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LESOTHO LAW JOURNAL

Volume 1 1985 No 1

EDITORIAL

The first issue of the only academic journal in the National University of Lesotho is born It is also special in another way it is devoted to the publication of the papers presented at the centenary of Roman-Dutch Law, held in Maseru, May 24-29, 1984 For this reason, the delight for its birth transcends this inaugural note from the Chief-Editor

The launching of the Lesotho Law Journal is the culmination of a series of relentless efforts by the Faculty of Law of the National University of Lesotho The need for a media of scholarly publication has, since the inception of the Faculty, been one of our concerns Within the independent States of the Southern African sub-region, there is no single university-based journal This gap has imposed crippling limitations on intellectual debates, by curtailing publication and dissemination of research and contribution to the academic development and understanding of legal issues within their wider socio-economic milieu

The Journal is thus intended to provide a forum for academic scholars as well as legal practitioners to discuss legal and related issues of relevance to Lesotho, the Southern Africa sub-region, and to Third World countries generally Within this framework, we welcome articles which have a legal dimension or written with interdisciplinarity but relating legal issues to their broader socio-economic context, as well as those which provide a background for their discussion

Articles may be written on areas where little has been written or where clarity of the law is needed, or where the pulse of economic and social change by way of law reform and legislation is wanting, or where broad legal education is necessary To this end, certain issues of this Journal may be thematic, devoted exclusively to the publication of articles on a common theme

Hence the first issue is devoted to the reception and development of Roman-Dutch law in Lesotho particularly, and in similar jurisdictions in general The papers presented, and the ensuing discussions at the Centenary of Roman-Dutch Law conference, unveiled a number of legal issues common to the entire sub-region and called for law reform and its dynamic development by legislation in many fields

Due to the political climate that exists in this sub-region, arising out of the on-going liberation process, the existence of the racist policy of apartheid in South Africa and the poverty generally obtaining in these countries, law and lawyers have a more dynamic role to play in the liberation and transformation of these societies In order to redress the legal issues raised and their interlocking complexities (in their internal and external dimensions), a wider confluence of various intellectual tributaries is indispensable It is hoped that the launching of this Journal will provide an invaluable platform in fulfilling these goals

DR N S REMBE
Editor in Chief

TABLE OF CONTENTS

OPENING ADDRESS

HIS MAJESTY, KING MOSHOESHOE II

Excellencies,
Distinguished Conference Participants,
Ladies and Gentlemen

1 When I was invited to open this Conference, I trembled, I pleaded that I was not competent, but Mr Justice Mofokeng assured me that no expertise was expected from me - both by the local fraternity, and by the invited guests My task - he explained, with humble duty! - was simply to welcome the guests in my official capacity, secondly, in my private capacity, to open the Conference in a manner, and with words, of my own choice, and then to disappear - hopefully without too much loss of dignity! I felt greatly re-assured and relieved

2 Excellencies, Conference Participants, Ladies and Gentlemen, allow me, therefore, to perform that task - which I do with pleasure - of welcoming all of you to this Conference, and, especially to welcome to Lesotho all our friends from outside our borders

We hope that you will enjoy the deliberations of the Conference, and that you will stimulate further developments in the common law that has sustained our society for the past hundred years

3 You have gathered here, invited to commemorate the centenary of the Adoption of Roman-Dutch Law as the common law of Lesotho" Poulter and Palmer, in their book on The Legal System of Lesotho (1972), in the Legal Systems of Africa series, use the words, "reception" and "retention", and they explain that the expression "Roman-Dutch Law" tells only half, or a third, of the full story, because the legal system, as a whole, has developed from three important elements - Roman Law, Dutch Law, and English Law - which now compose the body of South African common law Some of you may choose, in your deliberations, to go back to the Cape Act 12 of 1871, while others may be happy with the 1884 Proclamation as their starting point

That historical, and technical, debate I shall not - as a mere student - venture into, much of it will be discussed, with great authority and expertise, by those among you who have been selected to lead discussions Secondly, I shall not attempt to enumerate, or elaborate on the achievements of the last hundred years in the evolution of our common law, that, also, has been assigned to higher authorities

A general observation I would wish to make is that Basotho society, and the Basotho nation, pre-dates the Cape Act of 1871 Long before that Act, Basotho had evolved their own philosophy of life, their own code of conduct, their own procedures for settlement of disputes To them their custom was "Law", it had emanated from within, they understood it, they participated in it to the full, and they respected it And, above all, history tells us that they were very anxious to preserve it, so much so that their great leader - the Founder of this nation - felt compelled to request the Governor to transmit a clear message to the Queen of England that what he - Moshoeshoe - desired was to continue to rule his people by their own customs and laws Thus, the seed of "dualism" and "conflict" was sown, because, on the one side, the Basotho were anxious to retain what was their own - their own ethics - while the new rulers wanted to introduce something new and foreign

That state of dualism and conflict, in all areas of law, has been nursed throughout the years Recently, almost in desperation, Professor Palmer wrote, in his book The Roman-Dutch and Sesotho Law of Delict (1970) that he hoped his work would reduce the difficulties which he, and his students, had encountered in understanding the law of delict in Lesotho' He summarises those difficulties in this sentence "The difficulties occured in discovering what law of Lesotho on a given point was, not to mention what it should have been" And his colleague, Professor Poulter also wrote, in Legal Dualism in Lesotho (1979) that "there cannot be the slightest doubt that there is a pressing need for legislative action in relation to the choice of law question in Lesotho"

In some areas, legislative action has been taken, for example the Chieftainship Act, Act 22 of 1968 The interpretation of that Act in particular, Section 10, which provides, inter alia, that "in this section reference to a son of a person is a reference to a legitimate son of that person" - has led the High Court to say in Sekese Malebanye v Mammual'e Chabaseoele 1980 LLR 437 - following an earlier decision by Jacobs CJ in Khosi Molapo v Lepoqo Molapo 1971-73 LLR 289 - that "it seems to me that (with perhaps some exceptions) the correct Sesotho customary law position (at least for purposes of the Chieftainship Act) is that "a child born of a married woman, but fathered by a person other than the husband of its mother, is illegitimate, and therefore unlikely to succeed in the estate or chieftainship of the deceased husband of its mother"

Well, that is case law as it now stands, I believe But what are the social consequences of such a decision What rights - if any - does a child have, in a typical Basotho society, after it has been declared illegitimate? There is also the much wider socio-legal problem of single-parent families or unmarried mothers The courts may have ruled that the mother

of a child born out of wedlock is its natural guardian, and has the right to its custody, and that such a child is entitled to support or maintenance from both its parents But is custody and support all that such a child needs? Did custom accord, or, alternatively, has our social legislation developed sufficiently to accord full human dignity, social security, and basic rights to offsprings of such families? This problem is highlighted, I think, in the adoption case of Nchee v Medical Superintendent, Morija CIV/APN/205/1982 (unreported) where Rooney J, - having found that, in older times, in a Basotho society, an abandoned child might become the ward of a Chief and be brought up in the Chief's household eventually to become a kind of retainer with little status and few rights - said "there is, at present, a gap in the law, which I commend to the attention of the legislature in face of the possibility that more and more children may be affected by the absence of positive rules providing for their welfare"

However, it would seem that there is no unanimity in the judiciary over the question of the correct interpretation of the relevant sections of the Adoption of Children Proclamation 1952 when one takes into account a later decision of the Chief Justice in In re Tlalane Rasoeu, 21 May 1984 And what about the Marriage Act of 1974? In the case of Masupha v Masupha CIV/A/14/1977 (unreported), the court sidestepped, I think, a very strong undercurrent of the notion of "irretrievable breakdown", hoping that perhaps the legislature would take it up!

There is reason to believe that "custom" does not entertain such concepts, but is it so alien to our common law, in modern times, that it cannot even be studied? As far as the conflict between "customary" and "civil rites" marriages is concerned, perhaps the Court of Appeal has buried, for ever, the interesting notion of the "statutory bachelor", and had indicated finally what the "law" is in the case of Makata v Makata CIV/A/8/1982 (CA) Perhaps one day, a Law Reform Commission will be set up in Lesotho

What I would wish to do - if you will bear with me - is to invite you to focus your attention on those achievements, foremost, by seeking and attempting an analytical appraisal of their real contribution, and their relevance, in the present and future of the society they have so ably helped, and sustained, in the past For, it is always the achievements of the past which create the challenge to the present and the future What, therefore, is the image of law in the eyes of the ordinary person?

4 Whatever those achievements may be, they were brought about by members of the legal profession, and, of course, by policy makers as well But, for the purpose of this Conference, I invite your attention to the role of legal professionals in society

There is, then a double challenge - both to law itself, and also to the legal profession Mr Justice Holmes once wrote, in The Common Law (1881) that "The life of the law has not been logic it has been experience The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed"

At the turn of the century, Innes CJ, in depicting the role of judges in remoulding the law, had this to say, in the case of Blower v Van Noorden 1909 TS 890

> There come times in the growth of every living system of law when old practices and ancient formulae must be modified to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions And it is for the courts to decide

when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important, or so radical, that they should be left to the legislature

Some forty years later, in the East African case of Nyali Ltd v Attorney-General (1955) 1 All ER 653, Lord Justice Denning, in the English Court of Appeal, said

> it is a recognition that the Common Law cannot be applied in a foreign land without considerable qualifications It has many principles of magnificent justice and good sense, which can be applied with advantage to peoples of every race and colour all over the world But it has also many refinements, subtleties, and technicalities which are not suited to other folk In these far off lands, people must have law which they understand, and which they will respect The Common Law cannot fulfill this role except with considerable qualifications The task of making these qualifications is entrusted to the judges of these lands It is a great task I trust that they will not fail therein

That, then, is the magnitude of the challenge the profession is being called upon to re-examine its role

5 Many of our people - here in Lesotho, and in other developing countries - are preoccupied, solely, with survival and elementary needs Work is often unavailable, opportunities are selective and unequal, and wages are, in the majority of cases, below the poverty level, very many of our homes have neither piped water nor adequate sanitation, electricity is a luxury of the few, children are often needed for work, and cannot easily be spared for schooling, permanent insecurity is often the lot of vast numbers of our citizens a drought, such as we have recently seen, can destroy livelihoods with no hope of compensation

In the industrialised countries, ordinary men and women currently face their own economic problems, but they rarely experience anything comparable with deprivation, with legalised oppression and exclusion from participation in decision-making processes, and with the poverty of some of the Third World countries It is about those very disparities that we speak when we use the much misunderstood and misused words - development, equality, and freedom

6 Everyone here today will, I hope, agree that it would be inappropriate for our discussions to take place without our being keenly aware of the necessity to relate all social, economic, legal, political and moral concerns to the central problems of the society and to the people they serve at any one time For us, in Lesotho, the central problems of today are the injustice of poverty in all its forms, the quest for participatory machinery at all levels of decision-making processes, the search for the kind of formulae that will ensure equitable distribution of wealth, of services and development benefits, and the effects that those problems have on the well-being and the rights of the nation, and on each of its citizens individually Those problems are the challenge which our society faces in its quest for peace, tability, reconciliation of interests, and/or justice It must, inevitably, lead us to see the necessity of thinking of law as an attempt to answer fundamental human needs - because it is fundamental human needs satisfaction that creates the legality of any system, either of government, or of law I am aware that, as soon as we get into the realms of social and economic justice, and the rights of nations and individuals in society, we are in the realm of conflict of opinion about the role of law in a society

One of the problems which has always faced lawyers and philosophers, and indeed everyone concerned with law and justice, is this very question as to whether law belongs, essentially and only, to the world of existing facts, or to the world of normative precepts and ideals - the age-old conflict of the relationship of "is" and "ought" This question is often dealt with, in law, by reference to the distinction between positive and natural law, expressed often as the intractable tension between power and justice

7 Let us pause here, to take a brief look at the origins of the world's legal systems Every society in history, whether at present highly industrialised and modernised, or not, has seen the beginnings of their present legal system in some organisation for social control, which came from their very beginnings, their very first roots of custom and culture, as both grew and developed into a system of norms These did not come from without, but from within the group itself, and therefore had the complete understanding, support, consent, and observance of each member

There was, in the beginning, little need for judicial sanctions, the system relying on the very meaningful group approval or disapproval, with consequences for both The strength of these approvals/disapprovals was sufficient to ensure order because the individual felt bound to his society through customs, which also provided the reasons for observance, and for the very real sense of binding obligation - namely the rights of one party and the corresponding duties of the other party, and the inter-dependence of both As societies became more complex, customary law grew, and judicial sanctions became necessary These sanctions reflected local feeling and custom, and were rooted in the everyday affairs of the ordinary people

As industrialisation, commercialisation, and international contacts grew, and as population increased, there was need for a more centralised government to take more centralised powers Modern law, then, grew out of the configuration of obligations which made it impossible for any one member of the group to shirk his responsibility, without suffering for it, in some way, in the future This customary law, as we know it, was more closely akin to the concept of natural law, related, as it was, to religious principles, to local customs, and to the duty to one another in day-to-day life

8 In Roman Law, natural law played a very important part and it was within the framework of natural law that the ideas of the social contract and the notion of inherent human rights arose - the conception of society founded on a covenant, a pact between its citizens who joined together to limit conflict These two concepts - of inherent human rights, and the social contract - played a major part in European political and legal development, and were the foundations of later thoughts and theories about representative government, democracy, and the sovereignty of the people These theories were to find public sanction, and approval, in, for example, the American Declaration of Independence of 1776, the French Declaration of Human Rights of 1789, and in the Declaration of the Rights of Man of 1791 In these important declarations, we find the ideological bases for the defence of the individual and the Rule of Law - between majorities and minorities, between the stronger and the weaker

However, in the nineteenth and twentieth centuries, there was a rapid increase in industrialisation and modernisation, which increased further the need of the State to extend governmental control Coercion and sanctions became increasingly resorted to as economic, political, industrial, and social developments became increasingly complex The more modern the State became, the more government was expected

to assume greater powers to regulate, and indeed improve, economic affairs and social conditions, to solve international conflicts, and to erase injustice The object of the ensuing constitutions, and legal orders, was equality before the law, justice, and rule by consensus

But, it did not always work that way The increase in the powers of coercion was often subject to misuse, and tension between justice and power became the dilemma inherent in the coercive element of law Very often the techniques of law in the broadest sense, became separated from the everyday concerns of the ordinary citizen Now, we live in a sadly troubled world, where inequality, violence, oppression, instability, and injustice abound, we, in the Third World, experience and suffer from the results of those problems - among people of the same nation, and between nations, and we suffer from the exploitation of the weak by the strong Those who have "owned", and "governed" the world, kept in force legal orders to facilitate their rule and privileges Tension between power and justice became more and more intractable, coercion became the hall-mark of legal enforcement, somewhere along the line, there was a failure of the legal order to reflect the consensus and common aspirations from which it first arose

This has great significance for all of us, because, without involving the legal order, no government, whatever its intent or ideology, can mould society to its policy prescriptions, without it, ruling classes, or elites, cannot sustain their domination, without it, democratic liberties are at risk, any community must rely on the legal order to solve its problems Consequently, systems of law have become, inevitably, increasingly caught up with the professional guardianship, with regard to the formulation of the systems themselves, and with regard to the techniques of implementation and enforcement The more complex the demand became for more and more legislation and control, the greater the gap became between everyday concerns of men and women on one side, and the systems on the other

Some societies continued, however, to remain conscious of the need to appeal to the moral consciousness of the public in order to ensure the effectiveness of law and penalties, others, sadly, did not Law itself was required to become more and more institutionalised because of the enormity of its expansion, it became concerned mainly with the minimum standards of conduct in the life of the individual, and in the task of the regulation of commercial, social, and political institutions, it acquiesced, sometimes, to a social and political order that would contradict the principles of justice, it came to deal almost solely with facts, becoming a regulatory or bureaucratic system of law

9 Then came the 1939-45 war, whose horrors and barbarities shocked even its own perpetrators With this shock, came a revival of interest in, and a concern with the natural law And this interest was to be only one of the many symptoms of a new and intensified quest for law - law not just concerned with a minimum standard of conduct for individuals and for institutions of society, but law concerned with ideology Jurists like Gustav Radbruch in the years after the Nazi regime, published papers concerning the consequences of the positivist approach, in the hands of an evil government, when such a government issues evil laws In these papers, jurists rejected the theory that "law is law", there was unease, among them, about positivist doctrines, in their quest for a point of observation and action beyond existing positivist law, and they were unwilling to characterise this as something unworthy of the designation "law" - thoughts perhaps exemplified by Rawls when he said "Justice is the first virtue of social institutions, as truth is of systems of thought"

It was also after the 1939-45 war that the International Commission of Jurists (ICJ) was established, with the objective of promoting, throughout the world, the correct understanding and the acceptable interpretation of the concept of the Rule of Law, and also promoting the protection of human rights, and their incorporation into municipal laws so as to enable enforcement at both national and international levels But, also, between the promotion of human rights and their actual enjoyment, there is still an abysmal gap Indeed, much of the violence of our age derives from the violence inherent in the many denials of human rights we see abounding in the world today, and from the inadequacies of the existing legal order to secure these rights

10 Another reason for this new quest for law is the vast increase in the level of organisation of the world Various countries, regions, and continents are getting together to form close associations of economic, political, military and cultural relationships, new States have arisen out of the era of colonialism Such organisations imply new rules, and the need for more efficient machinery to resolve conflicts In consequence more legislation, with and among nation-States, has grown To the extent that this legislation becomes, as in some countries, increasingly concerned with social welfare, social development, human rights, and numerous other aspects of justice, the guardians of legal techniques and the Rule of Law are faced with new and baffling problems Law is no longer simply the institutionalised expression of minimum standards of conduct, legislative acts ought to outline - implicitly and actually - the course of future development towards ideals as yet beyond reach, direct coercion is no longer the hallmark of legal enforcement

Laws that may aim at social, political, economic and racial equality, at safety at work and other numerous aspects of security of employment, equal opportunities, and social security in general, are but examples at national levels, whilst at the international level the human rights debate - so vital for the well-being of the Third World nations - paves the way to a kind of legal thinking that bears kinship to the natural law approach And so we see that throughout legal history as well as in present legal theory, there runs a profound dualism between positive and natural law

11 To ordinary people, this dualism is, perhaps, a symptom of the two roles of law - that of coercive force, and that of a refuge from injustice, misery, oppression, discrimination and poverty, a morality of duty juxtaposed with a morality of aspiration, or even perhaps a fusion of both It is perhaps also between law as a technique, guarded by a professional body, and law as an expression of human needs, human hope, and human interest - the latter increasingly finding expression in treaties, international bodies, constitutions, and other sources of law

Nowhere is this more clearly illustrated than in the arena of human rights Human rights see the Rule of Law as being concerned with everything associated with social justice This is clearly shown by the ICJ which is dedicated to the support and advancement, throughout the world, of those principles of justice which constitute the basis of the Rule of Law, which, as defined and interpreted by its various congresses, seeks to emphasise that mere legality is not enough, and that the broader conceptions of justice, as distinct from positive legal rules, are embraced by the term, and, indeed, provide its more vital aspect Again this is shown in the 1959 Declaration of Delhi of the ICJ, which says that "the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be

employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised "

12 All law needs public consent Indeed, the rules of law need always to respond to the demands made by any part of the population, if the people share a set of basic assumptions, the State should aim to represent that consensus The legal order must assure only that individuals do not substitute their own deviant motivations and behaviour, for those the polity prescribes

Few rights demonstrate better the interdependence of economic , political and legal opportunities than the right to participate, which is an essential element of the "basic needs approach" Traditional development strategies, passed on to us, either ignored this need of participation, or undervalued it - reflecting, perhaps, the belief of many development planners that their client populations were neither able to diagnose their own problems, nor to formulate their own corresponding needs! The link between rights and participation has long been recognised, and in the Brandt Report (1980) it is stated "In achieving the main objectives of development, no system, lacking in genuine and full participation, will be satisfactory or truly effective " Earlier than Brandt, a Dag Hammarskjold Foundation publication, Development Dialogue, had this to say

> The organisation of those who are the principal victims of the current state of affairs is the key to any improvement Whether governments are enlightened or not, there is no substitute for the people's own truly democratic organisation if there is to be a need-oriented, endogenous, self-reliant, ecologically-minded development - if there is to be another development

Thus, the International Development Strategy, adopted by the UN General Assembly in 1980, states

> The ultimate aim of development is the constant improvement of the well-being of the entire population, on the basis of its full participation in the process of development, and a fair distribution of the benefits therefrom

