

FLS1501

The Origins of South African Law
Questions and Answers

What is the nature of SA's law and what are its 3 main components

SA's legal system is HYBRID in nature and is made up of three main components as follows:

- African
- Western
- Universal (Human Rights)

Why is a thorough knowledge of the history of SA law necessary?

- To enable one to work with the sources of the law
- To assess their significance and value
- Through the knowledge of the history of SA law one will gain a proper perspective on the sources from which SA law developed
- Knowledge of the history of SA law explains the present character of our law
- Proper understanding of the roots of our law will make meaningful law reform possible

Explain the comparative -law method

- Practitioners and courts have an increasing tendency to look at other legal systems for solutions to solve problems which are common to their own and other systems by comparing the systems
- South African Law Reform Commission uses the comparative-law method and regularly refers to legal developments in other countries

What legal systems have Roman law in common?

- South African Legal System
- Europe
- South America
- Japan
- Turkey

Why should we be interested in other legal systems

- We can note the way in which they have solved legal problems

Which countries in Africa share a common legal heritage with South Africa?

- Namibia
- Botswana
- Lesotho
- Swaziland
- Zimbabwe
- Legal systems comprise indigenous African law and Roman-Dutch law as influenced by English law

What is the difference between the Internal and External history of the law?

External History of the law

- Traces sources and factors which have contributed directly or indirectly to the development of a legal system
- Example: the establishment of trade unions

Internal history of the law

- Covers the origins and development of legal rules and principles themselves under the development of external historical events
- Example: the rule that no person may be dismissed unfairly
-

Activity 1.1

Internal History

- The internal history relates to the origins and development of and
- The internal history relates to the origins and development of legal rules and principles

External History

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

Identify the main sources of our law (3).

- Legislation
- Court decisions
- Common law
- Customary law
- Indigenous African Law

Describe what is meant by codification (1).

- In law, codification is the process of collecting and restating the law of a jurisdiction in certain areas, usually by subject, forming a legal code, i.e. a codex (book) of law.

What is the “common law”?

- The common law is the centre around which the sources of law revolve.
- In SA, the term “common law” refers to Roman-Dutch law as influenced by English law
- “Common Law” is a source/place of origin of South African law
- It must be distinguished from other sources of law such as court decisions, legislation and customary law

What is the “common law” in a broader sense?

- It is the common law of England
- English common law influenced the legal systems of many countries such as
 - South Africa
 - United States of America
 - Australia
- Legal systems that have been influenced by English common law are known as “common-law systems”

Roman and English law influences

- Legal systems that have been influenced by English common law are known as “common-law systems”
- Legal systems that have been influenced by Roman law are known as “civil-law systems”

What are the similarities between Germanic law, early Roman Law and Indigenous African Law

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

What drastic changes has our legal system and society experienced in the 1990's?

New constitution

- added Indigenous law to the sources of SA law
- Introduced new human-rights culture
- Safeguards fundamental rights enjoyed by every person because s/he is a human being
- Is the highest law/supreme law of the land
- Establishes principles against which all other laws should be tested
- No other laws (statutes, common law or indigenous law) may be in conflict with the constitution

Which components of our law give it a specific nature?

The Western or
European Component

Roman Dutch and English

The Indigenous
African Component

Indigenous African law

The Universal Component

Human Right law

Name the most important works of the following jurists: (6)

#	Jurist	Important Works
1	Hugo de Groot	<i>Inleidinge</i> <i>De Jure Belli as Pacis</i>
2	Simon van Groenewegen	<i>Notes on Grotius's Inleidinge</i> <i>Tractatus de Legibus Abrogatis</i>
3	Simon van Leeuwen	<i>Censura Forensis</i> <i>Het Roomsche – Hollandsche Recht</i>
4	Jahnnes Voet	<i>Compendium Iuris</i> <i>Commentarius ad Pandectas</i>
5	Antonuis Mattaeus II	<i>De Criminibus</i>
6	Cornelius Van Bijkershoek	<i>Quaestiones</i> <i>Observationes</i>

Name the most important works of the following jurists: (6)

#	Important Works	Jurist
1	<i>Inleidinge De Jure Belli as Pacis</i>	Hugo de Groot
2	<i>Notes on Grotius's Inleidinge Tractatus de Legibus Abrogatis</i>	Simon van Groenewegen
3	<i>Censura Forensis Het Roomsche – Hollandsche Recht</i>	Simon van Leeuwen
4	<i>Compendium Iuris Commentarius ad Pandectas</i>	Jahnnes Voet
5	<i>De Criminibus</i>	Antonuis Mattaeus II
6	<i>Quaestiones Observationes</i>	Cornelius Van Bijkershoek

Why is the Corpus Iuris Civilis still important today?

The Corpus Iuris Civilis is of great importance today because it provides modern society with a version of Roman law as it was at the end of its development

What are the components of the Corpus Iuris Civilis?

- The Digesta which contains the writings of the classical Roman law jurists
- The Codex consisting of imperial legislation
- The Institutiones -a text book written for law students of that time
- The Novellae consisting of imperial legislation promulgated after the publication of the Codex

- Libri Feudorum was incorporated in the later Middle Ages

Why was the Corpus Iuris Civilis not well received in its time?

