 *Stell LR* 353.

9 Langa 2006 *Stell LR* 359–360.

10 Moseneke D 2002 “The Fourth Bram Fischer Lecture: Transformative adjudication” *SAJHR* 314.

11 Moseneke 2002 *SAJHR* 316.

12 Moseneke 2002 *SAJHR* 317.

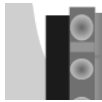
13 Moseneke 2002 *SAJHR* 318.

FEEDBACK 2.1

This question required that you give your opinion on which of the three discussions you liked best. There are no right or wrong answers, but you had to give reasons for your choice. You could have based your choice on anything – the words used by the justice, the images that came to mind when you read the quotes, personal experiences that relate to the statements, or what the words inspired you to feel. You could have considered these things or any other deciding factors you wanted to. This is your personal opinion and it should not be the same as anyone else's.

2.3 THE IMPLICATION OF TRANSFORMATIVE CONSTITUTIONALISM

But what does all of this mean? To find out how we should go about transforming the law (in order to transform society), read the following sections:



READING

Read sections 7, 8, 39 and 173 of the Constitution.

In the case of *Carmichele v Minister of Safety and Security*,¹⁴ the Constitutional Court explains the relationship between these sections of the Constitution, and the duty they impose on courts:

In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.¹⁵

...

It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.¹⁶

Now, with this information about the direct duty these sections of the Constitution place on courts (to transform law that is inconsistent with the Constitution), and the inherent duty of the transformative-constitutional project, what can we conclude about how and when law must transform? Let's try to simplify this duty on the courts (and by extension those who represent the courts and who interpret and apply law):

All law, whether the common law we inherited from Roman-Dutch law, the customary law, or legislation passed before or after the enactment of the Constitution, must adhere to the principles of the Constitution. The principles of the Constitution can be found in the foundational rights in Chapter 2, the principles of ubuntu, the *boni mores*, and the

¹⁴ 2001 (4) SA 938 (CC).

¹⁵ Para [33].

¹⁶ Para [39].

constitutionally inspired drive to transform South Africa's unequal society in order to restore dignity to all. Therefore, whenever courts come across legal principles that are not being used to better the lives of poor and vulnerable South Africans, they must change these laws. This must be done in order to achieve the transformative goal of the Constitution, because this is precisely why it was enacted.

2.4 CONCLUSION

Klare, Langa and Moseneke all agree that the Constitution is a driving force for (social) revolution, but that this revolution must be non-violent and grounded in law.¹⁷ Moseneke aptly summarises this revolutionary duty placed on us by the Constitution:

[T]ransformative constitutionalism is certainly not an event. It is a process that all wielders of public and private power are duty-bound to advance.¹⁸

Now that you have a better idea of exactly why unjust laws in South Africa must be changed, you will be better equipped to read or hear judgements and determine whether they have adhered to the national transformative-constitutional project. Transformative-constitutionalism embodies the idea that the law must constantly evolve, to serve the society in which it operates fairly and justly.

SELF-EVALUATION QUESTIONS

Answer the following self-assessment questions on the material that you have just studied in this learning unit. Make sure that you answer these questions to the best of your ability:

- (1) According to Justice Chaskalson, why do we have the right to dignity?
- (2) What does Justice Langa view as the “core principle” of transformative constitutionalism?
- (3) What is the purpose of the Constitution, according to Justice Moseneke?

17 Klare K “Legal culture and transformative constitutionalism” 1998 *SAJHR* 150; Langa 2006 *Stell LR* 352; Moseneke “Transformative constitutionalism: Its implications for the law of contract” 2009 *Stell LR* 4.