13 This emphasis, on such a broad conception of social justice, must, of course, be seen, and understood, in the context of those congresses of the ICJ where Third World countries were well represented, and indeed perhaps we now come to the root of our problem, where we have to ask ourselves What is the relevance of the mere formal application of law in a society beset by all the problems of oppression, political instability, economic survival, and a variety of other forms of social deprivations? Of course, we have to safeguard the bases of law and order, and it is in this context that we must examine the achievements of the past hundred years in our system of law

The whole question of the role of law and the role of lawyers, in a problem-stricken society, must also centre itself, not only in modernisation - as far as it is required in a society which is as yet underdeveloped - not only in minimum standards of conduct for all, not only in professional guardianship, and the interests of the elites and allied groups in society, but also dynamically with the questions of social justice that are concerned with the eradication of all those problems, with the aspirations of the people in every village as well as in every town, and with the creation of a base system where all people have an equal claim to an equitable share in all those advantages which are commonly desired, and which conduce to human well-being

And thus we may focus our attention on the burning problems of our society in Lesotho, a society struggling for its development - economic, political, and social, a society, among others, which now realises that it may not catch up that quickly with the industrialised nations in the near future, and perhaps not at all until we have tackled the question of the rights of individuals, in the first instance, and the rights of nations as a logical follow-up

It is obvious, I hope, that the forms of modernisation, and of social organisation, which developing societies should adopt cannot be carbon-copies of the model and values of the industrialised societies, which are, in any case, currently re-examining those very models and values because they are now found inadequate to cope with the present problems of development The spread of such models to Third World countries can only increase the gaps within these countries - the gaps between the few which the models can incorporate, and the majorities marginalised by their poverty and several other disadvantages We need much more than just material and economic development in terms of gross national product, Robert Kapp has rightly said that incompatibility between development and respect for human rights is conceivable only when development is defined solely in terms of economic growth Development is a moral and spiritual fact as much as a material one - concerned as much with peace, love and passion as with food, housing and shelter In simple terms, peace, equality, freedom and democracy are as important, not less, as low-cost housing schemes or self-reliance programmes In the words of the Brandt Report

> statistical measurements of growth exclude the crucial elements of social welfare, of individual rights, of values not measurable by money Development is more than the passage from poor to rich, from a traditional rural economy to a sophisticated urban one It carries with it, not only the ideas of economic betterment, but also that of greater human dignity, security, justice and equity

It is imperative, therefore, that law should be seen to promote and even to enforce that basic human right to development, which right, as is well known, is already written into the UN Charter There can be no development of this kind without the Rule of Law, within and between nations, its absence promotes contempt for human rights - that essential element of our humanity, which ought to be the concern of us all

Fortunately, the human being, however oppressed, has deep-rooted capacity, so that there will always be some one who insists on the right to be human, whatever the cost We, in Southern Africa, have seen all too frequently, those people referred to as "terrorists" or "dissidents" - aggressor and victim becoming confused, moreover, we are still unable to move many in the world, as to the plight of the deprived and disadvantaged majorities, as to the horrors of hunger whilst the world has adequate food for all, and as to the evils of racial, political, economic and social discrimination Nonetheless, in some noticeable respects, the people's struggle to survive in and to change the real world for the better has succeeded to prick, and even changed, academic legal consciousness, and, it is imperative that we here, today, must not lag behind

People have always devised legal orders out of the materials at hand, to suit the needs of the moment chosing within the constraints and resources of their society We, here in Lesotho, must take a critical look at the problems of our society, at the real constraints of the level of our present development, and resist any temptation to copy models we shall have little chance of emulating Our legal systems must stay within the necessity of eradicating all the problems referred to earlier, and remain in touch with the everyday concerns of survival - which is the world in which most of our citizens live - until a better system of social justice, and of our own sense of our own needs for development, based on everyone's human needs, can be worked out and put to the test

Very often it is that very majority who feel that "official law" is inaccessible to them, and therefore they see it as existing for the benefit of the few, consequently they feel it is alienated from their needs It is indeed often alleged, and not always without reason, that there is an elitist approach to the problem of human rights, and that it is the affluent sections of society which are the major beneficiaries of the "cliches" of human rights! But we have to ask the question What do human rights mean to the oppressed and disadvantaged men, women and children, of the Third World - the very poor? Does it seem to them merely a platitudinous utopia?

14 The next fundamental question, then, is What is the role of lawyers in a problem-stricken society, struggling for the right to development? I cannot do better than to quote a statement from the ICJ - relating to the role of lawyers in a changing world - contained in The Rule of Law and Human Rights Principles and Definitions (1966) at 34-36 That statement says

> (1) In changing an interdependent world, lawyers should give guidance and leadership to the creation of new legal concepts, institutions and techniques to enable man to meet the challenge and the dangers of the times and to realize the aspirations of all people They should not content themselves with the conduct of their practice and the administration of justice They cannot remain strangers to important developments in economic and social affairs if they are to fulfil properly their vocation as lawyers They should take an active part in the process of just and equitable changes They will do this by inspiring and promoting economic development and social justice Their skill and knowledge of law are not to be employed solely for the benefit of clients, but should be regarded as held in trust for society

(2) It is the duty of lawyers, in every country, to help ensure the existence of a responsible legislature, and an independent judiciary and to be always vigilant in the protection of civil liberties and human rights for all people

(3) Lawyers should refuse to collaborate with any authority in any action which violates the Rule of Law

(4) Lawyers should be anxiously concerned with the prevalence of deprivations and inequality in human society and should take part in promoting measures which will help eradicate those evils, for while they exist, civil and political rights cannot of themselves ensure the full dignity of man

(5) Lawyers have a duty to be active in law reform and especially where public understanding is slight

(6) Lawyers should endeavour to promote knowledge of, and to inspire respect for, the Rule of Law and an appreciation by all people of their rights under the law

(12) In an interdependent world, the lawyers' responsibilities extend beyord national boundaries and require their deep concern for peace and support for the principles as enshrined in the United Nations Declaration

Well, is this a tall order?

15 The advent of independence has certainly given rise to new goals and aspirations which did not exist during the colonial era The emergence of the public sector - signifying public intervention into the development process - has had significant consequences for the legal system, and the legal profession in particular The State, besides being the trustee and custodian of major natural resources, now has also to be the major entrepreneur as the exploitation and use of national resources are subjected to the "national plan" This has created an urgent need for much more thinking about the underlying theory of the "public" law concerned with public resource development and distribution, and about the new roles of lawyers in administering it, and their training in it

The psychology of "private" law and that of "public" law certainly differ to a considerable extent Yet, it is from the ethos of "private" enterprise that the legal profession derives its ethical principles and aspirational model, the "public" enterprise is a new institution with its own demands on and from the legal system For a system based on the Roman-Dutch common law principles, the choice to operate within the public sector under the common law principles raises considerable difficulties, for one thing, the major institution, for commercial and industrial activities is the company which has been developed on the premise that the essential responsibility of management is to maximise profit In the absence of a corpus of law which can legitimately trace its foundations from public enterprise, as opposed to common law, it is the latter which will continue to govern public enterprise, the role of the lawyers, and the provision of legal services, thereby accentuating the tension between administrative controls and legal controls It is in this area where the legal profession can provide useful insights by providing new legal formulae for public management

16 It must also be emphasised that the legal profession cannot be discussed outside the whole problem of State and Law At any point in time, law is an expression of claims and demands of the major influential groups in society To understand the legal profession, one must look at the material base which shapes the nature and the content of the law In a way, therefore, the study of the legal profession is a study of development, or under-development, and class conflict The profession, as a central institution in the legal system, has played a role both in spreading alien values, and sometimes in attempting to tie the basically subsistence economy of a country, like Lesotho, to international capital, even today, judges and other legal officers are constantly involved in the process of legitimizing the system through their decisions and legal advices The argument, here, is that there is a link between the development of the economy and the process of professionalization, which, in turn, brings in its train, unless checked, a process of class formation Therefore, it is important to ask Who uses the legal system, and what classes, if any, do it and the legal profession serve? How does the system of training and recruitment ensure the perpetuation and self-reproduction of existing class alliances?

The present role of the lawyer, therefore, should be to help evolve new institutions of governance, new roles to keep the society moving along politically and socially pre-determined paths, for instance, the strengthening of rural development networks, necessitates the formulation of myriad regulations and rules to make new institutions work In addition to their formulation, the role of the lawyer is to see that the regulations and rules are correctly applied to lead the country towards its predetermined goals The importance of their role, as law reformers and agents of social change, need not, therefore, be overstressed It is in this context that legal education can make spectacular contribution, legal education should be geared towards production of lawyers knowledgeable, not only in the technicalities of the profession, but also in the mechanics of policy and development planning

To be effective as a tool of social change legal education must synthesize the tendencies towards State planning, intervention and participation in social systems with a predominantly pluralistic legal system, in this context, it may be helpful also to begin considering the relationship between legal education and the system for the provision of legal services

This means that the legal profession must help evolve policies which are geared towards maximization of legal services Consequently, a new and wider basis must be found for making legal services available to a greater part of the population This basis must enable lawyers to put their skills at the disposal of disadvantaged groups and communities in order to assist them in learning to achieve their rights under the law This must, however, be done in conjunction with an emphasis of communication of the law and its meaning, to the greater mass of the population Ultimately, the effectiveness of the legal system lies in having a public which is reasonably aware of its rights

In these respects, lawyers may need to work with group clients in helping them define their problems, and define the choice of appropriate remedies available, they may have to offer their services for the establishment of "clinics" - seeking out the grievances of disadvantaged groups, and setting up law centres, perhaps, initially, funded by voluntary agencies, under the aegis of some organisation, which may be called a "national law centre for the disadvantaged", which could co-ordinate the work of such "clinics", and draw attention to the problem of specific groups

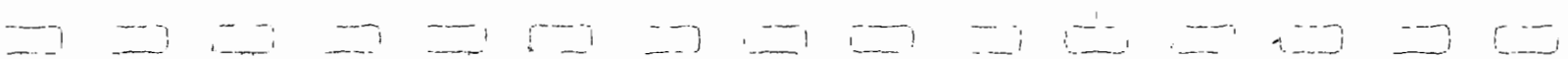
17 All this, indeed, presents a great challenge to the very real achievements of the past - a challenge, to help eradicate the injustices of all forms of inequalities and deprivation, to seek a new equity, to reduce the wrongs that man now perceives in his global order Nationalism and sovereignty may have to be tamed by internationalism and interdependence

You, as lawyers, may need to use the inheritance of the past in law, to fashion a new legal order for the next century, based on the human right to development, and, to be able to do that, you must diagnose realistically, the problems, and respond to them with your acquired wisdom, in a new quest for development and the Rule of Law

In Lesotho, we have the solid base of the past, on which to build a just and equitable society, in which peace, reconciliation, and social justice will exist alongside the satisfaction of the material needs of each of our citizens There is much to do before-we can attain that goal I appeal to you to remember those principles of need and justice in our society in your forthcoming deliberations, so that your deliberations may seek out and face up to the challenge of the plight of those who are unjustly imprisoned in deprivation and disadvantage, that all societies may seek their own ethic embodied in the values, and consensus, of their people And that is the challenge which all of us, here, today, are called upon, not only to be aware of, but to act upon, whilst seeking a solution We must not ever fail to relate our efforts to the realities and the needs of Lesotho of today

18 It is my greatest pleasure, now, to declare the Conference open

Thank you



HOW ROMAN-DUTCH LAW BECAME THE COMMON LAW OF LESOTHO

S B Burman

INTRODUCTION

On 29 May 1884 a British High Commissioner proclaimed Roman-Dutch Law as the Common Law for the British Colony of Lesotho [1] It may well be asked why Lesotho was not inhabited by many people whose customary law was based in a Roman-Dutch law tradition, as had been the case with the British Colony of the Cape in 1806 On the contrary, the customary law of virtually all the people in Lesotho had basic principles which conflicted in many respects with Roman-Dutch law Moreover, in 1884 the country had just come under direct British rule as a result of a successful revolt against the Cape Colony - a revolt which had been partly inspired by a deep mistrust of attempts to undermine Sesotho customary law Nor did Britain have any intention of putting enough magistrates and troops into Lesotho to make even a token attempt to enforce those Roman-Dutch law principles which conflicted with customary law In the light of these facts, the proclamation of Roman-Dutch law as the common law of Lesotho requires an explanation And for that explanation, it is necessary to begin at least some sixteen years earlier

THE INTRODUCTION OF ROMAN-DUTCH LAW PRINCIPLES

In 1868 the danger of disintegration was very real for the Basotho nation, which had been formed when a chief, Moshoeshoe, united the small-scale chiefdoms of the southern African High Veld earlier in the century Subsequent encroachment by white settlers on Moshoeshoe's land resulted in increasingly disastrous wars with the neighbouring Boer republic and led him in 1868, when an old man, to persuade Britain to take his

country under its protection Britain agreed reluctantly, determined from the first that the territory should be annexed to some other British colony in the region Meanwhile, until such arrangements could be made, as little money as possible was to be spent in administering the new possession The British solution was to leave the Basotho to rule themselves so far as the mid-Victorian Christian conscience would allow, and to ensure that they paid for any costs incurred But this ran counter to the prevailing idea both in Britain and South Africa that it was a Christian duty to introduce Africans to the benefits of 'civilized laws and values' These were visualized as a way of life rooted in Christianity, a profit-seeking economy, and the consequent high degree of protection of the individual against the group A sketchy and hastily drafted temporary code of regulations was therefore issued by Sir Philip Wodehouse, the High Commissioner, on 15 April 1868 at a meeting at which he received the formal submission of the chiefs[2], but both Sesotho and colonial politics delayed final arrangements for some time During most of the intervening period, Britain's presence was represented by only two officials and a hundred policemen, who were fully occupied in meeting frequent raids by the Boers and were in no position to enforce any regulations unless supported by the chiefs

Moshoeshoe died on 19 March 1870 and, eight days later, the agreement of the British and the Orange Free State on the borders of Lesotho was finally ratified, enabling the British to begin at last to make arrangements for their effective control of the country The Basotho had agreed at their first meeting with Wodehouse to pay hut tax, and orders were now sent to the official acting as High Commissioner's Agent to collect it in order to provide for the expenses and salaries of the future administration of the country The Basotho were fully aware of the purpose of the collection, so it was something of a test of whether the chiefs and people were willing to work with the British

Inducement to cooperate was offered to the great chiefs by arranging for them to receive ten per cent of the hut tax collected, and they in turn customarily commanded a high degree of obedience However, Letsie, Moshoeshoe's heir, had little control over his two most powerful brothers, Molapo and Masopha (who, together with Letsie, were the surviving sons of Moshoeshoe's first wife) As it turned out, the great chiefs, with the exception of Masopha, willingly assisted in the collection, and the encouraged officials decided that the time was ripe to promulgate a detailed set of regulations which Wodehouse had drawn up before his departure from South Africa in May, at the end of his term of office as High Commissioner There was to be a meeting of chiefs and headmen at Thaba-Bosiu on 22 December 1870 to announce Moshoeshoe's death to the nation formally, which provided a suitable opportunity

The regulations embodied many ideas put forward to Wodehouse in 1868 in a memorandum drafted by Emile Rolland, a French Protestant missionary who had grown up in the country and whose analysis of Sesotho society was to be crucial in shaping Government policy in the territory Rolland had began with the assumption that some form of magisterial control would be instituted, and argued that the main obstacle the British Government would encounter in ruling the Sotho and 'rendering them obedient to British law' would be the power of the chiefs, great and small, therefore the aim of the Government should be to diminish this power, preferably in such a way as not 'to excite the jealousy or embitter the prejudices of the natives' [3] The regulations which were introduced to the chiefs at the 1870 meeting, although declaring only a few aspects of customary law illegal, indirectly attacked the chiefs' power with a number of measures favouring Roman-Dutch law principles which conflicted with aspects of customary law on which the chiefs relied for income and/or patronage Thus, for example, chiefs were not allowed to enforce their judgements and a suitor could bring the same case to a magistrate on appeal, where new ideas might be utilized involving such foreign concepts as a woman at a given age achieving her majority, rather than remaining a perpetual minor

Polygamy and bridewealth or bohali (which latter could be, and in Moshoeshoe's day frequently was, a means of patronage) were also indirectly attacked in a number of ways Thus, Christian marriages (valid without bohali were to be as binding as customary ones, forcing marriage on unconsenting women was forbidden, and all marriages and bohali paid were to be registered before a magistrate (where a registration fee was to be paid - in effect, a tax on polygamy) And as an indication of what was in store in the future, they contained a provision which looked forward to the annexation of Lesotho to the Cape Colony, a British possession in the region which was about to obtain control of its own affairs under a form of Responsible Government a blanket clause provided that all acts which were offences in Cape law were now to be punishable, subject to the special circumstances of the country [4]

Not unexpectedly, the regulations, when read to the national meeting, aroused heated protests Molapo, Masopha, and the minor chiefs openly objected on the grounds that they ignored the chiefs, required payment for registration of marriages, and gave women rights that should belong exclusively to men Vocal opposition was halted only by Letsie's order to the meeting that, as he was satisfied, the regulations were to be accepted [5] However, when Barkly, the new High Commissioner, took up his post at the end of the month, he failed to realize, even after a visit to Basutoland (as it was then called), the strength of feeling against the regulation and the opposition that magistrates would encounter He therefore set about arranging the annexation of Basutoland by the Cape

This the Cape reluctantly did only after a Select Committee of its Legislative Council reported in August 1871 that Basutoland should be secured for the wide field of profitable commercial enterprise it offered, especially as it was geographically connected with the Cape Colony and would be able to pay for its own administration [6] Inherent, therefore, in the Cape's motives for undertaking the administration of the country was an official policy of breaking down the self-sufficient Sesotho economy to create a market for Cape goods and a source of labour for Cape needs

Its lack of interest in developing Basutoland in any other way is shown both by the total absence of budgetary provision for public works, buildings, education or postal communication, and also by the legal arrangements made for the territory. It decided to accept the British regulations of December 1870, although this was contrary to all previous Cape policy in administering African territories. Until that date, Roman-Dutch Law had always been the only recognized law in Cape-ruled territories, in theory at least. However, it was realized that the Basotho were fast recovering from the war with the Orange Free State and were a very different proposition from the collaborating Mfengu and defeated Xhosa of the Ciskei. Troops to repress opposition would be expensive, and it may be too that the Legislative Council was influenced by the farcical situation created even in the Ciskei by its non-recognition policy towards customary law.[7] Basutoland was a long way from Cape Town and there was little incentive for the Cape to insist on the full-scale introduction of Roman-Dutch Law. Rather, it could meet the demands of the humanitarians and missionaries for the introduction of 'British values' if it maintained intact the existing system of rule by an imperial officer. He could then apply regulations that made many 'civilizing' innovation but would still at least partially recognize most aspects of customary law and require much less enforcement than the alien laws of the Cape.[8] Thus the Annexation Act vested the duty of legislating for the territory in the Governor, who was to lay all legislative enactments before the Cape Parliament within fourteen days of the opening of the session, unless altered they would remain in force. No parliamentary act would apply to the territory unless expressly stated to do so in the act itself or in a proclamation by the Governor. And after the Annexation Act became law, the new regulations were re-proclaimed as the 'Governor's Code', and came into force on 1 December 1871.