- It was written in Latin which is one of the reasons it was not very successful in its own time
- It applied only in the Eastern Roman Empire where the official language was Greek
- The Western Roman Empire had fallen and no longer existed at the time of its compilation

Collectio Dionysiana

- Best known collection of church laws
- Compiled by the monk, Dionysius
- Compiled in early 6th Century AD

Lex Romano Visigothorum

- Also known as the Breviarum Alarici
- Was a codification of Roman Law by the Visigoths

Libri Feudorum

- Well known compilation of feudal law
- Was incorporated into the Corpus Iuris Civilis during the later Middle ages

The Glossa Aurelianensis

- Was a compilation of the glosses of the School of New Orleans
- It was produced by the ultramontani and NOT glossators

European ius Commune

- Developed during the period from the 12th to end 15th centuries

Code Napoleon (Code Civil)

- Louis Bonaparte Introduced to the Netherlands in 1809

Savigny

- Leading figure in the historical school
- Regarded as one of the greatest jurists of all time
- Produced a large number of works on German law

Bartolus

- Was a commentator
- Regarded as the greatest medieval jurist
- His work was legendary
- His work was very different from that of other ordinary commentators
- More inclined to consult the Corpus Iuris Civilis firsthand
- Nevertheless was reluctant to differ from the Glossa Ordinaria

Cujacius

- French humanist
- Outstanding legal scholar
- Professor at various universities
- Distinguished himself by reconstructing the old classical texts
- Attached to students
- Believed to have lost a vast amount of money through making loans to needy students

Blackstone

- Influential English legal scholar
- Published his “Commentaries on the Laws of England” in 4 volumes in the mid 18th century
- Leading modern authorities still refer to his work

Feudalism

- Emerged after the death of Chalemagne at the end of 9th Century
- Owes its origin to the feudal lords/overlords who accumulated vast tracts of lands
- Landowners allowed non-landowners(vassels) to cultivate the land in exchange for certain services
- The vassal had to pay tax to the feudal lord
- The vassal owed allegiance to his feudal lord and had to follow him into war
- The feudal lord had to protect his vassals
- Feudal law which regulated the relationship between the feudal lord and his vassal gradually evolved
- The best known feudal law is *the Libri Feudorum* recorded in the 12th century AD

What is meant by the territoriality principle?

It is the principle that everyone living in a specific territory is subject to one law

Example:

It no longer mattered if one was a Visigoth, a Lombard or a Frank, the law that applied was the law of the area in which that person lived.

Superseded old tribal laws that were mainly customary law

Influenced to some extent by Roman law

Activity 4.6

1. With the accumulation of land in the hands of the powerful landowners, people living in a specific feudal territory became subject to the law of the area. This is known as the TERRITORIALITY PRINCIPLE
2. After the death of Charlemagne, Europe entered a period of economic and cultural stagnation and FEUDALISM became the order of the day. Under this system the landowners allowed the non-landowners (VASSALS) to cultivate the land in exchange for the performance of certain services.
3. The *Libri Feudorum* is the best known recording of feudal law which was incorporated in the *Corpus Iuris Civilis* during the late middle ages

Activity 4.7

Factors contributing to the preservation of Roman Law

1. The Institutes of the roman classical jurist, Gaius	2 nd Century AD,
2.1 Germanic people record their laws in writing	5 th Century AD , recorded by clerics
3. Corpus Iuris Civilis	6 th Century AD. Justinian, Eastern Roman Empire
4.The capitularia- the enactments of the Frankish king	5 th Century AD to 9 th Century AD (Middle Ages)

Codifications that contributed directly and indirectly to the survival of Roman law during the middle ages (5th Century AD - 12th Century AD)

	What was it?	Who compiled it?	In which century was it compiled?
Leges barbarorum	Compilation of Germanic tribal law, as influenced by Roman law	The various Germanic tribes however the actual writing down of the law was done by clerics	There were various compilations which were written down from the 5 th Century AD to 9 th Century AD
Leges Romano Barbarorum	Compilations of Roman law as influenced by Germanic tribal law applicable to Romans who lived in Germanic Territories	The various Germanic tribes however the actual writing down of the law was done by clerics	There were various compilations which were written down during the 5 th Century AD and 6 th Century AD
Lex Romano Visigothorum (Breviarum Alarici)	A compilation of Roman law as influenced by Visigoth law applicable to Romans who lived in Visigoth territory	The Visigoths	In AD 506 6 th Century AD
Corpus Iuris Civilis	A compilation of Roman Law consisting of the Codex, Digesta, Institutiones and Novellae	Justinian Emperor of the Eastern Roman Empire	6 th Century AD
Collectio Dionysiana	A compilation of church laws based on Roman laws as adapted to the needs of the Roman Catholic Church	The monk, Dionysius	6 th Century AD
Libri Feudorum	A compilation of feudal law that was based on Roman law		12 th Century AD

Factors that played a role in the survival of Roman law in the West between 5th and 12th Centuries

1. The “ Rome idea”
2. The codification of Germanic law
3. The enactments (legislation) of the Frankish kings
4. The application of the personality principle
5. The codification of Roman law by Germanic invaders
6. The Roman Catholic Church
7. The rise and spread of Feudalism
8. The application of the principle of territoriality
9. The Corpus Iuris Civilis

The Germanic Peoples consisted of:

1. Franks - captured almost whole of Western Roman Empire in 5th Century AD

By 9th century AD Frankish empire included countries known today as France, Belgium, the Netherlands, Germany, northern Italy, Austria, Switzerland and parts of Eastern bloc countries (Hungary, Bulgaria and Romania)

1. Burgundians

2. Lombards

3. Visigoths

- Above were branches of the Aryan race which had migrated earlier from the regions around the Black and Caspian seas
- Charlemagne “Holy Roman Empire” beginning of 9th century AD -product of the “Rome idea” which prevailed in Western Europe during this period

Activity 4.1

The “Germanic peoples” is a collective name for the tribes that inhabited Western Europe during the Middle Ages. Examples of such tribes include THE FRANKS, THE LOMBARDS, THE VISIGOTHS and the BURGUNDIANS.

The establishment of the Holy Roman Empire by a Germanic king was the result of the “Rome idea” which prevailed in Western Europe at the time

The “Rome idea” refers to the Germanic peoples’ admiration of Roman culture; particularly its LEGAL SYSTEM and ORDERED GOVERNMENT. This contributed to the survival of Roman law after the fall of the Western Roman Empire in AD 476

4 phases of Reception of Roman Law into Western Europe

- Prereception (Infiltration)Phase [5th Century AD]
- Intellectual Rediscovery Phase [12th Century AD]
- Early Reception Phase [13th and 14th Centuries AD]
- Reception Proper [15th and 16th Centuies AD]

European Ius Commune?