18 Moseneke 2009 *Stell LR* 13.

LEARNING UNIT 3

Ubuntu and the transformation of South African law



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- provide an exposition of your own understanding of ubuntu
- explain why defining ubuntu is so complex
- discuss why you think the courts frequently make reference to ubuntu in constitutional matters

3.1 INTRODUCTION

Welcome to the penultimate (second to last) learning unit of this study guide. Earlier, in this final part of the study guide, we explored the supremacy of the Constitution and the transformative-constitutional project. The last concept we will be evaluating, is that of ubuntu. We have referred to ubuntu several times throughout this study guide. Can you think back to specific Constitutional Court cases discussed in this study guide that have made reference to ubuntu?

In this learning unit we attempt to scrutinise what ubuntu means, why it is so hard to translate and why it is essential to South African jurisprudence.¹ We will also look at the Constitutional Court's reliance on the principles of ubuntu, as well as the influence of ubuntu on the transformation of the common law.

We are aware that ubuntu may not be a foreign concept to many UNISA students, because they have personally experienced or seen what it means for a community to embrace the principles of ubuntu. Other students may have a more inferior understanding of the concept. We are also aware that the Historical Foundations of South African Law is not the only module in which you have come across the concept of ubuntu. We nonetheless urge you to work through this learning unit to refresh your memory and to gain an understanding of when and how courts have employed ubuntu in their judgements.

3.2 WHAT IS UBUNTU?

Ubuntu is a complex concept, one that is difficult to capture sufficiently in English.² In spite of this task being so complex, we will give it a try. In order to attempt this, we will be making reference to some gifted justices and academic writers.

1 The word “jurisprudence” is derived from the Latin word *jurisprudencia*, which means “knowledge of law” or “skill in law”. In simple terms, we can say that jurisprudence refers to the study of the law or the science of law.

2 Radebe SB & Phooko MR “Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu” 2017 *SA Journal of Philosophy* 2, 9.

In learning unit 2 of this final part of the study guide we made reference to the landmark case of *S v Makwanyane*.³ In our opinion, no other Constitutional Court case has since described ubuntu in a more compelling and complete manner. Justice Yvonne Mokgoro's description of ubuntu is one of the most accepted:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu* [a person is a person through/because of (other) people], describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* [human dignity] are also highly prized. It is values like these that Section 35 [of the Interim Constitution] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.⁴

Mr Sibusiso Radebe and Professor Tshidi Phooko take a different approach. Their insightful argument is that ubuntu is such a wide concept that, in order to fully understand it, it must be viewed as a philosophy⁵ encompassed by various components. They describe ubuntu as:

a way of life of the African people which is underpinned by certain components that make up its substantive content, and permeates every aspect of their everyday existence and interactions with each other and the world at large.⁶

They argue that most definitions of ubuntu “fall short” because they ignore various components that make up the substantive content of ubuntu.⁷ They explain this as follows:

The substantive content of ubuntu as captured by components such as *masakhane* [let us build each other], *izandla ziyagezana* [hands wash each other], *bathe pele* [people first], *letsema* [co-operative community farming], stokvels, *masingwabisane* [let us help each other in burying one another], the relationship between children and adults, the sacredness of human life, the meaning and uses of land by and between Africans, the importance of dialogue and consensus-seeking, and the continued connection between the living and the dead (ancestors) in African culture are further evidence of the continued relevance and flexibility of ubuntu. Therefore ubuntu has not reached its end but is evolving in line with both rural and urban settings.⁸

What are your views on these descriptions of ubuntu? If you have a different understanding of what ubuntu is, or how it influences a community, or if you want to give us examples of how ubuntu manifests in your community, please tell us about it on the myUnisa discussion forum for this module. Maybe you have a story about someone helping you, or a friend or relative receiving assistance from others. We would love to hear about your experiences, and maybe other students can learn from your description or stories.

3 1995 (3) SA 391 (CC) (hereinafter referred to as the “*Makwanyane* case”).

4 *Makwanyane* case para [307].

5 “A philosophy” can be described as an outlook on life that acts as a guiding principle, whereas “philosophy” is the academic study of the nature and foundations of knowledge, reality, logic, ethics and existence, meaning the study of how humans think and understand their surroundings.