ADMINISTERING THE LAW

When the Cape formally received Responsible Government in 1872, a Department of Native Affairs was set up and a Secretary for Native Affairs appointed from 1 December 1872 as the minister responsible to the Cape Parliament for the Department For the period of Cape rule in Lesotho, however, the Department remained very small and increasingly overworked, with the delays in answering letters growing ever longer As a result, the men in Lesotho actually in charge of administering the country had a great deal of discretion until 1879, when a change of government and policy in Cape Town was to leave a permanent mark on Lesotho

Basutoland was divided into four magisterial districts, with each of the three major chiefs residing in one After a few years some of the districts were sub-divided, but even so, the size of the Basutoland administration remained ludicrously small However, by the normal standards of the Cape Native Affairs Department, it was an extremely able team, headed by Charles Duncan Griffith, the Governor's Agent He proved to be a most impressive administrator, who both liked and respected the Basotho, and whose feelings were clearly reciprocated [9] He and the magistrates were sceptical of the missionaries' claim that only good could come from the rapid abolition of Sotho customs, and it was due to them that the pace of legal change in Lesotho was not pushed as fast as the missionaries advocated However, in essence the missionaries and magistrates differed only on the question of the desirable speed and method of abolishing Sesotho customary law, not on the ultimate aim in this respect Faced with a two-pronged attack by missionaries and Government on their customary means of influence, the chiefs not unnaturally did all they could to counteract the threat wherever they detected it, and this in turn reinforced the Administration's determination to undermine the chiefs' power Therefore, essential requirements for both the introduction and also the administration of Roman-Dutch law principles were political acumen and manoeuvrability by the magistrates when dealing with disaffected chiefs

Temperamentally and in terms of his own interests, there was obviously little to fear from the paramount chief, Letsie, but the magistrates kept a particularly wary eye on his two younger brothers by Moshoeshoe's first wife, fearing that fraternal ambition and dislike of government policies might result in one or other leading a national revolt if given the chance Political events in 1873 enabled the Administration largely to neutralize the elder of the two brothers, [10] but the younger, Masopha, came into conflict with the Government shortly after its arrival and continued throughout the period of Cape rule to represent an ever-increasing problem Similarly, while it was in the interests of Letsie's eldest son, Lerotholi, not to join his uncle Masopha in an anti-Government plot unless he felt very sure of its success and of the support of the people, the same did not apply to Molapo's sons nor to Moshoeshoe's influential sons by his next five wives Government policy therefore was to employ the junior chiefs where possible, thus firmly tying their interests to those of the government At the same time, the magistrates made every effort not to give the major chiefs any unnecessary cause for grievance against the Government that might, despite other interests, drive them into Masopha's arms

Closely associated with the Government's policy of dividing the chiefs was that of weaning their people away from them So long as this policy proceded successfully, the danger of a revolt led by the chiefs continued to diminish However, as the magistrates were also simultaneously attempting, by enforcing the regulations, to introduce a number of unwelcome changes into the daily life of the Basotho, they required a nice judgement of what changes in Sesotho law would be tolerated by the people in return for such advantages as Government protection from unwelcome impositions by their chiefs Simultaneously, the magistrates had to prevent the chiefs from becoming so discontented at their loss of power over their people that they united against the Government The Administration adopted every means available to it, from taking over the Sesotho custom of holding national meetings to discuss the laws, to encouraging traders, migrant labour, medical officers, Christianity and education,

all of which indirectly attacked the chiefs' power in a number of ways and introduced the people increasingly to the money economy and its individualistic values which underlay many of the regulations inspired by Roman-Dutch law

In 1872 Griffith established the Basutoland Mounted Police Force, paid for from the steadily rising hut tax, to replace the sixteen privates of the Frontier Armed and Mounted Police who had formed the entire police force in Basutoland after Griffith took charge The new police force gave greater weight to magisterial arguments that the Government provided a more effective way of settling disputes than did the chiefs, forbidden as the latter were to enforce their judgements It also enabled the Administration to enforce its decisions on the chiefs, and by February 1879 Letsie counted eight of Moshoeshoe's sons who had been in prison [11] Commoners also benefited from these provisions and the Government's power to enforce them, finding that they were able to defy their chiefs on certain issues with effective Government support, in civil suits as early as 1872 chiefs were being summonsed for debt by commoners [12]

Government enforcement was also popular for extending to areas where the chiefs had never had any authority without resorting to raids, notably for obtaining redress against Orange Free State and Cape settlers [13] Within court, a very flexible approach towards the Cape rules of evidence did much to decrease the people's feeling of unfamiliarity with the new court procedure Within seven years the Government successfully won enough support from the people to be settling most of their cases, despite initial opposition from the chiefs [14] By 1868 Rolland, as Acting Governor's Agent, when asked to report on the possibility of a general Basotho uprising, could report

> no such combination could be found or carried out except through gross mismanagement on our part, preceded by misgovernment and consequent unpopularity As long as the personnel of the Government commands respect and is duly supported by the indispensable display of material force, so long will we possess the confidence and respect of the people [15]

All the evidence available seems to bear out this analysis of the situation [16]

So successful a challenge to Sotho custom in such a short period gives rise to the suspicion that the magistrates were perhaps not enforcing those aspects of the regulations most unpopular with either the chiefs or people, which included most of the imported Roman-Dutch law principles But sufficient records survive to show that this was not the case Apart from trying the chiefs in court, Griffith and his successors intervened in various ways in chiefs' control of land rights, [17] which was central to chiefly power Nor was a blind eye turned to regulations as galling to commoners as to chiefs There is evidence that apart from discouraging circumcision by such means as affording legal protection against the chiefs to parents who refused to allow their children to be circumcised, [18] they enforced the right of widows to custody of their children, [19] and of girls to freedom to marry against their fathers' wishes once they had reached the age of majority [20] Infanticide and concealment of birth were treated as crimes, [21] and imprisonment - foreign to Sesotho law - was frequently used as a punishment

EXTENDING THE APPLICATION OF ROMAN-DUTCH LAW

So successful were the magistrates in obtaining compliance with the regulations that it was decided to extend their scope In 1872 Griffith had chaired a Special Commission consisting of the magistrates of Basutoland, to inquire into and report upon the laws and customs of the Basotho, and on the operation of the regulations established for their government [22] The Special Commission made a detailed report and redrafted the regulations, but there followed four years of consideration by the Secretary for Native Affairs and much drafting and redrafting by Griffith and the Attorney General before the amended regulations were eventually proclaimed on 1 July 1877 [23]

The final version contained various innovations on the pattern already established earlier, but also one radical change in the regulations as originally drafted by the Commission for the first time provision was made to apply Cape law to the white section of the Basutoland population, which numbered 378 people in 1875 [24] This shifted the whole legal policy on the conflict of laws against the Basotho Some alteration was certainly required to make legal the application of Cape law in cases between whites in Basutoland as the law stood, it was illegal to do so, yet it was inconceivable in the climate of the day that customary law should have been applied by a white magistrate in a dispute between two white men However, the new regulations provided that Cape law was to apply except where all parties in the case 'are what are commonly called Natives, in which case it may be dealt with according to Native law' (my emphasis) This meant that in all disputes between white men and Basotho, Cape law would apply And the section went on to provide that 'the proceedings shall, as near as may be, and so far as circumstances will permit, be the same as those in the Courts of Resident Magistrates in the Cape Colony' A fair amount of discretion was thereby allowed to the magistrate in how rigidly he applied colonial procedure, but at a stroke customary law was changed from being the normal law of the country to being a concession made to the Basotho While the present Roman-Dutch law system in Lesotho owes its legality to the proclamation of 1884, this provision in the regulations of 1877 is its original source

THE BACKLASH

Inevitably, the changes being introduced so fast into Basutoland as a result of religious, economic, and legal factors generated considerable unease in Sesotho society, the most obvious manifestation of which was the appearance of a number of prophets in the mid-1870s It was the regulations, however, which were the direct cause of the rebellion of Moorosi, the veteran chief of the Baphuti in the far south of Basutoland

With the creation of a magistracy in Moorosi's district in 1877, as a result of the subdivision of a larger magistracy, the number of clashes between Moorosi and his magistrate over applications of the regulations increased rapidly They culminated in a full-scale revolt of the chief and his people after a series of magisterial blunders in handling a crisis created by the refusal of the old chief to surrender a favourite son, involved in a theft case, for deportation for hard labour in the Cape Colony Cape troops were called in and, after an eight-month siege, Moorosi's mountain was taken The chief and all his principal sons were killed, as were most of the sixty or seventy defenders of the mountain The majority of his people who survived - men, women, and children - were sent to work on Cape farms The revolt highlighted the delicacy of the balance which enabled the Cape to impose its system of direct rule on Basutoland, and should have ensured even more careful handling of affairs there in the future, but unfortunately at that point Cape colonial politics intervened

THE COLLAPSE OF MAGISTERIAL RULE

The Sprigg ministry, which had come to power in the Cape Colony, appeared at first sight to have a policy on 'Native Affairs' in Basutoland very similar to that of its predecessor to undermine the power of the chiefs and replace Sesotho law and institutions with colonial ones But the new ministry visualized so different a time scale for this process that it became in practice a totally different policy Under the preceding ministry the approach of the colonial government had been extremely pragmatic customary law and the chiefs were to be undermined how and where the chance arose, within very broad guidelines It was envisaged as a gradual process which would take many decades of slow, steady loosening of traditional bonds In contrast, under Sprigg a new policy of 'vigour' was introduced Changes were to be introduced immediately when ordered by the ministry in Cape Town, not achieved by a combination of patient whittling away of chiefly powers and improvising on opportunities

This increase in the pace of change would probably have caused problems soon even without the introduction of a policy to disarm the Basotho, but the ironically entitled Peace Preservation Act of 1878 to enforce disarmament made them certain The Act was partly a consequence of a pet scheme of Sir Bartle Frere, the Cape Governor since 1877, to confederate the South African colonies, for the success of which he believed disarmament was an essential prerequisite To the Basotho, such an idea was anathema There had over at least the past six years been a great increase in gun buying, often out of wages earned at the diamond fields, and quite apart from the hours of labour invested in each gun, weapons were considered a sign of manhood They might also become necessary for defence against the Orange Free State once more should the Cape ever abandon Basutoland, as Britain had in 1854, during an earlier phase of British protection Finally, the Basotho interpreted the disarmament policy as a sign that the Administration distrusted them No argument advanced by the Government or missionaries could overcome the combined force of these considerations, and no advantages of the still relatively new Cape rule could outweigh this disadvantage If any issue could unite the whole nation behind any available Basotho leader in opposition to colonial rule, this was it

To make matters worse, the Cape Government also announced a number of other measures, each of which alone would probably have aroused only dissatisfaction, combined with disarmament legislation and the Government's mishandling of its implementation, they could hardly have been worse timed Sprigg, ignoring all the representations of the Governor's Agent, magistrates, missionaries, and traders, insisted on pushing ahead with his schemes, antagonizing most Basotho The chiefs therefore found themselves in an unexpectedly strong position Their long-standing grievances over the effects of the regulations on their customary powers made them the natural leaders to spearhead the opposition, now that they at last had the people behind them

Letsie, however, was old, obese, sick and vacillating, much under the influence of Griffith and the missionaries, and unwilling to lead a revolt which, if successful, would have disastrous results for Basutoland As Moshoeshoe's heir, his experience fitted him to understand better than most the inevitability of aggression by the land-hungry Orange Free State should Basutoland completely shake off colonial rule - and protection He therefore did all in his power to avert the armed resistance that he foresaw would follow if the Government tried forcibly to disarm the Basotho, including even arranging for a delegation to take a petition to the Cape Parliament, which, however, rejected it after a lengthy debate With dissatisfaction mounting rapidly among the Basotho, Masopha daily strengthened his position as leader of the majority opposed to surrendering their guns even if it meant war, and the prophetesses began to predict that he would be the next Paramount Chief This left Lerotholi, if he was to retain the paramountcy, with no choice but to join his powerful uncle in leading the opposition to disarmament

In the ensuing period the country split into 'rebels' and 'loyals', the latter nearly all Christian (though many Christians joined the rebels) Magisterial authority gradually collapsed, with widespread victimization of loyals whose property was 'eaten up' and who were sometimes killed fighting to protect it All orders to Masopha and the other rebel chiefs to restore captured cattle had practically no effect except where Letsie intervened Those who remained loyal flooded into the magistracies as refugees, and arrangements had to be made to feed them The whole country was patrolled by armed bands and the traders began to leave or send their families and goods out of the country On Griffith's orders the Berea magistracy, in Masopha's district, was abandoned, and the others fortified so far as possible against attack By the time Sprigg arrived in Lesotho to see the state of affairs for himself and finally realized the seriousness of the situation, his attemps at compromise came too late

The inevitable outbreak came in September 1880 when Lerotholi attacked a column of Cape Mounted Rifles who had crossed the border to garrison the magistracy in his district His attack marked more than the beginning of the Gun War, it marked the end of the magistrates' carefully constructed network of trust and interests That network, backed only by a token police force and British prestige, had enabled them to impose their new legal ideas, despite widespread - and, in the case of the chiefs, strong - opposition to the regulations The Cape was never to be able to control Basutoland again in the same way

THE WAR OF THE GUNS

The war which followed proved far more disastrous than Sprigg had feared In the south Mohale's Hoek and Quthing were besieged and were subsequently abandoned Mafeteng, Leribe and Maseru were attacked and besieged From October a revolt in the Transkei, encouraged by Letsie, further complicated matters for the Cape forces, and a magistrate was killed at the end of January 1881 in a badly planned sortie As a result of the revolt in the Transvaal, the Cape authorities began to fear collusion between the Free State Boers and the Basuto, and by the time the Cape expenses for the war had reached over £3,000,000, the ministry was exceedingly anxious to make peace However, the terms they initially offered in February 1881 were unacceptable to the Basuto and were rejected Nonetheless, as winter approached the need of the Basotho to conclude an agreement increased, for once the rains stopped the Cape Forces would be able with fewer hazards to obtain supplies from the Free State and to move more freely, while Lerotholi would have greater difficulty keeping his men together in the cold weather He was also suffering from a painful inflammation of the bladder

Negotiations therefore recommenced and on 29 April 1881 the Governor, whose arbitration had been accepted by both sides, announced his Award With its announcement, the fighting gradually ceased

The Award nominally provided for disarmament, but the licensing of guns was to be freely allowed, and compensation was to be paid for those surrendered There was to be a complete amnesty, the District of Quthing (Moorosi's District), which Sprigg had originally announced was to be confiscated, was to remain part of Basutoland, and a fine of 5,000 cattle, together with compensation for loyals and traders, was to be paid This met all the rebels' demands, for it was obvious that the Cape could no longer enforce the disarmament provision - or anything else Although all the chiefs eventually accepted the Award, they were back in the saddle and intended to stay there Even Letsie could not be relied upon to help bolster the magistrates, for his role throughout the war had been highly questionable That he played a double game to some extent seems certain, since he retained his position as Paramount Chief in the eyes of the Basotho and at least some of his authority, while ostensibly working for the enemy against which his heir and the majority of the nation were fighting The lines drawn in this civil war and its tortuous aftermath were undoubtedly even less clear cut than is usual in such cases, since the Basotho custom of marrying cousins knit all Moshoeshoe's descendants in a web of relationship which would have been difficult to ignore

A new Government had replaced Sprigg's at the Cape in May 1881, in the middle of the negotiations over the Award, and now decided to avoid the expense of recruiting more troops or police, and to rely entirely on the chiefs to persuade their people to surrender the cattle required for compensation and the national fine This was unrealistic Very few chiefs, ruling ultimately by consent, could afford to antagonize their people to the extent of enforcing the restoration of all the loyals' stock the Basotho regarded as rightful spoil anything captured in the war and would not easily surrender it

Not unnaturally, the much-tried loyals were extremely bitter about this, and became progressively more so as the policy failed to produce most of the compensation owed or to enable them to return to their villages The magistrates therefore lost even what authority they had had among the loyals huddled round the magistracies, and, under a new and unpopular Governor's Agent, became increasingly demoralized Masopha openly defied Letsie's and Lerotholi's orders, and the Government finally announced that it would send in Cape troops to enforce the Award, offering cheap farms from confiscated land in Quthing to persuade colonists to enlist The Basotho were given a month in which to fulfill the Award or face the consequences The ultimatum drew a storm of criticism from the humanitarians in England, the colonial press, and, most important, members of the Cape Parliament, while the Governor's Agent telegraphed from Basutoland that the entire nation would unite to fight for Quthing The Cabinet backed down Using as an excuse a plea from Letsie for more time, it announced that the Award would still be cancelled on the due date but that confiscation would not automatically follow on incomplete fulfilment of its terms Three weeks later the Peace Preservation Proclamation (which had extended the Act to Basutoland) was itself repealed, and with its removal the Sotho at last once more held their guns legally It was the final defeat of the disarmament policy and admission by the Government that it was completely powerless to enforce its will But Britain would not sanction abandonment of Basutoland by the Cape

The Cape ministry was, therefore, still faced with the need to solve the problem of how to reduce Basutoland to order again and to enable the loyals to return to their villages In the course of the next year it suggested no less than three different, successive policies to the chiefs, its agent in one disastrous approach to Masopha even being the specially imported Major-General Charles Gordon who was to win immortality for himself when he was killed by the forces of the Mahdi in Khartoum three years later

The third policy proposed gave the chiefs something close to internal self-government[25] - a retrograde step in terms of earlier Cape policy - but by then disillusionment with Cape rule was so great that most chiefs apparently preferred to come under British rule again if it could be arranged, or even abandonment by the Cape, with all the risks that it involved Although acceptance of the policy was wrung from Letsie in April 1883, it had by then very little chance of success Throughout the period, Masopha continued his defiance both of the Government and of Letsie, and the loyals remained largely uncompensated By May 1883 the Cape Government lost confidence in its ability to cope with the situation and opened negotiations with the British Government to hand over Basutoland to its care By November Britain reluctantly agreed to take back Basutoland and, at a meeting called for 29 November, Letsie and the chiefs loyal to him, faced with the choice of British rule or abandonment, opted for the former, agreeing to obey the 'laws and orders of Her Majesty's High Commissioner',[26] and to pay hut tax The document accepting the Queen's proposals was signed by chiefs representing over 110,000 people Masopha and his followers, conspicuously absent, represented about 20,000 However, in mid-December the British Government decided that the Basotho majority in favour of British rule was large enough to warrant it accepting Basutoland, and on 18 March 1884 Britain assumed direct imperial control of the country

CONCLUSION

Given this history of how Lesotho came under their control again, the British in fact had few real choices as regards what form of law they should introduce They had no intention of spending any more on the country than hut tax produced, and received a country which still had an openly declared rebel group, led by Masopha, opposed to British rule.[27] (Until 1886 Masopha refused to receive a magistrate in his district)

As in 1868, it would have been easiest for the British to accept customary law as administered by the chiefs as the cheapest way to control a country which wanted British protection but not rule However, as is clear from the history of Lesotho as well as other British territories, British prestige was a valuable commodity, quantifiable in terms of the number of troops not needed in a territory because respect for British rule (and the ultimate threat of British force) was a major factor in obtaining compliance with British law Quite apart from any Victorian civilizing mission, the British Government could not afford to be seen to accept Lesotho under its protection after the defeat of the Cape unless the chiefs publicly accepted that token of British rule - a code of regulations

Thus Britain had to introduce regulations and, given Lesotho's recent history, a number of factors pointed to the existing Roman-Dutch Law ones rather than the more apparently logical introduction of English Law There was, first, the symbolic force of the acceptance by the chiefs of the same regulations as they had previously rejected Then there was the advantage that those very regulations, which dated back only to the Cape's last attempt at a settlement in the country, in fact gave a large degree of self rule to the chiefs, which was highly desirable in the circumstances Moreover, from a purely administrative point of view, it made little difference in most instances whether the regulations allegedly embodied Roman-Dutch or English law the final Cape regulations had in fact removed the magistrates (and, in practice, white law) from the average Mosotho's life unless he chose to appeal from his chief's decision - an unlikely event in the circumstances of the country after the Gun War Only in a few specific instances were cases reserved for magisterial attention, and those were of the type where English and Roman-Dutch Laws were in agreement

Finally, the British retained an attachment to plans of confederation for their southern African territories, despite the failure of Bartle Frere's recent attempt, and it obviously would make such a confederation easier if all territories in the region at least nominally had the same legal system Thus it was that on 29 May 1884 the Cape code of regulations, legally kept in force by a British order in council, was replaced by a very similar new code of regulations, making Roman-Dutch law, as practiced in the Cape Colony, the Common Law of Lesotho A socio-legal study is still wanting of the process by which Roman-Dutch Law, officially but only formally accepted by the country in 1884, has over the succeeding century become a genuine legal force in Lesotho today

NOTES

1 British Parliamentary Papers 1884-5, lvi (C 4263) pp 75-80

2 Cape Archives, P M 259 copy of the original notes of the Rev J T Daniel, who acted as interpreter to Wodehouse at the meeting, Public Record Office, London, C O 48/441 regulations enclosed in Wodehouse to Buckingham, no 31, 2 May 1868

3 Cape Archives, Unpublished Basutoland Records collected by G M Theal, iv 125-51 'Notes on the Political and Social Position of the Basuto Tribe', 30 Mar 1868