- 12th to end of 15th century a common law was built up in Western Europe based on:
 - Roman law
 - Canon law
 - Customary law
- This common law or European ius Commune came into being when Roman law and Canon law were received into *Germanic customary legal systems*
- Common denominators in the ius commune were ROMAN LAW and CANON LAW both of which were adapted to meet the needs of individual countries
- The legal systems of most Western European countries are based on the ius commune - it is the legal foundation of the majority of Western European Countries
- All 3 medieval schools played a role in the creation of the ius commune however it was the COMMENTATORS who facilitated the IMPORTATION of Roman law into the practical administration of justice
- It was the COMMENTATORS INFLUENCE together with the invention of the PRINTING PRESS (GUTENBERG) which ensured the reception of Roman-law into the legal systems of GERMANYM FRANCE and THE NETHERLANDS

Relevance of the European Ius Commune

- Roman-Dutch law forms important part of SA legal system
- Impossible to separate the history of Roman-Dutch law from Roman law in the rest of Western Europe or the gradual assimilation of Roman law and Canon law into Germanic customary law.
- The reason for this that during 12th to 15th centuries there was a SPIRIT OF UNIVERSALISM in Western Europe
- There was constant interaction between jurists from Western Europe including England and Scotland.
- Although they came from other countries they all used LATIN as the international medium of communication
- There were few substantial differences in the legal systems of the various countries
- Roman- German law, Roman-French law etc developed in much the same way as Roman-Dutch law

Harmonisation?

- Harmonisation - drive to harmonise the private law of the European countries
- The Roman-law heritage and specifically the SCIENTIFIC STRUCTURE OF ROMAN LAW which makes it possible to harmony where there are different substantive rules applicable in different countries

An African Ius Commune?

- It is not just the Western European legal systems that share a common core that are considering the harmonisation of their private law
- The legal systems of the South African Law Association are close to our legal system
- The term “South African Law Association” was first coined by Schreiner J in a decision of the Lesotho High Court
- The term refers to the countries in Southern Africa whose legal systems are based on ROMAN-DUTCH LAW as influenced by ENGLISH LAW and INDIGENOUS AFRICAN LAW
- These countries are LESOTHO, BOTSWANA, SWAZILAND, ZIMBABWE, NAMIBIA and SOUTH AFRICA
- The common core of the legal systems in these countries was illustrated in the dictum of the judge in the Matumo case in Botswana who explained why he had used South African case law as authority - it based on Roman-Dutch law which is also part of the Botswana common law
- There is enormous potential for the convergence/harmonisation of private law in Southern Africa

Why is the *European ius commune* so important?

- It was the common law of (Western) Europe
- Consisted of ROMAN LAW, CANON LAW as received into the GERMANIC CUSTOMARY LEGAL SYSTEMS
- This means that many Western European countries have the same LEGAL HISTORICAL FOUNDATION
- Therefore they share SEVERAL SIMILARITIES
- The result is that a lawyer in one of these Western European countries may look for a solution to a legal problem by consulting the legal system of another country that forms part of the *European ius commune*
- The ius commune also applied in the Netherlands and it was the 16th century legal system of the Netherlands, namely Roma-Dutch law that was introduced into South Africa in 1652
- Therefore the European ius commune is relevant to SA lawyers today since s/he can look to the legal systems of Western Europe for a solution to a legal problem if our law does not provide one

The Usus Modernus Pandectarum

- Pandect = Digest one of the 4 parts of the Corpus Iuris Civile
- In the 17th and 18th centuries a new school of law emerged in Germany known as the “usus modernus pandectarum”
- Campaigned for the inclusion of the Corpus Iuris Civilis into everyday practice of law

What was the Working Method of The Usus Modernus Pandectarum?

- Followed a THEORETICAL/PRACTICAL line of thought
- Studied the law as it applied in THEORY but also as it applied in PRACTICE
- Concerned with Roman law that was *still applicable* and *still in use*
- Described Roman law as it *applied in practice subject to amendment and supplementation by their own laws and courts*

The usus modernus pandectarum and canon law

- Rejected the commentators' rules regarding application of canon law
- Were of the opinion that
 - Canon law should have preference over Roman law but that
 - German customary law should have preference over both Roman law and canon law

CARPZOVIVS II (leading proponent of the *usus modernus pandectarum*) “FOUNDER OF GERMAN NATIONAL LAW”

- 17TH AND 18TH CENTURIES
- Most famous of early German jurists
- Aim of his work was to describe the prevailing law of the time as it was actually applied in practice
- Was the “Bartolus of Germany”
- Dominated German law for more than a century
- Summarised and compiled the laws which had developed before his time from both Roman and German sources
- This work caused him to be regarded as the “ ***FOUNDER OF GERMAN NATIONAL LAW***”

Natural Law (17th Century)

- Development of natural law also influenced German legal history during the 17th century
- In terms of the law of nature there is a
 - Higher
 - Universal
 - Unchangeable
- Law to which all laws must conform

GERMANY: Legal Development from 19th Century

- German jurisprudence as developed by writers of 19th Century was of such high quality that it had a profound effect on other European countries where the law had already been codified

THE HISTORICAL SCHOOL (Early 19th century)