6 Radebe & Phooko 2017 *SA Journal of Philosophy* 2.

7 Radebe & Phooko 2017 *SA Journal of Philosophy* 2.

8 Radebe & Phooko 2017 *SA Journal of Philosophy* 6.

So, please share them with us. We would also like to hear about your experiences, even if you are not from a black African community or from sub-Saharan Africa.

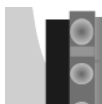
3.3 WHY DO THE PRINCIPLES OF UBUNTU INFORM SOUTH AFRICAN LAW?

Throughout this study guide we have asked you to read specific sections of the Constitution. You will remember that none of these sections made reference to ubuntu. The word ubuntu is nowhere to be found in the Constitution. It was, however, specifically included in the Interim Constitution. The postamble of the Interim Constitution contains a provision on National Unity and Reconciliation, which encompasses the following commitment:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

We can therefore accept that, since the Interim Constitution was the foundation for the Constitution, and the Constitutional Court had to confirm that all the principles and values of the Interim Constitution have been captured in the final Constitution (see 1.3 of this part of the study guide), ubuntu has been encapsulated in the Constitution. The word “ubuntu” might not be there, but its underlying values most certainly are. Various Constitutional Court cases have also specifically stated that ubuntu has found tangible form in the Constitution.



READING

Read the preamble and sections 9, 10, 11 and 12 of the Constitution.

After having read these sections, do you agree that the principles of humaneness and communality are captured in the Constitution? There are many more sections of the Bill of Rights that have the same effect. Can you find at least one other right in the Bill of Rights that also reflects the essence of ubuntu?

ACTIVITY 3.1

- (1) Why is it difficult to capture the essence of ubuntu in English?
- (2) Can it be said that there is a single, complete definition of ubuntu? Give reasons for your answer.

FEEDBACK 3.1

- (1) The English language cannot effectively capture the essence of ubuntu through direct translations. The substantive meaning of ubuntu can only truly be captured if it is regarded as a combination of components, many of which are not common to Western cultures.

- (2) No, there is no universally accepted definition of ubuntu, but the majority of South African courts and legal academics accept the definition provided by Justice Mokgoro in *S v Makwanyane*.⁹ Furthermore, Radebe and Phooko explain that ubuntu is not a static concept and that it changes with the times in order to capture the philosophies and practices of both urban and rural societies.¹⁰

3.4 THE ROLE OF UBUNTU IN CONSTITUTIONAL PRIVATE-LAW MATTERS

By now you should have a clear idea of the complex nature of ubuntu, some of the various ways in which it can be described and defined, and that it has an integral role to play in the South African constitutionally transformative legal landscape. Let's keep this in mind and think back to what we have learnt in part two of the study guide. Part two focused on the legal development and transformation of certain aspects of the common law on property, contract and delict. As you think back, also remember the crucial importance of the transformative-constitutional project, which we explored in the previous learning unit.

In learning unit 2 of part 2 of the study guide we discussed the complex nature of the law of property and how conflicting rights (both common-law rights and fundamental human rights) can apply to a single property. In all the Constitutional Court cases we discussed on eviction, access to housing and security of tenure, the Constitutional Court either directly or indirectly considered the principles of ubuntu.

In the case of *Daniels v Scribante*,¹¹ the Constitutional Court directly equated human dignity to the right to security of tenure and the right to live in a habitable dwelling. We now know that human dignity is one of the fundamental principles of ubuntu. The case of *Baron v Claytile*¹² illustrated how the Constitutional Court considered all the relevant circumstances and rights of the unlawful occupiers before ordering their eviction. This decision ultimately means that other individuals who had the right to live on the farm could also be respected as individuals with the right to dignity. In the *PE Municipality* case¹³ we saw how the High Court's decision to evict the unlawful occupiers had a direct effect on their human dignity. The Constitutional Court stated that the position of the unlawful occupiers must be seen in its historical context. As a direct result of apartheid land policies, many South Africans have nowhere to live. The principles of ubuntu guided the Court to an equitable solution, which restored the affected parties' dignity by treating them humanely and halting their eviction. In the *Occupiers of Berea* case¹⁴ it was clear that the unlawful occupiers, who sought the Constitutional Court's protection, had not been treated with humaneness and respect when steps were taken to evict them. In fact, other courts did nothing to protect them and perpetuated their undignified treatment.