4 Public Record Office, London, C O 48/450 Wodehouse to Granville, no 62, 14 May 1870, enclosing regulations

5 Cape Archives, G H 4/4/7 Austen to Bowker, 26 Jan 1871

6 Cape Parliamentary Papers, C 1-71 Report of the Select Committee on the Basutoland Annexation Bill

7 Only Cape law had been officially recognised in the Ciskei, with the result that the Africans there had generally ignored the magistrates' courts and continued to take their cases to the chiefs' 'illegal' courts See S B Burman, 'Cape Policies Towards African Law in Cape Tribal Territories, 1872-83' (Oxford University D Phil thesis, 1973)

8 Public Record Office, London, C O 48/455 minutes encl in Barkly to Kimberley, no 53, 31 May 1871

9 S B Burman, Chiefdom Politics and Alien Law Basutoland under Cape Rule, 1871-84 (London, 1981) pp 54-6

10 Ibid, pp 62-4

11 Cape Archives, N A 276 Letsie to Austen, 9 Feb 1879, encl in Griffith to Ayliff, no 31, 19 Feb 1879

12 Cape Parliamentary Papers, G 27-73, p 9

13 E g Cape Archives, Unpublished Basutoland Records, vi 270-1 Bell to Griffith, 25 Aug 1871, vi 311-12 Mills to Griffith, 20 Sept 1871, Lesotho Archives, S9/1/3/2 Griffith to President of Orange Free State, 30 June 1873

14 Cape Parliamentary Papers, G 27-74, pp 22, 35, G 12-77, p 8, G 17-78, pp 11-12, Cape Archives, N A 275 Bowker to Ayliff, no 25, 18 Mar 1878

15 Ibid, Rolland to Ayliff, no 36, 19 July 1878

16 Burman, Chiefdom Politics and Alien Law, pp 88-90

17 E g Lesotho Archives, Griffith to Nehemiah, 9 Sept 1871, Griffith to Masopha, 9 Sept 1871 and 30 Apr 1873, Cape Archives, Unpublished Basutoland Records, vi 462-4 Statement by Masopha, June 1872, vi 468 Griffith to Southey, 11 June 1872, vi 511-12 Griffith to Southey, 29 Aug 1872, N A 272 Rolland to Griffith, 23 June 1873, Griffith to Molteno, no 100, 14 Oct 1874, N A 275 Rolland to Ayliff, no 47, 17 Sept 1878, N A 840 Brownlee to Griffith, no 143, 3 July 1873, Lesotho Archives, S9/1/3/2 Rolland to Surmon, 13 Sept 1875

18 Little Light of Basutoland, no 6, June 1876, p 25

19 Lesotho Archives, S9/1/3/2 Griffith to Austen, 19 Jan 1874

20 Ibid, Griffith to Bell, Dec 1874 The father in this case was Molapo

21 E g Lesotho Archives, S9/1/3/2/ Griffith to resident magistrate, Aliwal North, 21 June 1875, Cape Parliamentary Papers, G 16-76, p 5

22 Cape Parliamentary Papers, 1873, Appendix III, Report and Evidence of the Special Commission on the Laws and Customs of the Basutos

23 Proclamation no 44, 1 July 1877

24 Cape Parliamentary Papers, G 16-76, p 18 Census Return, 28 Apr 1875

25 Lesotho Archives, S9/2/2/3 Scanlen to Letsie, 31 Mar 1883, enclosing proposed terms for the future government of Basutoland

26 Public Record Office, C O 48/507 Smyth to Derby, no 369, 12 Dec 1883, enclosing report of the pitso from the Friend of the Free State, 6 Dec 1883 Blyth's report of the pitso is enclosed in Lesotho Archives, S7/7/1 Blyth to Robinson, no 116/83, 1 Dec 1883

27 British Parliamentary Papers 1884, lvi (C 3855) p 47 Smyth to Derby (tel), received 12 Dec 1883, Cape Archives, N A 284 Blyth to Sauer, no 12/83 (sic), 16 Feb 1884, enclosure Letsie to Blyth, 11 Feb 1884

LEGAL DUALISM IN LESOTHO, BOTWANA SWAZILAND A GENERAL SURVEY

A J G M Sanders

INTRODUCTION

When the British, during the last quarter of the nineteenth century, took Lesotho, Botswana and Swaziland under their protection, they did so reluctantly Hopeful of freeing themselves from this new and potentially costly responsibility, they made provision in the Act that constituted the Union of South Africa for the incorporation of the three territories into the Union at some future date However, because of the untiring efforts of the chiefs to see their protectorate status respected, the three territories escaped that fate, and today the three countries are independent members of the international community As such, they do, however, form part of a greater "South African Law Association", a term coined by the late Mr Justice Schreiner [1] who, during his distinguished career not only served on the highest Bench of his own country, South Africa, but also held office as President of the Courts of Appeal in Lesotho, Botswana and Swaziland

Lesotho's, Botswana's and Swaziland's membership of the "South African Law Association" derives from the British decision to introduce to its newly acquired protectorates as their general law the European system already operative in other parts of the Southern African region then under their control At the same time, the British decided to preserve, as far as they thought feasible, the indigenous laws The legal dualism that resulted forms the theme of this paper

First, I will deal with the European law component of the Lesotho, Botswana and Swaziland legal systems, then with their indigenous law component, and finally, with the internal conflict of laws problem

THE RECEPTION FORMULAS

The formulas by which European law was introduced are not the same for all three countries

In respect of Lesotho, the reception formula is contained in s 2 of the General Law Proclamation 2B of 1884, effective 29 May 1884, which reads as follows

> In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope, Provided, however, that in any suits, actions, or proceedings in any court, to which all the parties are Africans, and in all suits, actions, or proceedings whatsoever before any Basuto Court, African law may be administered, and provided further, that the laws set out in the Schedule hereto and Acts passed after the 29th day of September, 1884, by the Parliament of the Colony of the Cape of Good Hope shall not apply to the said territory

It is in particular the words "the law for the time being in force in the Colony of the Cape of Good Hope" that gave rise to disputes - though in academic rather than judicial circles These disputes centred around the question whether the reception was timeless or subject to cut-off date, the effect of the demise of the Cape Colony by its incorporation into the Union of South Africa, the extent to which South African decisions are binding, and the effect of Lesotho's independence on the applicability of the law of the Cape [3]

James Beardsley's argument that the reception formula being of a fundamental or constitutional nature, ought to be interpreted in a liberal fashion is well founded

> We cannot, and need not review the actual legal history of Lesotho We need not even fix the point at which that system was cut loose from its mooring at the Cape and left to navigate alone - by dead reckoning, to pursue the metaphor - with occasional guidance from the Cape's successor systems

It is enough to conclude that this position has been reached without doing violence to the words of the 1884 Proclamation This seems to me to be the correct position and to be the only position that is consistent both with the 1884 Proclamation and with the fact and necessity of the operation of an independent national legal system in Lesotho whose premises are radically different from those of the Cape Colony's successor systems across the border [4]

The reception formula for Botswana as originally contained in s 19 of the General Administration Proclamation of 1891, was, as far as its principal part relating to the common law was concerned, identical to the Lesotho formula It was, however, reworded by s 2 of the General Law Proclamation of 1909 to read

Subject to the provisions of any Order in Council, in force in the Bechuanaland Protectorate at the date of the taking effect of this Proclamation, and the provisions of any proclamation or regulation in force in the said Protectorate at such date the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June, 1891, shall be deemed to apply, or to have applied to the said Protectorate unless specially applied thereto by Proclamation

By the inclusion of the words "mutatis mutandis", the new reception formula was - advertently or inadvertently - made to provide its own answer to the type of questions raised in respect of the Lesotho formula The general clause "mutatis mutandis", which refers clearly to both the unwritten and the written laws of the Cape Colony, suggests not only a timeless but also an independent reception

The inclusion of a reception date does not detract from this, ' given the general clause, it can be interpreted as a starting-point, never as a cut-off point

Finally, the Swaziland reception formula This is to be found in its amended form, in s 3 of the General Law and Administration Proclamation of 1907 and reads as follows

> (1) The Roman-Dutch common law, save in so far as the same has been herebefore or may from time to time hereafter be modified by statute, shall be the law in Swaziland,
>
> (2) Save and except in so far as the same have been repealed or amended, the statutes in force in the Transvaal on the 15th day of October, 1904, and the statutory regulations thereunder, shall mutatis mutandis and as far as they may be applicable be in force in Swaziland

Note that in the Swaziland formula, the general clause "mutatis mutandis" refers only to legislation, and not, as in the Botswana formula, to the common law as well This still leaves us, however, with Beardsley's argument that a provision such as subsection (1) of the Swaziland reception formula is of a constitutional nature and should be given a wide and liberal interpretation so as to constitute a timeless and independent reception

The premise that Lesotho, Botswana and Swaziland form truly independent members of the "South African Law Association" is further supported by a number of judicial pronouncements, notably those by the late Mr Justice Schreiner in Khatala v Khatala [5] and Annah Lokudzinga Mathenjwa v R [6]

HOW ROMAN-DUTCH LAW BECAME THE COMMON LAW OF LESOTHO, BOTSWANA AND SWAZILAND

Of the three reception formulas, only the Swaziland one makes explicit mention of Roman-Dutch law, the other two refer to the law of the Cape Had Swaziland been bordering the Cape Colony, its reception formula would, undoubtedly, also have referred to the law of the Cape But it so happened that Britain took over the administration of Swaziland from the defeated South African Republic, the Transvaal-located Boer Republic, which had adopted as its common law Roman-Dutch law There was not that much difference between the common law of the South African Republic and that of the Cape Colony Both were based on the Roman-Dutch law, but because of stronger British influence in the Cape, the law there showed more signs of English Law infiltration But even in the South African Republic the application of the Roman-Dutch law could not have been all that pure After all, with The Netherlands having adopted, in the early part of the nineteenth century, Napoleonic-styled codes, the Roman-Dutch law jurisdiction in Southern Africa, Ceylon (now Sri Lanka) and former British Guyana were left motherless New mother Britain, while thoughtful of the foreign origin of her adopted children, would leave her mark on them Of the Roman-Dutch law jurisdictions, British Guyana proved too weak to preserve any of its Roman-Dutch law heritage, but Southern African and Sri Lanka proved to be strong enough to come to a compromise and to develop mixed or hybrid legal systems

The mixture is one of pre-codal Civil law, the Dutch version, and Common law, the English version [7]

It was the Dutch East India Company which brought the Roman-Dutch law to Southern Africa in the mid-seventeenth century, with the establishment at the Cape of Good Hope of a refreshment station for its traders en route to the East As its name indicates, this law was of mixed origin It was, in fact, a blend of Roman law, Canon law, the law merchant and Germanic law as found in Holland - in other words, a Dutch version of Civil law

Roman-Dutch law which remained uncodified applied unchallenged in the Cape until 1795 In that year, as a result of the Napoleonic wars, control of the Cape was taken over by the British Dutch rule was restored in 1803, but only briefly, for in 1806 the Cape passed again to the British

While in principle retaining Roman-Dutch law as the common law of the Cape, the British by means of legislation actively pursued the introduction of English law, particularly with a view to bringing the general law in line with English public and commercial law Other factors which facilitated the reception of English law were the British way of life, which was promoted by the arrival of British administrators and settlers, the establishment of trade links with other parts of the British Empire, English legal training, adherence by the courts to the doctrine of judicial precedent, English legislative drafting and conveyancing techniques as well as techniques of statutory interpretation, easy access to English law materials, and, last but not least, the very nature of the Roman-Dutch law itself Like all other Civil law systems, the Roman-Dutch was, and still is, characterized by a high degree of abstraction and generality This made it vulnerable to English law which, rich in case history as it is, could often supply a ready-made answer to a particular problem where the Roman-Dutch law could provide only an abstract, general rule As a result, elements of English law which were not always in the spirit of Roman-Dutch law, crept in In addition, Roman-Dutch law showed all the deficiencies of pre-codal Civil law in general, in that it lacked uniformity, was often of a scholarly, at times even archaic, character, and rather unintelligible from a layman's point of view In fact, it was very much a law of intellectuals who did not hesitate to write in Latin Finally, the Roman-Dutch law at the Cape had been administered in a haphazard way

Today's position is different The leading works on Roman-Dutch law have been translated from Dutch or Latin into English, and the various authorities systematically treated it in an impressive range of textbooks, monographs and learned articles As a result, Roman-Dutch law has consolidated its position within the general law in a form that is much advanced on the one it found at the Cape at the end of the nineteenth century However, the twentieth century revival in Southern Africa of the Roman-Dutch law could do little to unscramble the mixed legal system that had developed earlier

From the point of view of legal technique, the modern legal systems of South Africa (including its "independent homelands"), Namibia, Botswana, Lesotho, Swaziland and Zimbabwe, are all mixed in the same way Civilian in their style, terminology, divisions and concepts, but Common-law-inspired in their treatment of the formal sources of the law and their form of law administration

As for their substantive law, there are differences as the reception of English law rules has not been the same for all of them The reception of English law has perhaps gone furthest in Botswana because of its Penal Code which expressly eliminates any further application of the substantive Roman-Dutch law of crime

Generally speaking, the reception of substantive English law rules in the Southern African region has been either absolute or very strong in respect of such areas as constitutional and administrative law - including the law relating to the organization of the courts, the judiciary and the legal profession -, criminal law, the law of procedure, the law of evidence, commercial law, the law relating to the administration of estates and the law relating to the registration of deeds In the private law sphere, however, there are only few pockets of English law influence, such as the underhand will, the concept of trust, the doctrine of estoppel, and English-inspired innovations with regard to matrimonial property, divorce and the freedom of testation

WHY NOT THE COMMON LAW?

It may be asked whether it would not have been better for Lesotho, Botswana and Swaziland if Britain had introduced its own Common law There being nothing sacred about the reception provisions, such a change could be effected today, if so desired Botswana has in fact done so in respect of its entire criminal law A former Chief Justice of that country, and present Justice of Appeal there, the well-known Nigerian jurist Akinola Aguda, is actually on record for having said - in an extracurial statement - that the Roman-Dutch law was "one of the most unfortunate relics" of Botswana's association with South Africa [8] His reasons for saying so were the following firstly, that "the so-called Roman-Dutch Law is now neither Roman nor Dutch" Secondly, that the Roman-Dutch law at the date of reception was primitive, and that it is that law which is regarded as the common law of the country Thirdly, he mentions the language factor

Let me deal with his arguments in reversed order

Language could indeed have been somewhat of a problem had it not been that most of the leading works of the old authorities on Roman-Dutch law had been translated into English and incorporated in modern textbooks It is important to keep in mind here that Roman-Dutch law is still developing and that there is nothing extraordinary about the old authorities, they have laid the foundation but they have not written the final chapter I wonder how many judges, members of the legal profession, or even academic lawyers consult the old textbooks or their translations They cannot be many of them

Justice Aguda's second argument that the Roman-Dutch law as at 1891 was a primitive system of law and that it is that system which now forms the general law of Botswana, is even less convincing In the first place, Roman-Dutch law is only one component of the common law of Botswana, the other being the received English law Secondly, even in its nineteenth century Cape form, Roman-Dutch law possessed the essential characteristics of the Civil Law which resulted from centuries of scholarly study, namely conceptualization and systematization [9]

However, Roman-Dutch law was, and maybe still is, too "professional", but "primitive", certainly not! Thirdly, Justice Aguda seems to believe that the reception of the law of the Cape in Botswana is subject to cut-off in 1891. Earlier we pointed out that the better view is that the reception was both timeless and independent.

There remains Aguda's remark "the so-called Roman-Dutch Law is now neither Roman nor Dutch". He did not elaborate on this statement, and it is not quite clear what he meant by it. It is, of course, true that Roman-Dutch law is neither Roman nor Dutch, it is a mixed legal system. And so are all Civilian legal systems. Indeed, which legal system is not mixed? Even the English law is not pure, having features of Roman law, Canon law and the merchant law. If Justice Aguda wants to suggest that because of its mixed character, a legal system like the Roman-Dutch law itself (or the law of the Cape, if that is what he meart by 'Roman-Dutch law') is ipso facto inferior to a relatively pure legal system like the Common law, he would not find many supporters, here or on his own Common law homeground.

Another possible interpretation of Justice Aguda's statement that "the so-called Roman-Dutch Law is now neither Roman nor Dutch" is that it had lost its original character and had become South African, and as such had developed into a legal system which, in the words of another former Chief Justice of Botswana, Robert John Hayfron-Benjamin, "bears a heavy imprint of the harsh social order within which it has developed", [10] and from which no guidance in matters of human rights can be derived [11]. But as Mr Justice Maisels, in his capacity as President of the Court of Appeal of Botswana, correctly pointed out "[t]he learned Chief Justice [Hayfron-Benjamin] may not fully have appreciated the distinction between the common law of South Africa and certain statutory encroachments on the common law" [12]. (In fairness to Mr Justice Aguda, I should mention that, sitting as a Justice of Appeal in the same case, he agreed with the President of the court that certain references by Chief Justice Hayfron-

Benjamin to the law of South Africa had been based on a misconception of that law) Mr Justice Hayfron-Benjamin, not being trained in the general law of this region, must have been unaware of its rich natural law component which it inherited from both the Roman-Dutch and the English sides [13] But then, how many judges, legal practitioners and legal academicians in South Africa, and in the neighbouring countries, take the trouble of acquainting themselves with that part of our general law and putting it into effect? This issue shall be taken up again later on in this paper

Not only is our general law rich in moral principles, it also has a built-in generative force of which we can be proud Unlike the Common law which thrives on specific rules, our general legal system thrives on a policy of principles which are characterized by their continuity, flexibility and indeed transnationality In addition, the Roman-Dutch Romanist style, terminology, divisions and concepts have provided a superstructure for our general law under which the received Common law rules and modern legislation are able to operate smoothly Could indigenous law be fitted in, as well?