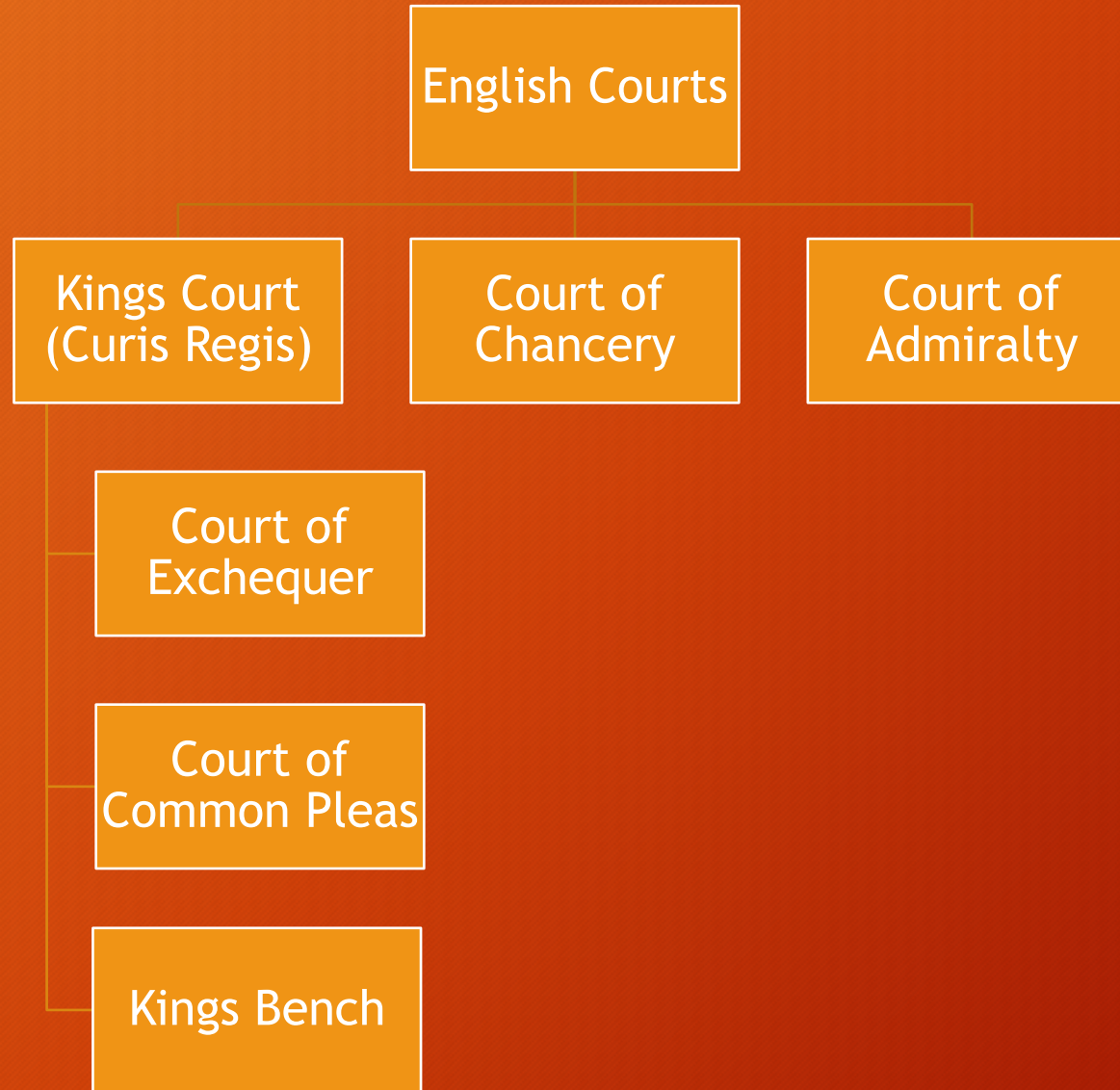
- Rose up in reaction against the doctrine of the law of nature
- Contrary to the law of nature, the historical school did not recognise any permanent and unchangeable law
- Considered the law to be essentially both *CHANGEABLE* and *RELATED TO THE NATIONAL SPIRIT*
- Studied German law together with Roman law
- Roman law was studied only for its *SCIENTIFIC INTEREST* and not with a view to its practical application

SAVIGNY -THE HISTORICAL SCHOOL (Early 19th century)

- Leading figure of this school
- Regarded as ONE OF THE GREATEST JURISTS OF ALL TIME
- Produced a number of works on GERMAN LAW

CODIFICATION: BÜRGERLICHES GESETZBUCH

- Idea of codification at the end of the 19th century
- 1900
- Civil-law code
- Introduced for the whole of the German Empire



Maxims describing the relationship between the law of equity and the common law

- “Equity acts in personum” law of equity took the litigants’ personal circumstances into account
- “Equity follows the law” parties could only rely on the law of equity if the common law answer to the specific case was unfair
- “Equity prevails” where the law of equity and common law provided different solutions to a legal question, the law of equity would have precedence

Influence of Roman Law on English Common Law

- Despite practical and emotional opposition to Roman law its influence can be traced in the works of common law of England
- in the works of jurists like
 - Glanville (12th century) student of Vacarius (glossator came to Oxford in 1143 Roman law)
 - Bracton(13th Century)
- In the works of
 - English Canonists - strong Roman law content found in cannon law and Eccliastical courts
- Humanist movement (Gentilis came to England in 16th century)
- Lord Mansfield as chief justice in the 18th century relied on the works of Roman-Dutch writers such as De Groot, Huber and Bijniershoek
- Roman law did have some influence on English common law but it is doubtful that it was of a fundamebtal nature

Roman-Dutch law before Codification

Study Unit 7

Introduction

- Based on the dominant position of the Province of Holland in the Netherlands
- Dutch East India Company applied Roman-Dutch law in its colonies
- Administration of the Cape applied the law of Holland
- Roman-Dutch law was accepted in the Cape gradually through *custom*
- *“old writers” or “old authorities” are the jurists who wrote about the law of all 7 provinces*
- *SIMON VAN LEEUWEN first used the term “ Roman-Dutch” law by coincidence in 1652*
- *The province of Holland held a special place in the jurisprudence of the Netherlands*
- *The law of the province of Holland was the leading law in the Netherlands*
- *The law of the province of Holland strongly influenced the law of the other six (6) provinces*
- *Provinces: Holland, Zeeland, Utrecht, Gelderland, the Ommelands, Friesland, Overijssel*

What is Roman-Dutch law?