In cases involving the unlawful occupation of land, one party always feels mistreated by the law. When eviction orders are denied, landowners often believe that the law has failed them, since their common-law right to reclaim their property has been disregarded.

9 1995 (3) SA 391 (CC) para [307].

10 Radebe & Phooko 2017 *SA Journal of Philosophy* 6.

11 [2017] ZACC 13.

12 *Baron and others v Claytile (Pty) Limited and another* [2017] ZACC 24.

13 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

14 *Occupiers of Erven 87 & 88 Berea v Christiaan Frederick De Wet* NO [2017] ZACC 18.

When unlawful occupiers are evicted in line with the precepts of the Constitution and relevant legislation, they feel let down and that they have been treated inhumanely. Think about the facts of these cases discussed in learning unit 2 of part 2 of the study guide, the historical background of homelessness in South Africa, and decide whether the Court came to the correct decision in each of these cases. What do you think you would have done if you were to sit in the chair of one of the justices and these or similar cases came before you?

In learning unit 3 of part 2 of the study guide we explored the common law of contract and its embarrassing lack of transformation. There we discovered that the rights to equality and human dignity are those that have the most direct influence in contract law. These are also the rights that relate most directly to the principles and components of the philosophy of ubuntu. That is exactly why the Constitutional Court pointed out the potential impact that ubuntu could have on the common law of contract. Our discussion of the relationship between good faith, the freedom of contract and ubuntu illustrated that the courts have been so busy trying to protect the common-law rights of parties to contracts, that they have created unfair and unjust legal rules: One party to a contract may act in bad faith, and potentially the other party may have no legal remedy at their disposal. This was never the way the Romans intended the law to apply. In the *Everfresh* case,¹⁵ the Constitutional Court indicated that it was time that this discrepancy between reality and justice was set right, and that ubuntu might guide courts in doing so in future.

Turn back to 3.8.4 in learning unit 3 of part 2 of the study guide. When you worked through that part of the study guide initially, the relationship between good faith and ubuntu might have had a different meaning. When you read this part again, are you able to develop a greater understanding of this complex problem? With what you know now about ubuntu, do you think that the law of contract must develop to be fair, just and humane to all?

In learning unit 4 of part 2 we analysed the common law of delict and how it has developed and transformed in line with the Constitution. The delict *iniuria* has, as a subcategory, injury to a person's dignity. This delict directly relates to the principles of ubuntu and its drive to protect an individual who has suffered injury to their dignity. This is why the Constitutional Court specifically referred to the insights we can glean from the ubuntu-based remedy of asking for forgiveness. In *Le Roux v Dey*¹⁶ this is exactly what the Court ordered (along with the payment of a *soliatum*) to soothe the hurt feelings of the respondent in the matter. The Constitutional Court took inspiration from the fundamental principles of togetherness and humaneness in order to rectify a wrong in a manner that would satisfy the community as a whole. Return to 4.7.2 in learning unit 4 of the previous part of the study guide and have another look at what the Court said on the value of an apology. Do you think, in those circumstances, that an order for an apology was the correct decision? Which do you think had more value to this respondent – R25 000 (which the parents of the wrongdoers probably paid) or a sincere apology?

15 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

16 2011 (3) SA 274 (CC).

3.5 CONCLUSION

The African philosophical approach of ubuntu is of immense value in South Africa's present discussions on social justice, legal transformation and the attempt to respect and protect the fundamental rights of all members of society. We hope that this has become clear as you worked through this learning unit. Ubuntu has already greatly influenced several areas of South African law, many of these being beyond the scope of this module. However, you will agree with us that it is a pity that the influence of ubuntu on the common law has not been greater. We can only hope that the coming years will bring a more integrated approach to the courts' drive to transform the common law in line with the values of the Constitution and the many cherished principles and values encapsulated in the components of ubuntu.