THE POSITION OF INDIGENOUS LAW WITHIN THE OVERALL LEGAL SYSTEM

The proclamations that provided for the introduction of European law as the general law for the three protectorates, also provided for the continuation of indigenous laws and institutions, [14] to the extent that they were compatible with the new order, of course

Initially, the newly introduced general law was meant to be essentially "personal", that is to say, to be applicable primarily to Europeans For social, economic, political and administrative reasons, however, it would gradually lose that personal character and become "territorial" In doing so, it would also become more dictatorial, encroaching ever more on the powers of the chiefs and their courts Soon, legal and administrative dualism were to be turned into a system of "indirect rule" in which the tribal component of law and government was made subject to the central one

Although Lesotho, Botswana and Swaziland have their own indigenous laws, there is sufficient uniformity among them to give a common account of their characteristic features as they distinguish themselves from the countries' general law

Both from an ideological and from a purely legal technical point of view, the indigenous law is quite different from the general law

Ideologically, the indigenous law remains to be of the communal or socialist type, in contrast with the general law which still is more of an individualistic and capitalist nature The ethos or social imperative of traditional African life is social solidarity, and it is this principle of social solidarity which still forms the underlying theme of the indigenous law The maintenance or restoration of social solidarity expresses itself in the form of kinship communalism It is the kinship group which is at the core of the social structure However, recognition is given to the individual and his personality In fact, there is more scope for self-realization for the individual in traditional society than one is sometimes led to believe possible But the group is the basic unit and the emphasis is on the interests of the group As for the traditional form of government, even though at times despotic in appearance, it is really government by discussion or consensus Traditional legal proceedings, too, are truly community affairs, aimed as they are at reconciling the parties and restoring harmonious relations within the community, they are less a means for the strict enforcement of the law than an institution for ensuring what is necessary for the cohesion of the group Many other legal expressions of the group notion can be cited, such as the concepts of corporate landholding, kraalhead liability, group inheritance and the concept of marriage as an alliance between two family groups rather than a union between two people

From a technical point of view, the indigenous law is of a non-specialized type For the most part, it manifests itself in custom, lacking a developed legislative machinery and a concept of judicial precedent, at times it is even problematic to draw a distinction between law, on the one hand, and public morality, on the other In a recent publication Comaroff and Roberts show, in respect of Tswana law - but their findings are equally applicable to the other systems of indigenous law - that, instead of constituting a coherent and internally consistent code, it consists of a somewhat amorphous repertoire of norms of varying specificity and value, embracing both a set of ideal patterns and expectations derived from the regularities of everyday behaviour, that the people are not unduly concerned if these rules sometimes contradict one another, and that almost any conduct or relationship is potentially susceptible to competing normative constructions Moreover, although rules are invoked in argument and decision-making, it proves extremely difficult to predict outcomes by applying them deductively to the facts of any particular case [15]

From the "developed" general law point of view, additional proof of lack of specialization on the part of the indigenous law lies in its failure to separate government functions the Western way In Max Weber's terminology whereas the general law provides a type of "legal" domination, the indigenous law is a blend of the "traditional" and the "charismatic" The respective characteristics of Weber's three standard types of domination - the traditional, the charismatic and the legal one - may be tabulated as follows [16]

TYPE OF DOMINATION

	TRADITIONAL	CHARISMATIC	LEGAL
Obedience owed to	Individuals designated under traditional practices	Individuals considered to be extraordinary and endowed with exceptional powers	Enacted rules formulated in accord with rational criteria
Law legitimated by	Origin in tradition All law is considered to be part of previously existing norms	Origin from charismatic leader All law is declared by the leader and regarded as divine judgment or revelation	Origin in rational enactment All law is consciously "made" through logical techniques by an authority which itself is established by law and which acts in accordance with legal rules
Nature of the judicial process and form of justification of decisions	Empirical/Traditional Decision-making on a case-by-case basis (Precedent may or may not be considered)	Case-Oriented / Revelatory Concrete case-by-case judgments justified as revelation	General/Rational Cases decided by formal rules and abstract principles and justified by the rationality of the decision-making process
Structure of administration	Patrimonial Staff recruited through traditional ties Tasks allocated by discretion of master	No structured Administration Ad hoc selection of staff on charismatic qualifications, with undifferentiated tasks	Bureaucratic Highly structural administration by professionals in hierarchic system with rationally delimited jurisdiction
Degree of discretion of ruler	High	High	Low
Calculability of rules governing economic life	Low	Low	High

That it was the "legal" type of domination that acquired the upperhand in the High Commission Territories, and in the whole of Africa for that matter, was because it suited the colonial powers and their successors best The forte of the "legal" type of domination lies in its technical potential, or, to be more precise, in all the advantages that go with specialization

In the process of introducing the "legal" type of domination through the system of "indirect rule", the traditional authorities lost many of their powers and the indigenous law was made subordinate to the general law, its application becoming restricted largely to matters relating to marriage, land tenure in the tribal areas, inheritance and similar institutions In respect of the more important crimes, the traditional authorities lost their jurisdiction Courts of the European type were set up to deal with cases where the application of the indigenous law was thought to be inappropriate, where disputes involving non-Blacks occurred and where new questions arose as a result of the many new matters for which the indigenous law did not provide The same European-styled courts were to act as courts of review or appeal in respect of the traditional courts Of course, colonial initiative did not stop there A whole new network of public administration was introduced, together with Christianity, European education and a capitalist economy When in the 1960's the High Commission Territories became independent, there was a change in government only The system of "indirect rule" continued In fact, in Lesotho and Botswana, even more curbs were imposed on traditional law and government, notably in respect of land tenure

Yet, the indigenous law has survived remarkably well Two factors account for this firstly, European influence has proved to be additive rather than substitutive the incorporation, within a single individual, of European and indigenous goals and forms of behaviour, each held as distinct and appropriate for specific times and places, is a common phenomenon Secondly, the indigenous law has shown considerable capacity for adaptation and spontaneous growth with the changes that have occurred during the last century

CONFLICTS OF LAW AND PROSPECTS OF PEACE

The general law and indigenous laws of Lesotho, Botswana and Swaziland continue to operate in a form of tenuous coexistence Much has been written about the conflict of rules in respect of status, marriage, succession and land tenure [17] Unfortunately, relatively little has been published about conflicts in the field of criminal law, the law of procedure and evidence, and administrative law, [18] and yet it is "public law" dualism that is socially most disturbing

Bringing order between, and eventually even integrating the general law and the indigenous law remains a major reform task facing the three countries Very little has been done since independence Only Botswana can boast of having made progress, namely by the enactment of the Customary Law Act of 1969, which goes a long way in regulating the choice of law problems,[19] and the Penal Code of 1964 [20] which provides for a uniform system of criminal law Both seem to work

An integrated national legal system is of course the ideal Without it national unity and equality of all before the law cannot be achieved But national legal unification has to be effected in the best tradition of scientific law reform, [21] for a unified legal system that fails to attract popular support might be a great deal worse than the present dual legal system

However pressing the need for a unification of the general law and the indigenous law may be, legislative reform should not be performed in haste The two systems of law still show too many ideological and technical differences for them to be unified immediately, in a way capable of carrying general approval For the time being, the legislature is well advised to give priority to the formulation of internal conflict rules, albeit as a transitional measure forming part of a long-term policy of legal unification

Given time - possibly more time than a modern nation can afford - the problem of legal dualism might even solve itself, as it did in the Civil law world, where the Romanist legal superstructure was able to take under its umbrella Germanic, Christian and, recently, Marxist concepts

The indigenous law is already growing closer to the general law One can think of no better example than some recent decisions by the court of the Paramount Chief of the Kgatla-ba-Kgafela (Botswana) in which unmarried women were given the right to appear and to sue, on their own behalf, for compensation for pregnancy directly from their suitors, even when the pregnancy was a second or subsequent one [22] There must be many more instances, though of a less spectacular nature Unfortunately, only few are recorded Writers on indigenous law still tend to adopt a "purist" approach, at the expense of the "law in action" [23]

Turning now to the general law Can it be said that it, too, shows signs of willingness towards rapprochement? For sure, the answer has to be in the negative The general law has retained not only its unnecessarily professorial and technical character, but also the positivist philosophy with which the colonial power has imbued it

The rise of legal positivism in Britain, which coincided with the European scramble for Africa, is best explained with reference to Max Weber's Wirtschaft und Gesellschaft[24] where he tried to elucidate why modern capitalism arose in Europe, and not in other parts of the world Law, according to him, provided part of the answer The failure of other civilizations to develop a type of legal order with a high degree of predictability of rules governing economic life explained why it was in Europe that modern capitalism emerged Nineteenth century legal positivism provided the ideal recipe for effecting that predictable legal order Law, it said, was a command and should be separated strictly from morality As an empirically grounded hypothesis this affirmation was nonsense, but as an intellectual construction it matched the demands made upon the courts While losing its scientific garb rather soon, legal positivism became an ideological instrument and a justification for judicial conservatism instead

Professor John Dugard has referred to this new type of legal positivism as an "unsophisticated, out-of-date, popular, crude or vulgar positivism" [25] In terms of it, a judge decides cases by a mechanical application of legal rules which he finds established, quite apart from his judgment as to their moral or social fitness This is the approach the courts in Britain and its dependencies adopted as their credo Legal positivism became determinative for them of the spirit of the law Yet, nothing is further from the truth As for our own general law, it has inherited from both the Roman-Dutch and the English law a natural law component which cannot be ignored by the courts without simultaneously turning the law into "an ass"

There is, unfortunately, very little evidence of the common law courts in Lesotho, Botswana and Swaziland employing the concept of good faith, the notion of the reasonable man, the principles of natural justice, and so forth, to steer the general law in a direction responsive to national values and away from foreign ideologies and South African precedents [26] It is regretted to say this, but for the common law courts in Lesotho, Botswana and Swaziland - and indeed all other member countries of the "South African Law Association" - to pursue their self-imposed hermit's life in the land of legal positivism, this really amounts to an abdication from their function to dispense justice and to help build a national legal order If ever there was a reason for this type of judicial attitude, there is certainly none today

In conclusion, our task is to mould the future and consider what contribution we can make towards a better legal order Legal dualism is one of the problems we are faced with, but, given the inherent flexibility of our general and indigenous law systems, we often tend to exaggerate that problem, particularly in respect of fairly homogeneous societies like Lesotho, Botswana and Swaziland It is my hope that, in this paper, it has been shown that the tools to solve that problem are readily at hand, and, if properly applied by both the legislature and the courts, will be able to create a single, sophisticated local system of truly national character

FOOTNOTES

1 1970-76 Swaziland Law Reports (SLR) at 29H

2 Cf Ellison Kahn "Oliver Deneys Schreiner A South African" in Fiat Justitia - Essays in Memory of Oliver Deneys Schreiner (ed Kahn), Juta 1983

3 Cf J H Pain "The Reception of English and Roman-Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland", The Comparative and International Law Journal of Southern Africa (CILSA), Vol 11 (1978), p 137-167, Sebastian Poulter "The Common Law in Lesotho", Journal of African Law (JAL), Vol 13 (1969), p 127-144, Vernon V Palmer and Sebastian M Poulter, The Legal System of Lesotho , Michie Co Law Publishers Charlottesville Virginia, USA 1972 chapter 2, James E Beardsley "The Common Law in Lesotho", JAL Vol 14 (1970), p 198-202

4 Op cit p 200-201

5 1963-1966 High Commission Territories Law Reports (HCTLR) 97 (CA) at 99

6 1970-1976 SLR 25 at 29H

7 Cf H R Hahlo and Ellison Kahn The South African Legal System and its Background , Juta 1980 at 578-596 W J Hosten and others, Introduction to South African Law and Legal Theory, Butterworth (revised reprint) 1980 at p 222-224, Sanders, "The Characteristic Features of Southern African Law", CILSA, VOL 14 (1981), p 328-335

8 "Legal Development in Botswana from 1855 to 1966, Botswana Notes and Records, Vol 5 (1973), 52-63 at 57

9 Cf Sanders, "The Characteristic Features of the Civil Law" CILSA, Vol 14 (1981), p 196-207

10 The Taxpayer's case, Criminal Appeal 14 of 1978 (28 September 1979) (unreported)

11 Moagi's case, Criminal Appeal 73 of 1978 (16 February 1979, 2 August 1979) (unreported) For details of these and other constitutional law judgments by Hayfron-Benjamin CJ, see Sanders "Constitutionalism in Botswana a valiant attempt at judicial activism", CILSA, Vol 16 (1983), p 350ff

12 Moagi's case, Criminal Appeal 28 of 1979 (CA) (8 April 1981) (as yet unreported)

13 Compare in this regard the following remark by professor John Dugard

> In contemporary South African law two legal systems - the repressive and discriminatory law of apartheid and the liberal Roman-Dutch law - operate side by side, however anomalous this may be Although Parliament is supreme and its enactments may not be questioned by a court of law, the statutes comprising the law of apartheid do not provide a complete system within themselves These statutes must still be interpreted in the light of the common law (with its presumptions in favour of liberty and equality), administrative powers exercised under these laws must still be reviewed in accordance with common-law principles of natural justice, and subordinate legislation made in terms of these laws must still be tested by the common law standards of reasonableness

Lawyers for Human Rights Bulletin No 3, January 1984, at 2-3

14 On the indigenous law in Lesotho, Botswana and Swaziland, see the following major publications

- Hugh Ashton, The Basuto, Oxford Univerisy Press (2 ed) 1967,
- Patrick Duncan, Sotho Laws and Customs, Oxford University Press 1960,
- Ian Hamnett, Chieftainship and Legitimacy, Routledge and Kegan Paul 1975,
- Vernon V Palmer, The Roman-Dutch and Sesotho Law of Delict, Lijthoff, 1970,
- Sebastian Poulter, Family Law and Litigation in Basotho Society, Clarendon Press 1976,
- John L Comaroff and Simon Roberts, Rules and Processes, University of Chicago Press 1981,
- Simon Roberts, Tswana Family Law, Sweet and Maxwell 1972,
- Isaac Schapera, A Handbook of Tswana Law and Custom, Cass (2 ed) 1955,
- B A Marwick, The Swazi, Cambridge University Press 1940,
- Southern Africa in need of law reform (ed Sanders), Butterworth 1981,
- The individual under African law (ed P N Takirambudde), University of Swaziland, 1982

15 Rules and Processes 1981

16 Taken from David M Trubek, "Max Weber on law and the rise of capitalism", Wisconsin Law Review, (1972), 720-753 at 735

17 Cf T W Bennett and N S Peart, "The Dualism of Marriage Laws in Africa" in Family Law - The Last Two Decades of the Twentieth Century, Juta 1983 at 145-169,
W C M Maqutu, "Current Problems and Conflicts in the Marriage Law of Lesotho", CILSA, VOL +" (1979), 176/187, and "Lesotho's African Marriage is not a 'Customary Union'", CILSA, Vol 16 (1983), 374-382,
Sebastian Poulter, Legal Dualism in Lesotho, Morija, Lesotho, 1979,
The contributions by W C M Maqutu and J Mugambwa in Southern Africa in need of law reform, 1981

18 cf the contributions by S E van der Merwe, G L Ndabandaba and J C Bekker in Southern Africa in need of law reform 1981,
the contributions by W C M Maqutu, R T Nhlapo and A J G M Sanders in The Individual under African Law 1982,
P N Takirambudde "External Law and Social Structure in an African context an essay about normative imposition and survival in Swaziland", CILSA, Vol 16 (1983), 209-228

19 cf C M G Himsworth "The Botswana Customary Law Act, 1969", JAL, Vol 16 (1972), p 4-18

20 Cap 08'01 of The Laws of Botswana

21 Cf the contributions by A N Allott and A J G M Sanders in Southern Africa in need of law reform 1981 Law reform in Lesotho, Botswana and Swaziland still is in its infant stage Of the three countries Botswana is by far the most active in this respect but its law reform machinery leaves much to be desired Cf Sanders "Botswana Matrimonial Causes Act - further proposals for divorce reform",Pula - Botswana Journal of African Studies, Vol 3, no 2, (Nov 1983), 14-28 at 17-18

22 Cf John L Comaroff and Simon Roberts "Marriage and extra-marital sexuality - the dialectics of legal change among the Kgatla", JAL, Vol 21 (1977), 97-123

23 Cf Sanders, "Comparative law, law reform and the recording of African customary law", De Jure (University of Pretoria), Vol 16 (1983), 321-329

24 Cf Trubek, op cit

25 "Some realism about the judicial process and positivism - a reply", South African Law Journal, Vol 98 (1981), 372-387 at 374

26 They have, however, removed from the general law the more overt signs of racism Cf Zweiger's case, High Court of Botswana, review case 522 of 1978 (12 October 1978) (unreported but summarized in CILSA, Vol 12 (1979), 98-99 and Vol 16 (1983), 354-355) For a commentary, see Barend van Niekerk "Mentioning the Unmentionable race as a factor in sentencing", South African Journal of Criminal Law and Criminology, Vol 3(1979) 151-158 Whereas discrimination has largely disappeared in respect of race, it still exists in respect of traditional beliefs cf T W Bennett and W M Scholz "Witchcraft a problem of fault and causation", CILSA, Vol 12 (1979), 288-301

THE RECEPTION AND DEVELOPMENT OF ROMAN-DUTCH LAW IN SOUTH AFRICA

Ellison Kahn

If one thinks of the Reception of Roman law, even in its most extended sense, in complexu, it meant the adoption of most of it in the German Empire in the fifteenth and sixteenth centuries as a subsidiary common law First came written law and local customs, second, general ordinances, third, general customary law, and only then Roman law This is not what happened historically in South Africa No matter One can use 'Reception' in an applied sense [1] It will be an extensively applied sense, for a true reception calls for a desire to receive by the recipients, whereas the original white settlers came to a land which, to them, was innocent of any legal system, they brought their law with them - a transplant, not a reception

When surgeon Jan (or Johan) van Riebeeck left the ship "Drommedaris" in 1652 and set foot on Cape soil, he brought with him, probably unknowingly, the Roman-Dutch law The indigenous inhabitants had their own law, but it was never recognized as the general law of the land Now follows a story the early part of which has been told before, [2] but which I must tell shortly again It is a story that has no end, to this extent, but only to this extent, it resembles the TV series "Dallas"

The government of the Cape was vested initially in the Commander (after 1691, Governor) and his Raad van Politie (Council of Policy), which also served as a Raad van Justitie (Council of Justice) From 1656 the Council sat as a specially composed Raad van Justitie Neither in criminal nor in civil cases were reasons for judgment given, and there was no question of the application of the principle stare decisis - the doctrine of judicial precedent was absent [3] Nor was there any Bynkershoek or Pauw who wrote reports for his private use and the unintended ultimate benefit of all

A number of the texts of the writers on the classical Roman-Dutch institutional writers were consulted, however Professor G G Visagie, one of the few to have penetrated the old Cape archives, mentions Grotius's Inleidinge, Simon van Leeuwen's Het Roomsch Hollandsch Recht, the Hollandsche Consultatien, Voet's Commentarius and Pandectas, and several lesser known works The Raad van Justitie, he concludes, had a fairly respectable library, which included a copy of the Corpus Iuris Civilis [4] Much digging has still to be done in the archives, however, and it is encouraging to know that Professor Visagie and several colleagues are wielding spades vigorously As there are 3,660 volumes of reports of the Raad van Justitie, and they are in a sad condition, one can only wish our colleagues good luck - and good-bye

The Articles of Capitulation of 16 September 1795, bringing about the First British Occupation that ended in 1803, allowed the colonists to "retain all the privileges which they now enjoy", and three weeks later General Craig re-established the Court of Justice, to "administer justice" in accordance with existing "laws, statutes and ordinances" Roman-Dutch law was also retained during the period of retrocession of the Cape to the Batavian Republic from 1803 to 1806 Commissioner-General De Mist, who had exclaimed 'Behold the sorry state into which justice and its administration has fallen', [5] also effected valuable reforms Then came the permanent Second British Occupation The Articles of Capitulation of 10 and 18 January 1806 stated that the inhabitants would retain the 'rights and privileges which they have enjoyed hitherto' Whether these vague words embraced the Roman-Dutch law has been a source of debate [6] In the final resort it does not matter in this regard, for the first rule in Campbell v Hall [7] applied that in lands acquired by conquest or cession from a civilized power the existing law remains operative unless and until altered by the new sovereign

The general peace settlement concluded by the Convention of London of 13 August 1814, under which Great Britain retained the Cape, brought no real change But, already the influence of English law had begun to be felt It was not merely that the Cape legal system had been cut off from its tap-root in The Netherlands, the tap-root had perished The classical Roman-Dutch had been given its quietus in the land of its birth in 1809 The conquerors of the Cape knew no Dutch They were rightly appalled by the judicial structure and the law of procedure, and started changing it In 1821 Henry Ellis, Deputy Colonial Secretary transmitted a damning report on the state of the administration of justice [8] The Earl of Bathurst, who in 1822 had written to Governor Lord Charles Somerset saying he was looking forward to the 'gradual assimilation of Colonial Law to British Jurisprudence', decided on an inquiry - our commissions of inquiry have a long lineage Who better to appoint than John Thomas Bigge, [9] former Chief Justice of Trinidad, who had conducted an exhaustive and impressive investigation into the laws and governmental structure of New South Wales from 1819 to 1821? Bigge was commissioned in January 1823, his junior commissioner being Major W M G Celebrooke [10] They were to report on conditions in Mauritius and Ceylon as well With the Cape they were, among other things, to have regard to 'the means of introducing a gradual assimilation to the forms and principles of English jurisprudence'

In their report on the judicial affairs of the Cape, dated 6 September 1826, [11] and addressed to Viscount Goderich, who had succeeded Bathurst, Bigge and Colebrooke recommended that legal procedure be based on that of England, that future enactments be framed in the spirit of English jurisprudence, and that gradually the English common law be adopted, with the reservation - understandable to those who have suffered the torture of learning the English law of property - that the Dutch law of property - 'so simple and efficient' - be left intact, provided that greater freedom of testation was permitted In particular, the commissioners reported 'Upon commercial matters the Dutch law is singularly deficient' - a statement that had considerable justification

Goderich's reaction was very cautious In his instructions of 5 August 1827 to Major-General Bourke, acting Governor, for the guidance of the Supreme Court about to be created by the Charter of Justice, he said that the British government was averse to any sudden change, though

> I am fully prepared to admit the propriety and importance of gradually assimilating the Law of the Colony to the Law of England" But, still, "it is obvious that the Roman-Dutch Law adequately provides for all the ordinary exigencies of life in every form of Society An entire change in all the Rules of Law respecting Property, Contracts, Wills and descents, must unavoidably induce extreme confusion and distress, nor is it very evident what compensatory advantage would be obtained

Roman-Dutch law as the basic substantive common law was saved As the Duke of Wellington said of the Battle of Waterloo 'It has been a damned nice thing - the nearest run thing you ever saw in your life '

Both the First and Second Charters of Justice of 1827 and 1832 respectively directed the Supreme Court of the Cape of Good Hope to exercise its jurisdiction according to 'the laws now in force within our said colony, and all such other laws as shall at any time hereafter be made' Finally, the 1857 Commission of Enquiry into the state of the law at the Cape, accurately describing the wood even if being a little hazy on the nature of the trees, concluded in its report of 10 November 1858 [12] 'the Roman-Dutch law, which consists of the Civil or Roman laws as modified by the laws passed by the legislature of Holland, and by the customs of that country, forms the great bulk of the law of the land '