- Has both narrow and a broad interpretation

Narrow: understood as the law of the province of Holland as it existed in 17th and 18th centuries meaning that it consists of:

- Roman law received in the province amended by
- Customary law and legislation (placaeton) of Holland as they existed in 17th and 18th centuries

Broad: interpreted as including the law of all 7 Dutch provinces as well as elements of the European ius Commune

How did elements of the European ius commune originate in the Netherlands?

- During the reception period a spirit of universalism prevailed in Western Europe
- Roman law and canon law governed many of the issues that existed in the law of that time
- Jurists of Holland consulted widely for authority consulting Italian, German and French writers
- Courts were willing to accommodate Dutch advocates who based their arguments on decisions handed down in French and Italian courts

View of the South African Appellate Division

- Until 1988 there was a conflict of opinion among academics as well as the courts on whether to follow the narrow or the broad interpretation of Roman-Dutch law
- The Supreme Court of Appeal settled this dispute in the *Du Plessis case* by *deciding in favour of the narrow interpretation*

Relevance of the European ius commune and the law of the other Dutch provinces

- Does the decision taken in 1988 by the Supreme Court of Appeal mean that the broad interpretation (which includes the European ius commune and the law of the other 6 Dutch provinces) is no longer relevant in the studies of legal history?
- In the Du Plessis case the Appellate Division emphasised the rules of Roman-Dutch law
- In reading the decision it is obvious that Roman-Dutch law is an important branch of the European ius Commune
- And that the writers of the other Dutch provinces played a role in the development of the law of Holland
- Basically the formal source of our law is the law of the province of Holland as it existed in the 17th and 18th centuries but it cannot be seen in isolation as it is the product of long historical development.

How does this work in practice?

- First we must distinguish between
- the search for authority regarding the the law in general and
- the search for authority regarding the specific legal rules
- We note there is *unity in the law of Western Europe* (including the neighbouring Dutch provinces) however
- When we look at the *specific rules* we may find some *differences* in the various legal systems that belong to the European ius Commune

Where will we look for authority in the in law in general terms and authority in specific legal rules

- When authority is sought with regard to general principles, ideas and doctrines of Roman-Dutch law we will look at:
 - The common law of Western Europe - including the law of the other Dutch provinces before codification
- When authority is sought for specific rules of Roman-Dutch law we will look at
 - The law of the province of Holland and in such a case the law would be contained in, for example, legislation (placate) of the province of Holland or the writings on the old writers on the law of Holland

-

Courts today still have the power to develop the common law

- The Appellate division does not hesitate to adapt Roman-Dutch law rules that no longer meet present day needs of South African society
- Courts often look at developments in other civil-law legal systems
- *Linvestment case*: the Supreme Court of Appeal re-evaluated a Dutch-Roman law rule as stated by VOET
- The court indicated that it would be wrong to adhere blindly to an inference drawn from the views of VOET expressed at the end of the 17th century and
- Referred to the development of the Roman-Dutch rule in other European Countries, Scotland and the State of Louisiana in the United States of America

Why is a SA lawyer able to consult the legal systems of the European ius Commune for solutions to legal problems?

- The common-law heritage of the European legal systems makes other European legal systems accessible to South African lawyers who have been educated in Roman-Dutch law. This is because Roman-Dutch law is historically a part of the European ius commune.
- Because of the spirit of universalism that has existed in Europe over the past 500 years, Roman-Dutch law and the European ius commune have influenced one another.
- It is therefore easy for a SA lawyer schooled in Roman-Dutch law to consult the legal systems of the European ius commune in his or her search for a solution to a legal problem.

Sources of Roman-Dutch law before codification

- The old writers (most important source of Roman Dutch law)
- Statute law or legislation
- Collections of court decisions
- Collections of opinions
- custom

The old writers

- Besides knowing the old writers and their work the value lies in understanding their significance in our founding law
- Information about the works of the old writers together with the evaluation of their authority in present day legal practice is essential
- Various factors which help to determine the importance of the old writers include:
 - The province in which the old writer worked
 - The period in which he worked
 - The type of work written by the author
 - His influence on South African legal practice

Which province did the writer represent

- Authoritative writers are those who wrote on the law of the province of Holland
- Writers who did not specifically write 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 European *ius commune* which was received in the Netherlands
- We can also obtain information on the law of Holland from writers on the law of Utrecht, Friesland etc where they compare the position of their own legal system with the legal system of Holland

The Period in which the writer lived

- Roman-Dutch law existed as an independent legal system in Holland for almost 3 centuries
- Roman-Dutch law consists of the law of Holland during the 17th and 18th centuries therefore these are the periods of interest and works of writers during this period would be consulted first
- The “golden age of Dutch jurisprudence” took place in the 17th century therefore an early Dutch writer like Hugo de Groot (Grotius) is evaluated differently from a late 18th century writer like Van der Keessel because the work of earlier writers like Grotius was of a pioneering nature whereas Van der Keessel had a developed system of law to work with and was able to make use of the commentaries of some talented and highly competent earlier jurists

The type of work written by the author

This is an important factor to be considered

There were different categories of work:

- Commentaries on Roman-Dutch law in its entirety
 - The Inleidinge of Grotius
 - Het Roomsch-Hollandsch Recht by Simon van Leeuwen
- Commentaries on Roman law “the learned law” pointing out similarities and differences between the prevailing law as applied in the courts of the day and Roman law. These additions provide us with important insights on how Roman law merged with the prevailing Dutch law to form Roman-Dutch law. An example is the well known encyclopaedic work
 - Commentarius ad Pandectas by Johannes Voet
- Commentaries on existing commentaries - a number of jurists added to and improved existing commentaries. Their work was of a high standard and thus qualify as important sources of Roman-Dutch law. Examples are the supplementary notes on the Inleidinge of Grotius written by:
 - Groenewegen
 - Schorer