SELF-EVALUATION QUESTION

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

After reading through this learning unit, close the study guide and think about what you have learnt. Write a 200-word paragraph in which you explain your understanding of ubuntu in your own words. Do not make use of the words and phrases used in this learning unit. Remember that copying word-for-word from any source is plagiarism.

LEARNING UNIT 4

Conclusions



LEARNING OUTCOMES

After studying this learning unit, you should be able to

- discuss the importance of legal history
- explain how historical legal sources should be interpreted in South African society in transformation
- discuss why legal rules have changed and should continue to change over time

4.1 INTRODUCTION

Welcome to the final learning unit in this study guide. What a journey it has been. In this part of the study guide on the role of the Constitution in South African legal development, we have discussed the basis for, and the importance of, the supremacy of the Constitution, transformative constitutionalism and the role of the courts, as well as ubuntu and legal transformation. We investigated these by referring back to parts 1 and 2 of the study guide in order to show the reasoning behind the development of the law and why continuous development of the law is so important. In this last learning unit, we will look at what we have learnt in this module and why it is so crucial to study legal history.

4.2 WHY IS HISTORY IMPORTANT?

With what you have learnt in part 1 of the study guide on the external legal history in mind, read the following quotes:

The Constitution of this country has not swept away everything that came before it.¹

The interim and final Constitutions preserved old order laws. Both pronounced that all law in force – the common law, customary law and old order legislation – shall remain in force ... If the truth be told, the interim Constitution did not rise like a phoenix from the ashes of the flawed apartheid legal system. Rather, it was superimposed over several live strands of law, both good and bad. In time, the legislature and the courts were to weed out constitutionally recalcitrant laws ... What was clear was that all saved laws had to be at peace with the highest law.²

These two quotations summarise what we have learnt as we have worked through this study guide. Owing to certain historical events, discussed in detail in part 1 of the study guide, we have inherited both European and African legal principles, that are now

1 *Bophuthatswana Broadcasting Corporation v Ramosa* [1997] HOL 283 (B) 283.

2 Moseneke D “Transformative constitutionalism: Its implications for the law of contract” 2009 *Stell LR* 5.

subject to the Constitution. No legal principles that were applicable in 1993, when the Interim Constitution was adopted, automatically fell away. Each legal principle, custom and piece of legislation had to be challenged in a court or had to be amended, repealed or replaced by legislation. As you have learnt in a part two of this study guide, this process of testing the constitutionality of legal principles that predate the Constitution, is not yet complete. If we, as a society, strive for social justice, equality and dignity for all, the transformation process must be ongoing.

But why is legal history important? How does it relate to legal transformation? Van der Walt answers this question as follows:

[T]he continued relevance of legal history in a time of transformation relates to its potential in analysing legal culture and its effects on the need and possibilities for transformation.³

He states that one of the most important reasons for studying legal history, and for referring to legal history when the law is interpreted and applied, is the fact that it provides us with multiple stories of transformation and instances where the law was out of touch with the needs of the society it was supposed to serve.⁴ If you think back to the external history as it was discussed in part 1 of the study guide, you will remember that the historical events and political changes discussed there, directly resulted in changes to the law, which we evaluated in more detail in parts 2 and 3. So, studying legal history allows us to analyse the way in which societal changes influence and transform the law.

Van der Walt argues that a drive for transformation does not automatically mean that all traditional (or original) sources of law must be disregarded, or that they should lose their authority. Moseneke's quote above contains the same argument. Transformation demands that historical sources must be seen in their historical context and that they must be interpreted with an understanding of the legal order within which they currently function.⁵ He stated that we cannot look at traditional sources from a conservative perspective, but that we must rather consider how we **want** the law to function in our society. Law cannot be seen as independent from the political and social context within which it operates. Ours is a society in transformation and this reality must influence how we view all law, including historical legal sources.⁶

We adopted this critical approach to analysing South African legal history in this module. We hope that you are now able to see how and why certain historical events changed the law. As you read the summary of the key aspects of the module that follows, keep everything you have learnt in this module in mind and try to identify which historical events led to the transformations of South African law thus far.