Already the Cape legislature had put the seal of approval on the Roman-Dutch law when it passed Ordinance 12 of 1845 applicable to the then District of Natal, a dependency of the Cape

The ordinance provided that

> the system, code or body of law commonly called the Roman-Dutch law, as the same has been and is accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope, shall be established as the law, for the time being of the District of Natal

The Supreme Court Act 1896 [13] was essentially to the same effect

In the Transvaal the Thirty-three Articles, drawn up in 1844 and confirmed by the Volksraad in 1849, provided in article 31 that the "Hollandsche Wet", in so far as it did not conflict with legislation, should be the basis of the law, 'but only in a modified way, and in conformity with the customs of South Africa and for the benefit and welfare of the community' "Hollandsche Wet" was an inelegant expression, and a law of citations was passed in Bijlage (that is, Appendix, or, in south African - but not English - English, Annexure) I to the Grondwet (Constitution) of 19 September 1859, to clarify its meaning Where there was no applicable legislation, Van der Linden's Koopmans Handboek was to 'remain' ('blyft') the Law Book of the state, and where it was unclear or silent, Van Leeuwen's Het Roomsch Hollandsch Recht and Grotius's Inleiding were to be binding With all three books the general approach presented by article 31 of the three Articles was to be followed

In the Orange Free State the Grondwet of 1854 stated in article 57 that in the absence of legislation by the legislature, the Volksraad, Roman-Dutch law was to be the basic law ("Hoofdwet") Ordinance 9 of 1856 provided a gloss by Roman-Dutch law was meant that law only as found in the Cape 'at the time of the appointment of the English judges in the place of the previously existing Council of Justice' - that is 1 January 1828, the opening day of the first session of the Cape Supreme Court created by the First Charter of Justice

The Ordinance went on expressly to exclude new laws of Holland 'not based on, or in conflict with the old Roman-Dutch law, as expounded in the textbooks of Voet, Van Leeuwen, Grotius, De Papegaay, Merula, Lybrecht, Van der Linden, Van der Keessel, and the authorities cited by them' The provisions of the Ordinance were repealed in the Wetboek (Law Book) of 1891 of the Orange Free State

The courts of the Transvaal and Free State never took the numerus clausus of old authorities seriously

At one time the Free State seriously considered codification on the lines of the Dutch Burgerlijk Wetboek, but all it did in the end was to rearrange and consolidate its legislation in the Wetboek

After the annexation of the Transvaal and Free State at the conclusion of the Anglo-Boer War of 1899-1902 there was a suggestion of replacing Roman-Dutch law by English law, but it came to nothing [14] Indeed, section 17 of the Administration of Justice Proclamation 1902 [15] stated 'The Roman-Dutch law except in so far as it is modified by legislative enactments shall be the law of this Colony' In similar vein section 1 of the Laws Settlement and Interpretation Ordinance 1902 [16] of the Orange River Colony (the former Orange Free State) provided that 'the Roman-Dutch law shall be the common law of the Colony in so far as it has been introduced into, and is applicable to South Africa'

So ingrained was the Roman-Dutch law in the four colonies that on 31 May 1910 combined to form the Union of South Africa that the South Africa Act 1909, which brought about unification, made no mention of the legal system in the state, all that section 135 did was to preserve existing legislation until it was changed by a competent law-making body

'Roman-Dutch law' is not an accurate translation of Roomsch Hollandsch Recht In fact, it was the law of Holland that was taken over There was no law of The Netherlands as a whole

True, principles of the common law were to a large extent the same throughout the seven provinces of the misnamed Republic of the United Provinces But as each province was a republic on its own - the Republic at most was a kind of confederation - there were many variations in legal rules from province to province The colonies were under the control of the Staten-Generaal (Estates-General), the chief organ of the United Republic The Cape itself was a possession of the Dutch East India Company, its charter having been conferred by the Staten-Generaal The province of Holland predominated in the running of the affairs of the company So it came about that the law of Holland, rather than, say, the law of Utrecht or Overijssel, became the basic common law of the Cape and ultimately southern Africa However, as Sir Henry de Villiers, Chief Justice of the Cape, said in 1891, [17] 'the first settlers carried with them only those laws which were applicable to the circumstances of this country'

Suffice it to say , the only enactment that left a lasting impression on the substantive law was the octrooi (statute) of the Staten-Generaal of 10 January 1661 dealing with intestate succession [18]

When the Cape came under British rule, inevitably the law of the conqueror started filtering in What was his law? The answer was English law Sir Frederick Pollock once mused on why Whitehall assumed that it was automatic that always English and never Scots law crossed the seas to British colonies, possibly he may have thought particularly of Nova Scotia The only answer may possibly be that Scots law is not even a mixed legal system - it is English law masquerading as a different law That is what a very eminent professor of comparative law once told me Tell it not in Scotland, publish it not in the streets of Edinburgh!

Professor H R Hahlo has narrated what happened in his inimitable way

> The process by which English doctrines and principles infiltrated into the law of the Cape resembles in many respects the reception of Roman law on the Continent during the fifteenth and sixteenth centuries Some English institutions marched into our law openly along the highway of legislative enactment, to the sound of the brass bands of royal commissions and public discussion Others slipped into it quietly and unobtrusively along side-roads and by-paths [19]

Think of the situation at the time The British had taken over after half a century or so of distant and sometimes acrimonious relations of the Cape with The Netherlands, with the administration of justice at a low ebb British rule coincided with an upsurge in trade Had the Cape been restored to the Dutch in 1814, as had many of the Dutch colonies, no doubt the motherland would have ensured that the legal system kept pace with changing circumstances - only it would almost certainly have been a completely different legal system Under British rule, strong though the attachment of the inhabitants was to the local legal system, considerable anglicization was inevitable The constitution of the country was framed by Britain The crude and cruel system of criminal procedure was refashioned in 1828 on the lines of the reformed English law Civil procedure was changed considerably to accord with that of England, though much of the Roman-Dutch law, such as the rules governing jurisdiction and provisional sentence, were allowed to remain The English law of evidence was taken over virtually en bloc in 1830 Other legislative measures of importance reflected the need to keep the law of the Cape abreast of the times Particularly was this so with mercantile law, where, fortunately, English law had been much influenced by the jus mercatorum of the Continent The Merchant Shipping Act 1855 was based on English law The Cape Companies Act of 1861 started the never-ending process of modelling company legislation on that of England

In 1893 the Cape legislature followed closely the famous English Bills of Exchange Act 1882, drafted by Chalmers, though Natal had preceded the Cape by six years The history of the law of immaterial property - patents, trade marks and copyright - tells a similar story The law of insolvency was put on a statutory basis in 1843, being a nice mixture of English and Roman-Dutch legal principles

In the area of succession the lawmaker accepted some of the underlying philosophy and a number of the concepts and rules of English law In 1833 the English system of executorship took the place of the Roman-Dutch system of universal succession of heirs, 1845 saw the introduction of the informal and simple English 'underhand' will, and in 1873 and 1874 the Roman-Dutch rights of succession of children and close relations were ended by the legislature infected with a bad dose of the disease of freedom of testation, a disease which it has proved impossible to eradicate ever since

The lawmaker worked in three ways The first was to pass a statute modelled closely on an English statute, as with, for example, negotiable instruments, companies and immaterial property The second was simply to say that our law was the same as English law, as with evidence and insurance The third was to pass an enactment introducing, sometimes in a very modified way, the legal rules of the 'mother country' thus, for instance, with criminal procedure and the administration of deceased estates

In Natal a similar process took place in the nineteenth century Being the most English in character and sentiments of the colonies and states of southern Africa, in some fields she went further, for example, appointing a King's Proctor in divorce cases

Odd though it may appear at first blush, the independent republics of the Transvaal and Free State, where the official language was Dutch, 'borrowed' considerably from the Cape enactments The Orange Free State followed the Cape more closely than the Transvaal, but each went its own way in a number of respects For instance, the Transvaal did not abolish the legitimate portion and other limitations on the freedom of testation - this unhappy step had to await the opening of the twentieth century [20]

But it was not only via the open avenue of legislation that English law walked in It also sidled in to certain parts of the law through judments of the courts and the practice of lawyers No one acted with bad intentions, everyone meant for the best The process of osmosis was a natural and inevitable one

The legal profession was initially weak There was little by way of proper academic training or a tradition of scholarship that would have helped lead to the smooth adaptation of the Roman-Dutch to the new dispensation, one in which the British rulers understandably tended to wish to replace parts of an alien Continental civil legal system with something they felt more comfortable and at home with So many of the early judges, who hailed from and were trained in the law of England or Scotland, had little if any systematic training in Roman-Dutch law And taught law, as Maitland said, is tough law The members of the bench could possibly read Latin with fair ease, and two-thirds of the old law books were in that language, though the readers would have been happier with English translations, of which there were very few until late in the nineteenth century But, except for two or three, none of the judges could read Dutch, and translations into English of books in that language emerged very slowly In any event, frequently the 'musty manuals of the Middle Ages', to use the expression coined by a judge of appeal not so many years ago, were hard to come by By contrast, English was the official language of the Cape and Natal courts, works on English law, reports of the decisions of English courts and precedents of English legal documents were pretty easily available, the terminology of English law found expression in a number of important statutes, and this terminology had a generally pervasive influence Furthermore, in the Cape and to some extent in the Transvaal and Free State, many of the leading advocates had had their legal training in England

The attraction of English law in Natal was, if anything, even greater One might have expected things to be different in the independent Transvaal and Orange Free State, once professionally qualified judges were appointed in the eighteen-seventies But the influence of Cape legal decisions was too great, English law spread mediately through them

The remarkable happening was not that so much of English law was absorbed into the South African legal system but that so great a part of Roman-Dutch remained untouched and unsullied

It was not just a matter of chance that, with a few exceptions, English law made its deepest impression where the classical Roman-Dutch law was silent, or least developed, or most out of tune with modern times, or uncertain or obscure Particularly striking was the impact of English legal rules on South African commercial law in the widest sense, even those professedly most appreciative of our legal inheritance have conceded that this impact was in general for the good Least affected was private law, and after that the general principles of criminal law Some of the important statutes, such as the legislation on company law, hardly affected Roman-Dutch law, for it was virtually non-existent The legal rules fashioned by the courts did not often introduce a malignant growth in the rounded majestic body of the Roman-Dutch legal system

What I have said may be illustrated with a few examples English law had a considerable influence on the enunciation by the judiciary of the rules of domicile This was understandable, for, paradoxically, England, a common-law country, was wedded to the civil-law principles of domicile, whereas the civil-law countries of the Continent abandoned their loyalty to them While there is the danger of too close an identification with the rigorous attitude of English law to animus manendi and animus revertendi, welcome signs appear of judicial realization of the danger Our courts have turned, with beneficial results, to English law for guidance on choice of law in the conflict of laws

The law of agency has been aided from the same source This sentiment, many believed, could have been expressed of the law of nuisance, until the Appellate Division in 1962 in Regal v African Superstate (Pty) Ltd [21] declared that the English law of nuisance had not taken root in South Africa, South African law, it held, was 'burereg' (neighbour law), however unfortunate it was that Roman and Roman-Dutch law said so little about it, our courts would simply have to develop it on sound basic principles - something, I should say, they have not hitherto been afforded an opportunity of doing, resulting in a legal vacuum in which legal advisers float helplessly like abandoned astronauts in space In the law of contract assistance has been derived from English law in many areas, among them formation, discharge through acceptance of anticipatory repudiation, remedies for breach and agreements in restraint of trade Certain Common-Law specific crimes were considerably affected by curial practice With some of them there was substantial conditioning by English law thus, for example, rape (it would be an ill day were we to return to the Roman-Dutch requirement of lack of consent of the woman flowing from force or threat of it), assault, contempt of court, perjury, robbery, public indecency, and theft by false pretences With others, there was little influence of English law, but considerable work by the judges in bringing order out of the chaos of the writings on the Roman-Dutch law thus, for example, abortion, crimen injuria, treason, bribery, incest and fraud

It is striking how loath to change course have been the Appellate Division and even its members most avowedly devoted to the restoration of the purity of the Roman-Dutch ancestry of the law It seems clear that curial practice of long life will be maintained, unless the Appellate Division considers that it conflicts with general principles of criminal liability or is inequitable or irrational [22]

English law had its impact on aspects of the law of delict too, notably with liability for negligence and the defences in defamation, and in all but a small portion of constitutional and administrative law

The least influence exercised by English law was in areas where the old law was clearly developed, systematic and consonant with the spirit, moral beliefs and sense of justice of nineteenth-century South Africa Not surprisingly one finds that these areas were notably the law of property, succession, husband and wife, family relations, the specific contracts (in particular sale and lease, but particularly not insurance, where Roman-Dutch law was very undeveloped, and recourse has always been had to Anglo-American law), quasi-contract (unjustified enrichment and negotiorum gestio

In a number of these areas of the law the inheritance of the systematic Roman law system acted as a constant source of supply for blood transfusions

Many great nineteenth-century judges obeyed the injunction 'petere fontes' and 'aided in the preservation of the old law judges such as Menzies, E B Watermeyer, Henry de Villiers, William Solomon, J G Kotze and Henry Connor, their honoured ranks were joined early this century by men of the calibre of James Rose Innes and J W Wessels They were assisted by the submissions of learned counsel Nevertheless, some judges were concerned at the absence of a dyke to hold back the ceaseless wash of the alien English common law Indeed, as late as the nineteen-twenties Mr Justice Wessels vainly urged codification as a protective wall [23] No one today pleads for a code for this reason

Doubtless the foreign waters did at times invade and spoil the fair fields of the Roman-Dutch law Most often they were ultimately expelled Especially was this so after 1910, when the Appellate Division of the Supreme Court was established Within a year it was pronouncing the existence of only one common law in South Africa and its duty to secure harmony in the true expression of that law [24]

By then the general rules of the doctrine of judicial precedent had been settled, rules far more rigorous than those that had obtained in The Netherlands of the eighteenth century The principle stare decisis was accepted A judge had to follow a higher court and also his own court when it was composed of two or more judges A court had to comply with its previous ruling unless satisfied it was clearly wrong This attitude was said to be warranted by expediency and equity in giving expression to justifiable expectations But as the ratio decidendi of a decision is declaratory in effect, not prospective as legislation generally is, the principle stare decisis had the defect of its quality on the one hand a judgment was absolutely binding on lower and smaller courts, so there could be no deviation from the correct path, on the other hand, though the court that rendered the judgment could depart from it, it would frequently be hesitant to do so Never has that been a suggestion - except on a matter of court practice - by the Appellate Division or a provincial or local division of the Supreme Court, that the operation of a decision is to be prospective only This solution, known in certain jurisdictions, is admittedly beset with problems, but it is worth considering, particularly by those wishing to give the judiciary a freer hand in moulding South African common law

This constraint notwithstanding, the courts, particularly the Appellate Division, pumped out much of the foreign water it considered to be impure A few illustrations will suffice In 1919 out went two polluted streams the one from the Cape, that the justa causa needed for a contract was more or less the equivalent of valuable consideration of English law, and the other, flowing from many sources, that guidance should be sought from English rules on the discharge of contract by supervening impossibility nay - civil-law principles reigned alone [25] Two years after it had expelled the English law of nuisance, in 1964 the Appellate Division expelled the English law of estoppel, holding it had been wrong in considering that it was the same as the South African law Again, a lacuna suddenly emerged

Thus it could prove possible for the judiciary to eliminate the impurity and to give expression to the dictum of Mr Justice Stratford, [26] 'if the decisions had disregarded fundamental principles of our law, we might have to reassert those principles even at the cost of reversing judgments of long standing' But sometimes it has been impossible or considered undesirable for the judiciary to do this, and the remedy, if one is considered to be desirable, has to be furnished by the legislature A prime example is the confession by our highest tribunal in 1953 [27] that it could not restore the Roman-Dutch law on contractual penalties that had been supplanted by English law through judgments of the courts of the Cape and the Privy Council That brilliant academic, Professor J C de Wet, was asked to draft remedial legislation The product, the Conventional Penalties Act 1962, [28] was based on Roman-Dutch principles, but showed the impress of modern Civil Law, in particular the German Civil Code and the Swiss Federal Code of Obligations It is one of the rare instances of the influence of modern civil law systems Another instance that should be mentioned was not the result of judicial decision but of earlier enactments The legislation on prescription had for long been an admixture of the 'weak' extinctive prescription of English law (limitation of actions) and the Roman-Dutch 'strong' prescription that wipes out a debt The Prescription Act of 1969, [29] another product of Professor De Wet's, provides for strong extinctive prescription, going back fundamentally to Roman-Dutch principle but also calling in aid from certain modern civil-law systems for some of the detailed rules

No one denies that in the absence of legislation, binding precedent, modern custom (including trade usage) or curial practice, when a general rule is involved in a case recourse should first be had to Roman-Dutch authorities The difficulty of the courts lies in deciding when a legal rule that came as a stranger has become naturalized in South African law

The Appellate Division faced it when some thirteen years ago it had to decide whether there could be agency for an undisclosed principal [30] It found that apparently there could not in Roman-Dutch law Nevertheless, our courts in decisions going back to 1869 had said there could be, and in two cases the Appellate Division itself had accepted the rule without question The court concluded that, whatever its inconsistency with basic principles of contract, the rule had not produced inequitable results, and to disown it now would foil legitimate expectations Therefore, it had to be accepted as part of South African law, but because of its doubtful antecedents, it would be confined to one undisclosed principal, and no regard could be had to Anglo-American authority in considering whether it extended to two or more undisclosed principals

How the judiciary should approach the common law of South Africa has been the subject of a fascinating and often acrimonious debate among legal academics over the years [31] What sources may legitimately be tapped? How much regard should be had to logical consistency? How far are the courts able to jettison an ancient rule because it does not accord with modern conditions or moral beliefs?