Treatises on aspects of Roman -Dutch law

Majority of Jurist writings

- Wrote works on aspects of Roman-Dutch private, public and procedural law and although it was not written on Roman-Dutch law in its entirety it does not mean that it should be disregarded
- A good work on one aspect of law can be very meaningful
- An example is the work on public international law:
 - De Iure Belli ac Pacis by Grotius

Work that falls outside of the listed categories

- Other writers work that falls into different categories:
- Collections of Opinions
- Legal Dictionaries
- Notes on Court cases

The best known is

- *Observationes Tumultuariae* by Bijnkershoek

The influence of these writers on SA legal practice

- Most influential Roman-Dutch authority was JOHANNES VOET
- Reason for his popularity was in his book *Commentarius ad Pandectas* he wrote authoritatively on a wide field of law
- His work illustrates the greatest virtues of the Roman-Dutch legal system
- He personified the “golden age” of Dutch jurisprudence in the opinion of many judges such as:
 - Lord de Villiers
 - Sir John Kotze
 - Sir Johannes Wessels
- Percival Gane’s fine translation of the *Commentarius* was completed in the 1950’s and incorporates extensive notes by the translator. This ensured Voet’s continued popularity as a source of reference.
- Other popular sources are the works of Grotiu, Leeuwen, Van der Kessel, Groenewegen and Bijnkershoek

Prominent 17th Century Writers on the law of Holland

- Grotius
- Groenewegen
- Leeuwen
- Voet

Hugo de Groot (Grotius) 1583-1645 (62)

- Generally regarded as the greatest of the Dutch jurists
- One of the most outstanding jurists of all time
- Was a jurist and a theologian, classicist, historian and a poet
- Greatest achievements were as a jurist
- His two best known works are:
 - Inleidinge (Inleidinge tot Hollandsche Rechtsgeleerdheid)
 - Written while he was imprisoned in Loevenstein
 - Had to rely on memory because he had few books available so there are a few shortcomings in his work
 - First circulated in manuscript form and then was printed for the first time in 1631
 - Innumerable editions have been printed and some as recently as the 20th century
 - Notes by Groenewegen and later Schorer remedied these shortcomings
 - De Jure Belli ac Pacis (De Jure Belli ac Pacis, Libri Tres)

Simon van Groenewegen (1613-1652) 39

- Received training at the University of Leyden where he practised as an advocate for a while
- Died at early age of 39
- Two important works:
 - Notes for Grotius's Inleidinge
 - Tractatus (Tractatus de Legibus Abrogatis)

Important Works	Content		
Notes on Grotius' Inleidinge	Provided notes in support of Grotius' statements Occasionally amended or added to the text		
Tractatus (Tractatus de Legibus Abrogatis)	Indispensable authority on Roman- Dutch law of the 17 th century		

Old Writer	Time	Period	Province	Type of Work	Influence on SA legal practice	Comment
Hugo de Groot (Grotius)	1583 -1645	17th				
Groenewegen		17th				
Leeuwen		17th				
Voet		17th				

	Grotius (Hugo De Groot)	Simon van Groenewegen	Simon van Leeuwen	Johannes Voet
Born /Died	1583-1645	1613-1652	1626-1682	1647-1713
Period	17 th Century	17 th Century		
Province	Province of Holland			
Type of Writings	First Treatise about the law of Holland First Treatise published on public international law (law of nations)			
Name of Work	Inleidinge (printed 1631) De Jure Belli ac Pacis (Paris 1825)	Notes on Grotius's Inleidinge Tractatus (Tractatus de Legibus Abrogatis)		
Language	Dutch latin translation by Johannes van der Linden in 19 th Century 1845: English translation			
Subject of Work	Described the law of Holland as an independent system International law/law of nature/legal philosophy	Provided notes for Inleidinge that largely backed up Grotius's statements and Occasionally amended or Supplemented the text Tractatus -indispensable		

Reception of English law at the Cape

- 2 phases
 - Early Reception of English Institutions and Law
 - Reception of English Law at the Cape (1828-1910)

Early Reception of English Institutions and Law

- 1820 Settlers
- Proclamations by Lord Charles Somerset - indicates evidence Policy of Anglicisation and English legal rules influencing the system
- Appointment of commission - investigate affairs of Cape including the legal system
- Recommendations made for changes resulted in promulgation of the first Charter of Justice (1927) effective 1928

Reception of English Law at the Cape (1828-1910)

Reception of English law at the Cape cont

- Reception of English Law at the Cape (1828-1910)
- First Charter of Justice effective 1828 brought changes in:
 - Court Structure
 - Formal law (i.e. law of evidence and procedure)
- No official instruction however the above paved the way for the reception of English law into the existing law
- Changes in the new legal system included:
 1. Raad van Judisie replaced by Supreme Court of the Colony of the Cape of Good Hope
 2. Appeals process instituted to Privy Council (London) -Highest court of appeal for all legal matters
 3. Jury System implemented- unpopular in 1891 done away in 1969
 4. Judges appointed -recruited from advocates England, Scotland and Ireland
 5. Advocates appointed had to be advocates- have a doctors degree in law from Oxford Cambridge and Dublin - advocates from the old Raad van Judisie were also appointed
 6. Second Charter implemented 1834 - Amendments and Additions

Mechanics of Reception Process

- Both Charters of Justice stipulated old law(Roman-Dutch) to be applied by courts
- Viscount Godrich indicated English law to be assimilated gradually into law of the Colony
- Following factors led to the reception of English law
 - English Institutions
 - Judiciary
 - Legislation
- English Institutions
 - Education
 - Language
 - Commerce
- Role of the Judiciary
 - Inns of Court Tradition
 - Accessibility of English Sources
 - Precedent System - Doctrine of “stare decisis”
- Importation of English law through Legislation
 - 1828 long list of statutes in force based on similar legislation effective in England provides evidence that English law was imported through statutes
 - Judicial interpretation of these statutes would increase the emphasis on English law

Role of the Judiciary

- Newly appointed English judges instructed to draft proposals for the reform of the existing civil and criminal law in order to promote the gradual assimilation of English law into Roman-Dutch substantive law
- Early judges like Menzies and Burton resisted the influence of English law
- Eventually it was not law reform but other factors that led to the assimilation of English law into the existing legal system:
 - Inns of Court Tradition
 - Accessibility of English Sources
 - Precedent System - Doctrine of “stare decisis”

Factors that led to English law being assimilated into the Roman-Dutch law of the Cape

Role of the Judiciary

Newly appointed English judges were instructed to promote the gradual assimilation of English law into Roman-Dutch Substantive law. They were required to draft proposals for reform of both civil and criminal law.