4.3 REFLECTIONS ON THE STUDY GUIDE

Let's briefly look back on what we focused on in this module. In part 1, we learnt about the external historical events that influenced the development of the uncodified, hybrid South African legal system. In learning unit 2, we traced the origins of the African component of our law. We learnt that, while legal effect is given to some of the legal

3 Van der Walt AJ "Legal history, legal culture and transformation in a constitutional democracy" 2006 *Fundamina* 30.

4 Van der Walt 2006 *Fundamina* 37, 46.

5 Van der Walt 2006 *Fundamina* 5–6.

6 Van der Walt 2006 *Fundamina* 7, 36.

institutions of some of the many South African communities (such as Islamic law), today only indigenous law, together with Western law, are officially recognised and constitutionally protected as sources of South African law.

Learning units 3 to 5 dealt with the roots of the Western component of our law. This section introduced us to the origins and growth of Roman law, its revival in the medieval law schools, the eventual development of a European *ius commune*, the reception of Roman law and canon law in Western Europe and the development of Roman-Dutch law in the province of Holland. We then turned to the development of the Western component of our law (Roman-Dutch and English law) on South African soil. We saw how these two systems of law merged to become a single system of South African law.

Learning units 6 and 7 brought together the origins and history of the principle of constitutionalism and the concept of human rights in South African law. We encountered political events of the 20th century, such as the activities of the liberation movement that paved the way for the introduction of a constitutional democracy in the 1990s, as well as the constitutional protection of fundamental human rights in South Africa.

Part 2 of the study guide focused on the internal history of South African law. As we have seen throughout this study guide, political, constitutional, economic and sociological events influence the way members of society view their world and the development of their legal system. In learning units 2, 3 and 4 of part 2 respectively, we discussed the historical foundations and constitutional development of the law of property, contract and delict. Our specific focus was on how the needs of a changing society influenced the relevant legal principles.

In learning unit 2 on the law of property, we explored the reasoning behind the abolition of slavery and the transition of slaves from legal objects to legal subjects. We compared Roman and indigenous conceptions of ownership, as well as the varying focus on individual and collective ownership in each of these systems. We focused on the protection of ownership, with specific reference to the *rei vindicatio*, and towards the end of the study unit we explored the crucial impact of sections 25 and 26 of the Constitution on owners' right to institute this action against occupiers of their land. Lastly, we investigated the impact of the transformative-constitutional project on property law and how the national transformative project demands access to housing, since the right to dignity requires this. Here we looked at four recent Constitutional Court cases. The importance of land redistribution, and the problems experienced with the practical implementation thereof, was also highlighted.

Learning unit 3 of part 2 of the study guide focused on the law of contract, its historical foundations and its lack of constitutionally inspired transformation. We started by looking at the nature of obligations and the general principles of contract, after which we explored specific contracts in greater detail, focusing on the contract of sale. Developments instituted by the Consumer Protection Act⁷ were contrasted with the lack of constitutional development in contract law. We explored the potential for the fundamental principles of ubuntu to influence the nature of contracts and the hope that ubuntu could reintroduce a responsible ethos of contracting, where respect for the other contracting party is paramount. We also pondered the following question: If a branch of the law, especially one as important as the law of contract, does not reflect

⁷ Act 68 of 2008.

the values of our society or the principles of ubuntu, how will we be able to use contract law to effectively transform our society?