Four main schools have been identified The pragmatists say that the received English law has become an integral part of the South African legal system In future, however, the judges in developing the law should favour no particular foreign legal system but try to give expression to the needs of society and justice The antiquarians contend that, as far as can be, there should be a return to the pure, classical eighteenth-century Roman-Dutch law, undefiled even by the works of the nineteenth-century Pandektists The purists, while acknowledging that the Roman-Dutch is basic, agree that it must be adapted to modern conditions, but assistance should be sought not from English common law, in their eyes casuistic and often antiquated, but from Continental legal systems, with their systematic civil-law base, historically connected with the Roman-Dutch legal system

Furthermore, the object should be the creation of a South African legal system that is logically coherent This aim has had two results The first is the critical evaluation of the consistency of the views of the old authorities If they do not stand up to the test of reason, they should not be followed [32] The second is that occasionally individual justice and social policy are sacrificed on the altar of symmetry Finally, those given the derogatory name of 'pollutionists' were ready to find guidance primarily in the decisions of the courts of England

Nowadays there is no avowed pollutionist Those belonging to the other three schools do not label themselves, but are labelled by their critics Some scholars cannot be identified with any one school

As for the judges, while it can be said that there was a tendency towards the pragmatic approach until the 1950s, it is impossible to be dogmatic on their attitude since Indeed, it is difficult to find even a particular judge taking a consistent approach He may lean in favour of antiquarianism or purism and even make statements in favour of it, but, as will already be apparent, so much depends on the circumstances of the case, and on his attitude to the doctrine of judicial precedent One acute analyst [33] has labelled chapters of his work 'Criminal Law the Triumph of Purism', 'The Law of Delict The Antiquarian Allure', 'Contract and Quasi-contract Pragmatism Secure' But these titles, though they contain elements of truth, are overstatements - probably deliberately so The author rightly concludes that in many branches of law the influence of English law has been benign, that the tide of antiquarianism, so often counter-productive in producing legal uncertainty, reached its neap in the sixties and has receded rapidly, that English decisions are still found very helpful, and reliance on the old authorities remains comparatively rare, but that purism has come into its own, particularly in criminal law, though by no means always at the expense of pragmatism

The eclecticism of the judiciary in the last thirty years has already become apparent, but I should like to illustrate it further

Take the meaning of animus injuriandi in the actio injuriarum, for long a matter of controversy, though the controversy was virtually confined to actions for defamation For many years after 1915 the courts turned their backs on this essential element of the Roman-Dutch law, leading Professor R G McKerron to conclude that it was a hollow fiction [34] In the early sixties the Appellate Division insisted that it was alive and well, but the initial decisions gave the appearance of antiquarianism rampant, shed of policy and equity, and left one grasping for the law in the dusk, if not, indeed, in the dark [35] In a further series of decisions, starting in 1967, the highest court caused the sun to shine ever more brightly Aspects of English law have in reality been adopted where they have been considered compatible with Roman-Dutch principles - take the acceptance of the traditional defences and the imposition of strict liability on the press and other news media [36] There has been a switch of approach by the Appellate Division to social needs and policy, though possibly at some cost to freedom of speech [37] The court has shown a remarkable capacity for creativeness in this branch of the law Truly, modern Roman-Dutch law is not beyond the age of child-bearing Academic writers, as here, frequently are found of assistance in the sometimes prolonged process of insemination

Occasionally the courts, in their attempts to keep the received Roman-Dutch law in full flower, will expound a legal rule by extending a trend already discernible in the eighteenth-century legal system of The Netherlands A noteworthy example is the virtual resurrection by the Appellate Division in 1962 of the doctrine of causae continentia (continuity or connection of cause) in the law of civil jurisdiction and its adaptation to present-day jurisdictional rules [38]

In enunciating general principles of criminal law the Appellate Division over the past three decades has effected radical changes The law is not what I was taught it to be over forty years ago The new dispensation appears to be the product of several aims One is to give expression to the fundamental principle of Roman-Dutch law, actus non facit reum nisi mens sit rea - the subjective test for criminal intention Another is to produce symmetry and consistency in the legal rules, an aim which has resulted in the rejection of some importations from English law and an increasing (and occasionally uncritical) absorption of doctrines and concepts of German criminal law (not always up to date, unfortunately) a result of persuasive writings by academic lawyers A third aim has been to be fair to the accused Look what has happened! The accused must have had the requisite mens rea - the unlawful mental state - for the very crime charged - and in particular dolus intention for murder and culpa (negligence) for culpable homicide (though here the test remains an objective one, for all the protests of Professor J C de Wet) The doctrine of versari in re illicita has been thrown out of the window no longer is he who committed an unlawful act criminally liable for all the consequences whatever his mental state [39] Logical progression has caused the Appellate Division to hold that there is no exception where the accused committed the act when in a state of self-induced intoxication or subjection to some other drug, not deliberately caused in order to commit the crime [40] The fear of creating a 'drunkard's charter' led the court obliquely to suggest legislation to penalize voluntary drunkenness or subjection to another drug that gives rise to an unlawful deed One may be excused for thinking that the inexorable dictates of logic have driven the courts to a bleak land, from which they seek salvation The legislature of Bophuthatswana is considering a Bill to put an end to this dismal charter,[41] as several countries have done, and the South African Law Commission is studying the question

Finally, the maxim that ignorance of law is no excuse has been subjected to surgery by our highest court, aided by recommendation of a number of writers, surgery that has left it a paraplegic such ignorance is treated on the same footing as mistake of fact [42] Is the wrongdoer not being treated too favourably? Would it not have been better for the court to rule that mistake of law will not negate liability, including liability for crimes requiring dolus, except where it is reasonable? [43]

This purist approach is found elsewhere too More striking is the decision by the Appellate Division in 1980[44] declaring erroneous the general belief that a lessor of premises, where there was no cancellation clause, had no right to rescind the lease unless the lessee was two years in arrears with the payment of rent An exhaustive analysis of the civil law led the court to conclude that the Roman-Dutch writers who had supported the supposed rule had been mistaken as to the Roman law The rule was a superfluous historical anachronism that should be excised from modern law All that is required is reasonable notice of intention to cancel after rent is in arrear

On the other hand, there are judgments that dredge from the old books a rule overlooked by judges and jurists, usually because it was taken to have been abrogated by disuse The causae continentia rule is one example Another is the decision of the Appellate Division ten years ago that if a creditor fraudulently cedes his claim to defeat the contra claim of his debtor, his machination will be ineffectual [45] The decision produces an equitable situation In the past judges had urged that it be created by legislation On this occasion, as with strict liability of the press for defamation, the judiciary found itself able to provide the remedy

Indeed, of recent years, the law reports have been shot with decisions that have changed the law or made new law- decisions that display a pragmatic approach In 1973 the Appellate Division extended the aedilitian remedies for latent defects in the merx to incorporeals, such as shares "the current climate of opinion", it said, "is propitious and receptive to such extension by the courts " [46]

In 1945 the court held that modern South African law had moved away from the narrow approach of classical Roman-Dutch law to the question whether there can be theft of an incorporeal [47] In 1979 the court stated that the 'birthpangs' of a right of action in delict to recover compensation for pure financial loss caused by negligent misstatement had been endured long enough, the time had come to bring the child into the world, even by "Caesarian section" [48]

There is so much more to say but so little time in which to say it Let me end with a few general remarks

The courts are in a very creative mood In a remarkable decision a few years ago [49] the Appellate Division went back even to Roman law, and, it seems, held that every contract is subject to good faith implied by law, with a scope that varies with the times It was held that the courts have a wide jurisdiction to read a term into a contract where justice so requires The law of contract may be entering a new age And not only as a result of this decision The highest court has expressed reservations about the correctness of the expedition theory of contracts through the post [50] Who knows whether it may conclude that accepted rules relating to price tags, revocation of an offer and yet other aspects of agreement need recasting? That it would hold an offer of reward to be anything other than an ordinary offer subject to the ordinary rules, and that it would reconsider the existence of the doctrine of undue influence seems very doubtful, however [51] Other interesting prospects of advances or changes in the common law are in the air, such as products liability [52] and the right to the advertising image [53]

The attitude of our courts to foreign law is instructive Mr Justice L C Steyn in 1964, when he was Chief Justice, made the telling remark that South African courts are never bound by English law But reference to or consideration of the principles of the law of another country with a related legal system can be a particularly valuable means of obtaining clarity on the best application, adaptation and development of our own principles [54]

This fascinating dictum - and there are other dicta in the same vein - is suggestive of the benefit to be gained by tapping modern Continental legal systems, with their roots, like those of South African law, embedded in the historical soil of Roman law In particular, some writers contend, is this so with private law and criminal law Up to the middle of this century judges very rarely looked to the laws of European countries for guidance In the last three decades or so, however, largely mediately through views expressed in legal treatises and articles, some of the solutions of Continental systems have found their way into South African law Certain judges of appeal nowadays do tend to mention at least relevant Dutch and German legal writings Generally, a review of recent decisions has shown the continued predominance of reference to the Anglo-American system of private law [55] And not even those judges keenest on keeping faith with our inherited legal system have questioned the long-established practice of regarding the decisions of English courts on the interpretation of a statute as of great persuasive force in the interpretation of a South African statute modelled on it unless, naturally, the English decisions are based on legal principles alien to South African law

The common law of South Africa is in the midst of an exciting period of development and change through decisions of the courts There is no doubt that this process has been greatly facilitated by legal literature, notably that emanating from academics Since the last war there has been a remarkable increase in the number of teachers of law and the quality of their writings

A survey of the case law of South Africa over the last thirty years makes me wonder whether the celebrated dictum of Justice Oliver Wendell Holmes would not be an understatement were it applied to the tip of Africa 'I recognize without hesitation that judges do and must legislate, but they do so only interstitially, they are confined from molar to molecular motions ' [56]

FOOTNOTES

1 The eminent jurist J C de Wet appears to have no qualms in the use of "reception", see his article cited in note 2 below Hosten, note 2 below, at 193, speaks of 'this"reception"' - using quotation marks

2 See, for example, H R Hahlo and Ellison Kahn The Union of South africa the Development of its Laws and Constitution (1960) ch 2 and The South African Legal System and its Background (1968) Pt II, especially ch 17, Ellison Kahn 'The Role of Doctrine and Judicial Decisions in South African Law' in Joseph Dainow (ed), The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions (1974) ch X, "Law and Criminal Procedure in South Africa" in James Midgley, Jan H Steyn and Roland Graser (eds), Crime and Punishment in South Africa (1975) 99, and "The Development of South African Substantive Law" in H Mellet, Susan Scott and Paul van Warmelo (eds) Our Legal Heritage (1982 117, J C de Wet "Die Resepsie van die Romeins-Hollandse Reg in Suid-Afrika" THRHR Vol 21 (1958), and "Die Romeins-Hollandse Reg in Suid-Afrika na 1806" THRHR, Vol 21, 239, E M Burchell and P M A Hunt South African Criminal Law and Procedure I, General Principles of Criminal Law (2nd ed) (1983) 28ff, W H Hosten 'The Permanence of Roman Law Concepts in South African Law' CILSA Vol 2 (1969), 192

3 See G G Visagie Regspleging en reg aan die Kaap van 1652 tot 1806, 1969, 69ff, Ellison Kahn 'The Rules of Precedent Applied in South African Courts', SALJ, Vol 84 (1967), 44

4 On the foregoing see Visagie, 70ff

5 See The Memorandum of Commissary J A de Mist (Van Riebeeck) Society Publications, No 3 (1920), Proclamation of De Mist of 1 March 1803

6 For example, in R v Harrison and Dryburgh 1922 AD 320 at 330, the answer given was "Yes", but De Wet, loc cit, no 2 p 239, finds this unconvincing Again, in Union Government v Estate Whittaker 1916 AD 194 at 203, the Appellate Division, while holding that the retention of the Roman-Dutch system of law and prerogative rules relating to property was intended, ruled that the Crown did not forego its prerogative rights in English law in broad constitutional issues Critics have attacked the latter conclusion rights and privileges under the Roman-Dutch law were meant to be protected, such as the right to sue the state (government) See, for instance, Marinus Wiechers, Verloren van Themaat Staatsreg 3rd ed (1891), 53 ff

7 (1774) 1 Cowp 204 (98 ER 1045)

8 G M Theal Records of the Cape Colony, 36 vols (1897-1905) XIV 183ff (Theal)

9 On Bigge (1780-1843), see A F Hattersley in Dictionary of South African Biography 1 (1968) 74

10 On Colebrooke (1787-1870) and his distinguished later career, see M Arkin, op cit, 175

11 Theal XVII 333ff, 342ff See also the instructive article by C Graham Botha "The Early Influence of the English Law upon the Roman-Dutch Law in South Africa", SALJ, Vol 40 (1923), 396, where authority for several of the statements that follow can be found

12 Published in the preface to Statute Law of the Cape of Good Hope (1862) See especially at p vi

13 Act 39 of 1896 s 21

14 See 'Vindex', SALJ, Vol 18 (1901), 153

15 Proc 14 of 1902 (T)

16 Ord 3 of 1902 (O)

17 Seaville v Colley (1891) 9 SC 39 at 42

18 See Green v Fitzgerald 1914 AD 88 at 99-100

19 In the Union of South Africa The Development of its Laws and Constitution, op cit, note 2 at 18

20 The Administration of Estates Proc 28 of 1902 (T) ss 126-8

21 1963 (1) SA 102 (A) See A S Mathews and J R L Milton 'An English Backlash?', SALJ, Vol 82 (1965) 31

22 See the impressive analysis in Burchell and Hunt, op cit, note 1 at 43ff

23 See SALJ, Vol 37 (1920), 265, especially at 282-4, and Vol 45 (1928) 9

24 Webster v Ellison 1911 AD 73 at 82, 92-3, 98-9

25 Conradie v Rossouw 1919 AD 279, Peters, Flamman & Co v Kokstad Municipality 1919 Ad 427

26 Stratford A C J in Dukes v Marthinusen 1937 AD 12 at 23

27 Tobacco Manufacturers' Committee v Jacob Green & Sons 1953 (3) SA 480 (A) Another example is afforded by the decision in Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha 1964 (3) SA 561 (A), in which the Appellate Division felt constrained by previous judicial decisions to give a restricted meaning to the passage in Pothier Vente para 214 on the liability of a merchant in the merx The result was a rule inadequate in modern times for the protection of the buyer The Appellate Division virtually conceded this but contented itself that it was a vague suggestion in favour of legislation

28 Act 15 of 1962

29 Act 68 of 1969

30 Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Ko-operasie Bpk 1972 (1) SA 761 (A)

31 Apart from the literature mentioned in note 2, reference may be had in particular to P Q R Boberg "Oak Tree or Acorn? - Conflicting Approaches to our Law of Delict", SALJ, Vol 83 (1966) 150, Edwin Cameron "L C Steyn's Impact upon South African Law", SALJ, Vol 99 (1982) 38, C F Forsyth The Appellate Division of the Supreme Court of South Africa from 1950 - An Historical Study of Judicial Choice (unpublished PhD thesis University of Cambridge 1984) ch VI, A S Mathews and J R L Milton "The Permanence of the Temporary", SALJ, Vol 83 (1966) 16, G A Mulligan "Bellum Juridicum (3) Purists, Pollutionists and Pragmatists", SALJ, Vol 69 (1952) 25, "Proculus' 'Bellum Juridicum' - Two Approaches to South African Law", SALJ, Vol 68 (1951) 306, 'Proculus Redivivus' 'South African Law at the Crossroads or What is our Common Law?', SALJ, Vol 82 (1965) 17, L C Steyn "Regsbank en Regsfakulteit", THRHR, Vol 30 (1967) 101, Adrienne van Blerk "The Irony of Labels" SALJ, Vol 99 (1982) 365

32 Forsyth, op cit, note 31

34 'Fact and Fiction in the Law of Defamation', SALJ, Vol 48 (1931) 154 at 172

35 Jordaan v Van Biljon 1962 (1) SA 286 (A), Craig v Voortrekker Pers Bpk 1963 (1) SA 149 (A), Nydoo v Vengtas 1965 (1) SA 1 (A) Confusion abounded, for instance, about the nature of the traditional defences

36 Pakendorf and andere v De Flamingh 1982 (3) SA 146 (A) The media can still rely on a defence relating to the element of unlawfulness, such as consent, privilege, fair comment, and truth and public benefit

37 See Coenraad Visser in SALJ, Vol 100 (1983) 3

38 In Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd (1962 (4) SA 326 (A)

39 S v Bernardus 1965 (3) SA 287 (A)

40 S v Chretien 1981 (1) SA 1097 (A)

41 Sunday Times, 13 May 1984 The legislation has now been passed, see The Criminal Law Amendment Act, No 14 of 1984 B

42 S v De Blom 1977 (3) SA 513 (A)

43 See R C Whiting in SALJ, Vol 95 (1978) 1, especially at 6ff

44 In Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk 1980 (4) SA 775 (A)

45 LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A)

46 Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (A) at 418, per Holmes, J A

47 S v Graham 1975 (3) SA 569 (A) at 576, per Holmes, J A

48 Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 831, per Rumpff, C J Extended to a negligent misrepresentation inducing a contract by Kern Trust (Edms) Bpk v Hurter 1981 (3) SA 607 (C)

49 Tuckers Land and Development Corporation v Hovis 1980 (2) SA 645 (A) In a striking judgment, the Appellate Division in Braun v Blann and Botha NNO 1984 (2) SA 850 (A) held that it is wrong, both historically and jurisprudentially, to identify the trust with the fideicommissum and to equate a trustee with a fiduciary, further it being a function of our law to keep pace with the requirements of changing conditions in our society, the court would accept as a salutary development of our law of trusts the validity of conferring our common-law powers of appointment on trustees to select income or capital beneficiaries, or both, from a designated group of persons

50 A to Z Bazaars (Pty) Ltyd v Minister of Agriculture 1975 (3) SA 468 (A) at 476

51 Preller v Jordaan 1956 (1) SA 483 (A), followed without criticism in Patel v Grobbelaar 1974 (1) SA 532 (A)

52 See Schalk van der Merwe and Frederick de Jager "Products Liability A Recent Unreported Case", SALJ , Vol 97 (1980) 83

53 See the article by that name by Frederick Mostert, SALJ, Vol 99 (1902), 413

54 Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) at 410-11 The judgment was concurred in by three of the four other judges of appeal who sat in the case

55 See -- Annual Survey of South African Law, (1979), pp 538-9

56 Southern Pacific Co v Jensen 244 US 205 at 221 (1917)

ROMAN-DUTCH LAW IN SOUTH AFRICA
ASPECTS OF THE RECEPTION-PROCESS

Reinhard Zimmermann

Roman Law and classical Roman-Dutch Law are, for a lawyer from a European civil law jurisdiction, subjects for the legal historian In South Africa they still provide the basis for the present legal system [1] The continuity of the ius commune has not been disturbed by codificatory interference [2] That has advantages and disadvantages One of the advantages lies in the fact that every private lawyer in South Africa has to be (or should in any event be) much better acquainted with Roman Law and "Privatrechtsgeschichte der Neuzeit" [3] than his European counterpart, as a historical evaluation forms an integral and indispensable part of research in this field One of the concomitant disadvantages appears to be a lack of interest in legal history per se Few chairs in South African law faculties are occupied by "Romanists" in the European sense of the word, and legal history has not really established itself as an autonomous subject (it didn't in Germany either, until the Corpus Juris Civilis abdicated on the 1 1 1900 as a source of modern law) But not only is there little enthusiasm for Roman Law as the historical legal system of the Romans [4] South African legal history has been largely neglected as well One can mention Visagie's "Regspleging en Reg aan die Kaap van 1652 tot 1806" and, more recently, Spiller's thesis [5] about the early history of the Natal Supreme Court in this context Also, the project "175 Jaar Kaapse Regspraak" deserves attention [6] But these are rather exceptions [7] Detailed investigations into the development of Roman-Dutch law in South Africa are largely wanting That is to be regretted for a variety of reasons, one of them being that one could learn much about reception processes from the South African experience The literature about the reception of Roman Law in Europe - "Reception", as Hahlo and Kahn [8] put it - is redundant [9] Also, one would not be at a

loss to find some works dealing with the reception of the great European codes to other countries [10] But the history of Roman-Dutch law at the Cape of Good Hope is only rarely mentioned in this context, and has not yet fully and comprehensively been explored

Under these circumstances, it cannot be my aim to give a comprehensive analysis of the reception of Roman-Dutch law in South Africa All that can be done, at this stage, is to draw attention to some aspects of the reception process, which might be worth considering when generally analysing reception processes The subsequent material is based on research for four articles written during the past year and which are intended for publication in the near future

At the outset it seems appropriate to remember that sensu stricto Roman-Dutch law has not really been received at the Cape at least not if, following Max Rheinstein, [11] we see the characteristic trait of a "reception" in the consciousness and voluntariness of the process on the part of the recipient In our context there was no recipient The Dutch settlers came to a country which they occupied and where they established their new communities as if it were entirely uninhabited They took with them their law and transplanted it to their new surroundings Even as a question, it would not have occured to them why they should have lived under a different law at the Cape than at home It is obvious that such transplantation is a much simpler, less sophisticated process than a reception Why the transfer of a legal system took place, by whom and in which way it was effected are crucial questions when we discuss the reception of Roman Law in Europe The transplantation of Roman-Dutch Law to the Cape mainly throws up two different problems What exactly was transplanted? and secondly What happened to the transplant once its links to the mother-system had been severed?