Early judges like Menzies and Burton resisted the influence of English law

Finally it was not reform but other factors that led to the assimilation of English law in the system

- Inns of Court Tradition
- Accessibility of English sources
- Precedent System (Doctrine of stare decisis)
- Inns of Court Tradition
 - Inns of Court is an ASSOCIATION of ADVOCATES IN ENGLAND RESPONSIBLE FOR TRAINING ADVOCATES
 - They require advocates to pass examinations in English Common Law before they can practice law
 - There was NO UNIVERSITY IN THE CAPE WITH A CIVIL OR ROMANIST ORIENTATION
 - The Inns of Court Tradition influenced the application of English common law in the Cape especially since the Charters of Justice stipulated that advocates had to be educated in English law only
 - This meant that these advocates applied English law when they eventually practised.

Accessibility of English sources

- Judges and advocates received their training in English law and preferred to use English sources
- When legal problems had to be resolved it was found that the “old writers” had stated the principle of law too concisely so when elaboration was required they made use of English cases
- It was easier to read English rather than Latin or Dutch so the advocates looked at the more accessible English sources on the assumption that they were similar to the Roman- Dutch principles or on the assumption that the “old writers” did not refer to the issue
- Precedent System - Doctrine of Stare Decisis
- Doctrine literally means as “as the decision stands” in other words decisions have binding authority
- The Cape Supreme Court started following the doctrine of stare decisis- this was a movement away from the Roman-Dutch Courts attitude that previous decisions were merely persuasive
- In consideration for the respect for judicial precedent and the fact that the PRIVY COUNCIL in London was the highest legal authority it is to be expected that the English rules of law took root once they were imported.

Extent of Reception of English Law in the Cape

- In dealing with the factors that influenced the reception of English law it is necessary to question whether the reception of English law was a scientific (principles, concepts and doctrines forming the basis of that law) reception
- Or a practical reception in the Cape - or both
- Can we say that the extent of reception of English law in the Cape was similar to the extent of the reception of Roman law in the Netherlands?
- The Netherlands experienced both a scientific reception and a practical reception of Roman law however in the Cape only some areas of law received both a scientific and a practical reception of English law -for example the whole of
 - the English Companies Act,
 - the English law of negotiable instruments,
 - the English law dealing with Parliamentary Conventions

Legal Development outside of the Cape

- Policy of Anglicisation actively followed by British after arrival of 1820 Settlers
- Policy not well received by non-British population (mostly Dutch people “Boers”)
- Resisted so intensely that they decided to leave the Cape and go inland to escape British control
- This mass exodus is referred to as the “Great Trek”
- People who participated in the Great Trek are referred to as “Voortrekkers”
- They moved as far away as the regions known before 1994 as Natal, the Orange Free State and the Transvaal
- Legal development in each area is discussed as follows:

Legal Development outside of the Cape NATAL

- 1838 declared that Roman-Dutch law (Hollandsche Rechtspleging) would be the basis for administration of justice at Port Natal (today known as Durban)
- After British took control in 1845 it was stipulated that the legal system practised in the “District of Natal” would be the system practised in the Cape Colony- namely *Roman-Dutch law as modified by English procedural laws*
- From then on the legal system resembled that of the Cape Colony except that in Natal there was an even stronger tendency to follow English law

Legal Development outside of the Cape

THE VOORTREKKER REPUBLICS

After the Great Trek the boers settled in the areas known as the Transvaal and Orange Free State which they declared to be independent states

The two republics were referred to as the “Boer Republics” or “Voortrekker Republics”

Transvaal was known as the *Zuid-Afrikaanse Republiek (ZAR)*

Free State was known as the *Republic of the Orange Free State*

Both these republics were in a position to develop their own legal systems because at the time they were not under the control of the British Government however they were also influenced by English law

Legal Development outside of the Cape

THE VOORTREKKER REPUBLICS

The Zuid-Afrikaansche Republiek

- Basis of the law would be *Hollandsche Wet* in ZAR
- Indicated a move towards an independent legal system
- *Hollandsche Wet* comprised VAN DER LINDEN'S *KOOPMAN'S HANDBOEK*
- Where Van der Linden did not have any thing to say on particular matter LEEUWEN (*Het Roomsche-Hollandsche Wet/ Censura Forensis*) and the *INLEIDINGE* of GROTIUS were considered *binding sources subject to local legislation*

Legal Development outside of the Cape

THE VOORTREKKER REPUBLICS

The Orange Free State

- Constitution provided that ROMAN-DUTCH LAW would be the basic law of the state
- VOLKSRAAD (Executive Authority of the Government of the Orange Free State) defined the term “Roman-Dutch law” as the system of law in use at the Cape prior to 1828 (prior to the Charters of Justice and the appointment of English judges at the Cape)
- Eight old writers including
 - VOET
 - VAN LEEUWEN
 - GROTIUS
 - VAN DER LINDEN
 - VAN DER KESSEL
 - As well as the AUTHORITIES QUOTED BY THEM
- Were regarded as authoritative sources

Legal Development outside of the Cape

THE VOORTREKKER REPUBLICS

The influence of English law

- Anglo-Boer War 1899-1902
- 2 Republics surrendered - signed Treaty of Vereeniging at Melrose House in Pretoria
- Influence of English law was evident in both Boer Republics long before they were annexed by the British after the Anglo-Boer War for the following reasons:
- In the High Courts of both Republics, decisions of the *CAPE SUPREME COURT* were regarded as being more than highly persuasive
- The judges who sat in the courts of these republics did not hesitate to consult *ENGLISH AUTHORITIES* when necessary.