Learning unit 4 of part 2 focused on the historical development of, and the constitutional influence on, the law of delict, with specific reference to the delicts of *damnum iniuria datum* and *iniuria*. We analysed the importance of the constitutional development of the law on delict, with specific reference to ways in which damage may be addressed and alleviated. Here we discussed the value of an apology (the principles of ubuntu served as inspiration for the Constitutional Court's decision), alongside the payment of a sum of money. We also looked at the crucial role the common law of delict will play in the upcoming class-action case against South African gold mines.

Let's look at the contents of the study guide holistically and draw some conclusions about what we have learnt, and why this is important.

ACTIVITY 4.1

Write a 150-word paragraph in which you explain whether you think legal history has a place in the current LLB curriculum at UNISA. Your paragraph has to provide reasons for your answer.

FEEDBACK 4.1

This question asked of you to give your own opinion on the value of legal history in the LLB curriculum. There are several ways in which you could have answered this question, and no two students' answers should be the same. You could have discussed what you learnt in this module, whether you enjoyed working through this study guide, whether you feel the contents of the study guide are inclusive of various views and opinions, or whether you agree with the statements about the value of legal history that have been provided in this learning unit. There are no wrong answers to a question like this, but, whatever your opinion, you had to explain your thinking. The purpose of this question was to make you think about what you have learnt and to find out whether you thought it was valuable or added to your understanding of the South African legal system as a whole.

4.4 FINAL THOUGHTS

The focus of this module is the historical development of South African law over time and the value of ongoing constitutional transformation of current South African legal rules and principles. We have learnt about the various sources of our law and why they form part of South African law. We discussed some instances where these different sources of law have different rules and approaches in a given situation. Where different rules may apply, the Constitution, as the supreme law, must guide the interpretation and application of conflicting legal rights. Here the courts are guided by the fundamental human rights protected by the Constitution (specifically the rights to dignity and equality), the principles of ubuntu, the transformative-constitutional project and South Africa's history.

The Constitutional Court has started to take relevant social and historical contexts into account "as **sources** of legal knowledge".⁸ This is important when the aim of legal

⁸ Davis D & Klare K "Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 495.

action is to right historical wrongs, such as our current dilemma of unequal access to land resources and power. Regarding the interpretation of law and the importance of its historical context, take a look at this quote from *S v Makwanyane*:

With the entrenchment of a Bill of Fundamental Rights and Freedoms in a supreme constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text. The constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society.⁹

Barnard argues that it is not “the law” which is responsible for the legal transformation we wish to see in South African society, “but it is **us** who create the law with our human will in the face of our humanity who is inexcusably responsible for transforming it”.¹⁰ This relates directly to our constitutional duty to become involved in the constant legal transformation required by South African society. Legal history has taught us that law must continuously develop and transform along with the society in which it operates.

The jurist Ulpian¹¹ wrote the following in the opening lines of the *Digesta*:

Justice is the constant and perpetual desire to give to everyone that to which he [or she] is entitled.¹²

This sentiment is thousands of years old, but it is just as true today. The purpose of law is to regulate the lives of people in a fair and just way and, in South Africa today, that involves a drive to transform society in order to restore dignity and equality to all. We can only truly do that if we know where legal rules come from, why the law is as it currently stands (why laws are part of our legal system) and how legal rules still need to change to achieve the best society possible. As you progress through your studies in the Bachelor of Laws degree (LLB), always try to understand where a legal principle comes from and judge for yourself whether it is truly in line with the transformative-constitutional project.

SELF-EVALUATION QUESTIONS

- (1) What happened to the existing common law and legislation that was in place in 1993 when the Interim Constitution was adopted?
- (2) In Barnard’s opinion, who or what is responsible for legal transformation?
- (3) After taking into consideration everything you have learnt in this module, what do you think is the purpose of a transformative-constitutional project in South Africa?

⁹ *S v Makwanyane* para [302].

¹⁰ Barnard AJ *A critical legal argument for contractual justice in the South African law of contract* (LLD thesis University of Pretoria 2002) 252.

¹¹ For a reminder of who Ulpian was, page back to 3.3 in learning unit 3 of part 1 of the study guide.

¹² *Digesta* 1 1 10pr.