1902 - 1910 The Years of Crisis

- Fear that English common-law would completely replace Roman-Dutch law after the Annexation of the Boer Republics
- During this period some of the British were in favour of making radical changes if not abolishing Roman-Dutch law in each of, what was now, the four British Colonies in South Africa
- Despite this, there was no obvious attempt by the British Government to eliminate Roman-Dutch law
- They were content with
 - modifications to the structure of the courts
 - Importation of a great deal of Cape legislation into the former Republics
- So English law did not replace Roman- Dutch law it was gradually assimilated into Roman-Dutch law

Legal Development since the Unification of South Africa in 1910

- 1910 British government decided to unify the four colonies
- Union of South Africa (1910 -1961)
- Unification of the four former British colonies in 1910 was the start of a new era in the legal development of SA
- The Appellate Division of the Supreme Court (today the Supreme Court of Appeal situated in Bloemfontein) which was established in 1910 played an important part in this development
- After 1910 judges were less inclined to consult English sources for solutions to their problems than they were in the past
- They began to believe in the importance of *retaining pure Roman-Dutch law*
- The English influence did continue after 1910 through *legislation*

Legal Development since the Unification of South Africa in 1910

Legal Development since the Unification of South Africa in 1910

1. Legislation
2. The Teaching Institutions
3. The Appellate Division
4. The “Purists” “Pollutionists” and “Pragmatists” Debate
5. The South African Law Reform Commission

Legal Development since the Unification of South Africa in 1910

1. Legislation

- After 1910 Parliament promulgated large amounts of legislation for a wide variety of subjects
- It seems our legislation has been badly advised in its approach
- Most of it was not conducive to the healthy development of the law
- The direct incorporation of entire sections of English law into South African law without adapting it to local conditions and circumstances is possibly its biggest mistake.
- This English law was later adapted and amended by the courts and by subsequent legislation
- The direct incorporation of English laws may also indirectly effect our law because often the courts look at English legislation for interpretation especially where it is involves English case law. The courts could follow the English decision and give authority to English case law in our courts.

Legal Development since the Unification of South Africa in 1910

2. The Teaching Institutions

- Jurists should practice law scientifically in order for the healthy development of a legal system
- Law should be studied from a theoretical perspective and discussed critically
- Universities play an important role in this
- In 1916 after the establishment of the fully independent universities of Cape Town and Stellenbosch, the scientific study of Roman-Dutch law could be seen.
- Extensive literature on South African law with its scientific Roman-Dutch law approach supports this
- as does the extensive influence of our legal academics on the court.

Legal Development since the Unification of South Africa in 1910

3. The Appellate Division

- Prior to unification in 1910 the legal systems in different parts of SA developed independently
- Although they had Roman-Dutch law as the foundation of their legal system individual differences in development occurred through local custom, traditions and opinion
- Unification of the colonies also marked a new era of assimilation and unification of the law
- The establishment of one Supreme Court with provincial and local divisions and more importantly the establishment of the Appellate division for the whole of South Africa, South West Africa (Namibia) Southern Rhodesia (Zimbabwe) played an important role in the process of assimilation and unification of the law

Legal Development since the Unification of South Africa in 1910

3. The Appellate Division

- After 1910 the Appellate Division was the most important factor in legal development in SA
- Contributed to the development of SA law through
 - unification of the law of South Africa
 - Creation of an independent legal system
- Important task of the judges was and still is to continue independent development of law
- Has achieved notable success because
 - it did not adhere to strict and outdated principles that were no longer useful
 - Also did not deviate from the recognised and established principles of Roman-Dutch law
 - Was not willing to be led by English law
- Roman-Dutch law was revived after the founding of the Union and the subsequent establishment of the Appellate Division

Legal Development since the Unification of South Africa in 1910

4. The “Purists” “Pollutionists” and “Pragmatists” Debate

- 1936 Watermeyer JA -judge of the Appellate Division at the time warned of relying too much on medieval commentators or civilians (Romanists)
- He drew attention to the possibility of upsetting an apparently sound line of modern cases by
- Disregarding the changes taking place in the developing Roman-Dutch law common-law through influences such as custom
- 25 years later a debate arose between the so called Purists, Pollutionists and Pragmatists whose approaches can be summarised as follows:
- The Purists demanded that Roman - Dutch law be applied in its pure form free from contamination of English law
- The Pollutionists held that for practical reasons English law solutions should be applied only where the old Dutch writers were silent
- The Pragmatists steered a middle course between the two opposing viewpoints
- What was the Appellate Division’s viewpoint on the above?
- From its decisions, it seems to identify more closely to the Pragmatist’s point of view -It has often rejected English legal rules which are supported by the doctrine of stare decisis where such legal rules have not been accepted into our legal system but not without proper consideration of the implications
- On the other hand the Appellate division has not abolished any Roman-Dutch laws which it may have found to be outdated instead it has tried to develop the law within the Roman-Dutch Framework

Legal Development since the Unification of South Africa in 1910

5. The South African Law Reform Commission

- Established in 1973
- Tasked to investigate matters referred by Parliament
- In each investigation, it considers
 - The current legal position
 - Historical development of the matter under consideration
 - Undertakes extensive research
 - Proposes changes to the law to bring it in line with the needs of society
 - Proposed changes usually take the form of a draft bill
 - Draft bill is studied by Parliament
 - If approved becomes law
- In looking at the draft bill it appears that the Commission makes use of comparative-law methods and makes use of comparative legal material
- It takes into account the civil-law heritage that we share with other European legal systems
- The South African Law Reform Commission has achieved a lot in the harmonisation of our (Western) common law and indigenous law in South Africa