As far as the first question is concerned, it is generally accepted that "Romeins-Hollandse" reg, (i e the law of the province of Holland) had become applicable at the Cape [12]

In this context, reference is made to a letter of the Heeren Zeventeen, the Council of the VOC, dating from the 4 3 1621[13] The VOC was subject to the authority of the "Staten Generaal", i e to an organ of all seven provinces comprising the Republiek der Vereenigde Nederlanden However, the common law of the United Netherlands could not be adopted for the territories of the VOC for the simple reason that there was no such thing The legal systems of the seven province differed not unsubstantially from each other Roman Law had been received - from province to province - in various ways and to various degrees Thus a choice had to be made That it fell in favour of Roman-Dutch law is mainly due to the dominating influence of Holland on the VOC and the legal culture of the Netherlands generally From a more dogmatic point of view, one point is note-worthy it has been argued that the Heeren Zeventeen, when determining the legal system for the Indian territories in the East, had acted ultra vires Thus the legitimacy of the application of Roman-Dutch law at the Cape rests on somewhat precarious grounds [14] That it was applied in practice cannot however be doubted But what exactly does it mean when we say that Roman-Dutch law has been taken over at the Cape? This throws up various problems concerning the sources of South African law Thus, for instance, one has to ask whether the reception of Dutch law referred to subsequent changes in that legal system, to legislation passed in Holland after the 7th of April 1652 as well [15]

One of the most interesting problems in this context relates to the authoritative sources of the (Roman-Dutch) common law It seems to be obvious that Dutch authors like Grotius, Voet and Groenewegen have to be at least preferentially consulted for the analysis of common law problems On the other hand, a total exclusion of other writers on the ius commune could hardly be justified The Roman-Dutch authors themselves were far from such parochialism and referred to writers of other countries and other epochs without hesitation After all, Roman-Dutch law was just a branch of the European Roman common law

If one looks through the South African Law Reports and textbooks, it is therefore hardly surprising to find refererces ranging from the Glossators to the Pandectists As Ben Bernart has put it "Our courts range far and wide, into the depths of Germany, and through the breadth of France even into the heart of Spain, in search of anyone who wrote on the Corpus Iuris[16] And Proculus, in a witty attack against an all too far-reaching, ius commune orientated school of thought has added "The true Antiquarian seems to feel that he has reached the pinnacle of achievement if he can quote a writer of whom nobody has ever heard before "[17] But what is the weight to be attached to these non-Roman-Dutch writers of the ius commune I would like to consider this question with regard to the "father" of the French code civil, Robert-Joseph Pothier a writer, whose estimation today strangely vacillates between that of " a great thinker, and a great jurist and a great practical lawyer"[18] and rather less complimentary comments like " he had managed, just in time, to produce a shallow but readable statement that, for some persons, strangely, still has charms "[19/20]

In Wolson v Gerber,[21] and in the subsequent decision of the Appellate Division in Gerber v Wilson[22], the problem crisply arose of whether Pothier's opinion could be followed against that of Voet and Sande If one out of seven co-debtors has paid the creditor and obtained a cession of the creditor's rights against the other debtors, he can, according to Voet[23] and Sande,[24] sue one of these remaining co-debtors for six-sevenths of the original debt Pothier, on the other hand,[25] had advocated a restriction of his right of recourse against each of the co-debtors so that in this case he would only have been able to recover one-seventh of the original debt from the defendant

(By way of parenthesis, it may be mentioned that the solution proposed by Pothier has been taken over by Burge[26] and by the code civil,[27] the writers on modern German law have adopted the same approach[28])

Faced with this conflict of opinion, L C Steyn, J, in Wolson v Gerber stated "I would hesitate to prefer it (Pothier's opinion) to that of Sande and Voet's statement of the law, unless it appears that it was adopted by other Roman-Dutch authorities "[29] Quite similar was the view of Van den Heever, J A, on appeal

> Pothier is of course a great authority on the Civil law, but his authority is merely suasive, his works having weight only as ratio scripta As an interpreter of the Roman law, our law in subsidio, on questions on which the Dutch jurists are silent, his opinions naturally carry much weight On questions in regard to which the Dutch commentators are in irreconcilable conflict and a Court is bound to apply one or the other of the conflicting doctrines, his authority may be considerable But it cannot prevail against the opinions of the accepted Dutch authorities "[30]

This can be taken as reflection of the "theoretical", the "official" position of the South African courts not only as far as Pothier but also as far as other non-Roman-Dutch writers of the ius commune are concerned In actual practice, things often look quite different though Even in Gerber v Wolson, all these general reflections about his authority notwithstanding, Pothier at least scored an indirect victory Admittedly, the opinion of Fagan, J A, who found the latter reasoning of Pothier unanswerable,[31] did not carry the decision But a majority of the judges too seem to have regarded his opinion as more equitable and convenient, otherwise they would, in the end, not have limited the right of recourse to one-seventh[32] They based their decision on an implied agreement between the seven co-debtors that in case one of them paid the debt off, his right of recourse against the others should be limited pro parte This, I would submit, is a very unsatisfactory fiction, introduced in order to obtain a result to which the direct path did not seem to be open

But there are other cases where one can find that Pothier has had a direct influence on the South African usus modernus of the Roman-Dutch law Here one can mention the rule that not every error in persona excludes consensus, only if a consideration of the person forms an ingredient of the agreement, does a contract not come into existence [33] This differentiation does not find a basis in Roman Law[34], still Savigny, for a long time main authority for the interpretatio moderna of the error doctrine, held invalidity to be the general consequence in cases of error in persona [35] The Roman-Dutch authors did not know of anything like the Pothier-rule either That did not hinder the South African courts from adopting this distinction, for this they are attacked not because they have brought in a "foreign" doctrine, but because the result cannot dogmatically be reconciled with the will theory [36] It is submitted, however, that the Pothier rule offers a practical solution, which today prevails in most modern European legal systems Secondly, I would like to refer to the so-called contemplation theory in cases of breach of contract such damages (apart from the "general damages") can be claimed "as may reasonably be supposed to have been in the contemplation of both parties, at the time they make the contract, as the probable result of the breach of it" [37] This is not the place to discuss whether the contemplation test has in the meantime been superseded by a "convention principle" [38] - whether, in other words, in order to recover such "special damages", "the plaintiff must be able to aver a contract to that effect" [39] Here I am just concerned with the fact that this test for limiting liability can be traced back to Pothier (who in turn had taken it over from Dumoulin) [40] " le debiteur n'est tenu que des dommages et interets qu'on a pu prevoir, lors du contrat, que le creancier pourrait souffrir de l'inexecution de l'obligation" [41] Again, the Roman-Dutch authors do not offer any authority for such rule

Another example of a Pothier-reception is that "liability for consequential damage caused by latent defect attaches to a merchant seller who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold [42] This rule is a restricted version of a statement in the Traite des Obligations[43] and the Traite du Contrat de Vente[44] to the effect that a seller is held to be liable for consequential damages - even if he had not known the defect of the article sold - if he was "un ouvrier, ou un marchand qui vend des ouvrages de son art, ou du commerce dont il fait profession" Again, however, not Pothier should have been credited with this rule, but Dumoulin, he had given the discussion about the famous Pomponius-fragment D 19, 1, 6, 4 a new angle in arguing that by undertaking to produce and to professionally sell objects like the one sold, producer and merchant seller ipso facto and ex professo give an implied guarantee that the object sold be free from defects [45] Again, this type of strict liability does not find a basis in classical Roman-Dutch law where a merchant/seller who did not know about the defect was not liable for consequential damages Only Voet recognised one exception [46] But this only related to an artifex and moreover is not supported by the authorities on which Voet relies Incidentally, the restricted form in which South African courts have received this Pothier-rule, is probably due to an incorrect translation of Pothier by Solomon, J, in Erasmus v Russell's Executors [47]

Finally, Pothier's Traite des Obligations was also used to justify the introduction of the undisclosed principal into South African law [48] Pothier deals with situations where employees, tutors or curators conclude a contract in their own name but with reference to the affairs entrusted to them According to Pothier, the contractual obligations do not only exist in the person of the agent "(le principal est) cense avoir accede a toutes les obligations qui en resultent" [49] Needless to say that this is in sharp contradiction to the view of the Roman-Dutch

authorities,[50] nevertheless, the "undisclosed principal" is so firmly rooted in South African law today that the Appellate Division has not felt free any longer to eradicate it "Ofskoon die leestuk inderdaad indruis teen die grondbeginsels van ons reg, is (dit) nie 'n geval waar ingegryp en die leerstuk oorboord gegooi kan word nie "[51]

All in all, these examples may be sufficient evidence for my submission that the influence of non-Roman-Dutch writers on the South African common law extends beyond what one could reconcile with the prevailing opinion about the authoritative nature of Roman-Dutch authors

I am now proceeding to the second of the above-mentioned questions From the account given by Visagie in his Regspleging en Reg ann die Kaap it is clear that the standard of the administration of justice at the Cape during the time of the VOC was comparatively primitive The members of the Raad van Justitie were not trained lawyers and admission to the professions of procureur and notary was not dependent on legal qualifications either Even though one can hardly talk of a scientific legal culture at the Cape, the authority and application of Roman-Dutch law remained a matter of course On closer analysis one will probably find what one might call a vulgarisation of Roman-Dutch law Much more interesting for the comparative legal historian is, however, what happened after the British occupation in 1806 The formal ties to the old mother-country were now severed Moreover, The Netherlands soon codified their private law and thus ceased to give a lead as far as the cultivation of Roman-Dutch law and its adaptation to modern needs were concerned Roman-Dutch law at the Cape continued to be the law of the country and was never formally replaced by English law But soon an infiltration of English law started to take place[53] which led to a sometimes interesting, sometimes problematical amalgamation of common law and civil law ideas and resulted in South Africa becoming what is often referred to as a mixed jurisdiction

This introduction of elements of English law to the Cape was a process of reception in the true sense of the word with, however, some elements of what Rheinstein[54] calls "imposition" in it Thus, if we look to the fate of Roman-Dutch law during the nineteenth century, we see a reversal of the process which had led to the reception of Roman Law in Europe Roman-Dutch law was gradually beginning to be forced back by very similar mechanisms which once had been responsible for its inception and growth The whole framework within which Roman-Dutch law was to be applied was changed - and that is anglicised - court structure, the law of evidence and procedure, organisation of and qualification requirements for the legal professions, official language used in court, the doctrine of stare decisis, to mention the most important factors Until well into the second half of the nineteenth century, we hardly find any indigenous legal literature,[55] a local legal training was offered since 1859, but until 1890 only 16 candidates had obtained admission to the bar by virtue of having passed the examination of the Board of Public Examiners in Cape Town[56] If, by way of example, one looks at the curriculum vitae of the six judges who served on the Cape Bench during 1868-1870 (the period covered by Buchanan's Reports),[57] one will find that only one of them had been born in the Cape Colony and had studied on the continent All the others had obtained their legal qualifications in England or Ireland

Those, briefly, were the conditions under which Roman-Dutch law continued to be applied Again, I cannot venture to give a comprehensive account of the consequences of these changes, i e of the decline of Roman-Dutch law during the nineteenth century I will only try to pinpoint a few aspects which deserve consideration

Roman-Dutch law is a system which, due to the nature of its sources, already under normal circumstances it is not easy to apply[58] Our discussion about the various Pothier-rules (which in some instances should in actual fact have been Dumoulin-rules) may have given already some impression of the eclecticism in the handling of the sources and the vagaries in establishing and developing the common law

Given the lack of training and experience in handling the old authorities and the language barriers, it is not surprising to find instances where the Roman-Dutch law, even where it was applied, and thus quite independently of any English influence, was misrepresented and wrongly applied One example of this are the accrual presumptions[59] Every student of the South African law of succession must, I think, have wondered why, according to firmly established practice,[60] accrual is to be presumed if the will reads "Titius and Maevius shall be my heirs" whilst for a will of the type "Titius and Maevius shall be my heirs in equal shares" a presumption against accrual is held to apply The very artificial and unsatisfactory distinction goes - as far as South African law is concerned - back to the decision of Lord de Villiers in Steenkamp v De Villiers[61] Lord de Villiers based his analysis of Roman-Dutch law solely on the authority of Voet[62]

If one looks into other Roman-Dutch sources, however, one finds that Voet alone maintained this opinion He was the only Roman-Dutch lawyer of some standing who still applied the distinction between conjunctiones re et verbis, re tantum and verbis tantum, as the Roman lawyers had developed them, without taking into account that the conceptual background for these distinctions had changed Due to their underlying "Gesamthand" - idea,[63] the Romans applied a system of necessary accrual, the result was expressed in the famous rule "nemo pro parte testatus pro parte intestatus decedere potest"[64] The accrual presumptions served only to decide whether the lapsed share should accrue to all or only to some of the co-heirs, in other words, whether accrual should, in a particular case, be restricted, not whether it should take place at all[65] In Roman-Dutch law the "nemo pro parte" rule was held to have been abrogated by disuse[66] a Roman "scherpzinnigheid"[67] which had been left behind by the "consuetudines hodiernae" As a consequence, one had to look for a new dogmatic basis for accrual which did not any longer take place necessarily

In carving out their rules in this regard, the Roman-Dutch lawyers used the coniunctio-distinctions of Roman Law However, they realized that it would be unsensible to exclude coniuncti verbis tantum of the above-mentioned type "Titius and Maevius shall be my heirs in equal shares") from accrual That question had been extensively discussed, i e already by the writers of the French Elegant Jurisprudence (Zacharias Huber refers to "πολυθρύλλητον illud"),[68] but one had finally come to the conclusion that from the point of view of the testator there would be no reason not to treat this case in the same way as a coniunctio re et verbis How much of an outsider Voet was with his all too antiquarian position becomes clear e g from Decker's notes on Van Leeuwen's Roomsch Holandsch Recht where he rejects Voet's view as "al te absurd" [69] I cannot trace here the further history of the accrual presumptions in modern South African law [70]

It may be mentioned in passing that the courts today have also inadvertently changed the meaning of the term "coniunctio verbis tantum and no longer use it in the same sense as the Roman-Dutch lawyers [71] When they have, from time to time, expressed their dissatisfaction with these "cumbersome and unnatural"[72] distinctions, they have questioned whether a clause of the above-mentioned type should be regarded as a (mere) coniunctio verbis tantum They did not realize, however, that according to Roman-Dutch law a bequest in equal shares leads to accrual because it is, not because it is not, a bequest verbis tantum! The point being made is simply that the unsatisfactory state of modern South African law is due in this example to a selective perception of the Roman-Dutch sources It may be added that one can also find the situation, of course, that a legal rule is historically wrong but nevertheless practically leads to satisfactory results An example is the rule that children of a testator who have been disinherited are given a claim for maintenance against the estate of the deceased [73] It is based on a misunderstanding of a text by Groenewegen[74] and serves to alleviate the unsatisfactory situation disinherited dependants

are faced with since the legitimate portion - under English influence - had been abolished at the Cape[75] Thus, one can say, that one (legislatorial) mistake is in this instance partly compensated by another (this time judge-made) mistake

Most changes to Roman-Dutch law during the nineteenth century, however, occurred due to the influence of English law Here I am not so much thinking of instances where the legislator has acted and modelled the law in particular areas according to English patterns, but where English ideas have crept into the decisions of the Courts[76] and thus shaped the common law From a methodical point of view it is quite fascinating to see in how many different ways, some quite blunt, others very subtle, this infiltration process took place[77] In looking through the decisions, one often finds genuine attempts to consult the Roman and Roman-Dutch sources But sometimes, one gets the impression that the discussion of these sources is merely ornamental, it does not really contribute to the solution of the case but is done rather in fulfillment of some kind of duty Thus, the courts do not really seem to be guided by the old authorities On other occasions, the discussion of the old sources is not based on a thorough exegesis, but on ideas, arguments and thinking patterns which do not emanate from or are at least in conformity with these sources, but which are, a-historically, superimposed on them from a modern context The selection of the sources not infrequently seems to be arbitrary, generally, no words are "wasted" about the role of the particular author under discussion within the process of reception of Roman Law in Europe

There are cases where English law is applied without any pretence as if the Court were sitting in England There are other cases where English thinking patterns seem to have so much impressed themselves on the minds of the judges that they perceived Roman-Dutch rules in their light Often Roman-Dutch and English law were compared on a particular point and were found to be in accordance with each other, the door was then open to have recourse to the more easily accessible English materials

Quite often the Roman-Dutch sources were forced into (the English) shape in this context A good example is provided by a judgement of Connor, J In Oosthuizen v Oosthuizen[78] he condemns the Roman requirement of aditio hereditatis on the part of the heir as a "vexatious snare" He is arguing that the Cape Ordinance 104 had rendered such aditio hereditatis obsolete, due to the change from universal succession to the system of obligatory executorship "adiation (has) become a nullity", as he put it[79] This statement is in itself highly questionable It does not seem to follow logically that because an executor takes charge of the deceased's estate, the heir would no longer have a choice of whether to accept any benefits under the will or not Connor seems to feel himself that this might not be altogether satisfactory In order to back up his argument, he tries to show that in Roman-Dutch law aditio hereditatis was not an essential requirement any longer, because the idea of obligatory executorship had already gained ground at that time[80] For this assertion he relies on Van der Linden's Koopmans Handboek If one looks up Van der Linden, one will find that he deals with the position of an executor However, he makes it clear that executorship can, but does not have to take place The fact that legatees are granted an action against the executor does not alter this Van der Linden writes "De Legataris heeft 'n actie uit kragte van het testament, tegen den erfgenaam of ook tegen den Executeur van het testament, zoo die door den overleden is gesteld"[81] The claim only "also" lies against the executor and only insofar as such executor has been appointed The situation is thus comparable e g to section 2213 BGB

Finally, as far as this process of amalgamation of Roman-Dutch and English law is concerned, I would like to mention two aspects Quite ironically, an idea conceived of in the civil law has sometimes entered South Africa (i e originally another civil law jurisdiction) via the English common law A good example of this form of indirect reception is the influence of Pothier in South Africa

In many of the cases discussed above, Pothier had first influenced the English common law Pothier's differentiation as far as the relevance of an error in persona is concerned has been taken over into English case law,[82] in an article published in 1957 it has been emphasized that the relevant quotation from the Traite des Obligations had been cited no less than twelve times verbatim in various English sources Pothier's contemplation test with regard to damages for breach of contract had been received in the celebrated decision of Hadley v Baxendale[84] and the strict liability of the merchant seller for consequential damages caused by a latent defect, whilst not leaving any traces in the continental codifications can be found in the English Sale of Goods Act Pothier's influence on section 14 of this Act seems to be quite obvious especially if one takes the high regard into account in which Pothier was held by Sir Mackenzie Chalmers, the "father" of the Act "Pothier's Traite du Contrat de Vente," he writes,[85] is still, probably, the best reasoned treatise on the Law of Sale that has seen the light of day "[86] Especially in the first of these two cases, the respective Pothier rule came to South Africa as part and parcel of the English law In fact, the rule in Hadley and Baxendale had already been received in South Africa[87] before one began to go back to Pothier[88] in order to find a dogmatic basis for it

The second aspect is of particular interest for comparative lawyers and legal historians in Europe In a couple of cases this gradual infiltration of English law into Roman-Dutch law led to a mutual fertilization and to an ingenious blending of the two major legal systems in the Western world I would like to illustrate this assertion with an example, taken again from the law of succession[89] (an area of the law which so far has been a bit neglected at this Conference on the occasion of the Centenary of the Roman-Dutch Law) According to English law, if a trust for charitable purposes is in danger of failing because it is impossible, illegal or impractical to carry out the

precise charitable object indicated by the donor, and where the donor can be shown to have had a general charitable intent, the courts may rescue the property for charity and will direct this gift to be applied to a charitable object as close as possible to that indicated by the donor [90] This so-called "cy-pres" doctrine has been received in South Africa [91] However, the courts have not simply taken over and implanted into South African legal soil some totally strange and unrelated growth of a different legal culture They have skillfully used some niches within the Roman-Dutch common law and moulded them accordingly At first, of course, the concept of a testamentary trust had to be recognized To be sure, this institution cannot be derived from the Roman-Dutch sources But on the other hand, fideicommissum in diem and fideicommissum sub modo provide a dogmatical basis for a development in this direction [92] Well known is Innes' (C J) dictum in Estate Kemp v McDonald's Trustee [93] " a testamentary trust is in the phraseology of our law a fideicommissum and a testamentary trustee may be regarded as covered by the term fiduciary " Thus the Courts have created a South African law of trusts, opening the Roman-Dutch law for the experiences of English law in this regard, but nevertheless ensuring that these experiences were channelled into a civilian framework [94]

Secondly, the concept of a charitable trust had to be integrated Here, the rules about disposition ad pias causas could be drawn upon Already in Justinian's time it was customary for a testator, in order to obtain remission of sins and exemption from their consequences, to leave parts of his patrimony to the Church or (but that actually amounted to the same thing) to the poor Such dispositions were privileged in various ways [95] Andreas Tiraquellus, a French author of the sixteenth century (in what J F Schulte called "scholastische Kleinigkeitskrämerei" [96]) enumerates no less than 167 privileges [97] According to Canon Law, even the testamentary formalities could be dispensed with These privileges had, right from the beginning, covered the promotion of charitable (as opposed to stricto sensu religious) purposes, because social welfare and poor

relief, the administration of almshouses, hospitals, orphanages, etc were the concern of the church[98] In various ways the concept of charity came to be extended, already Paulus Castrensis summed the development as follows " quicquid fit ad publicam utilitatem, id pium dicitur "[99] The general tendency was thus, particularly since the secularization, to extend the concept in the same way as we find it e g in the Statute of Charitable Uses of 1601,[100] the starting point of the modern English law of charities Even though the Roman-Dutch authors - with few exceptions - seem to have followed a narrower interpretation still (Grotius and Van Leeuwen translate "piae causae" with dispositions to "Godshuizen ofte Armen",[101] the equation of "piae causae" with "charitable purposes" in modern South African law seems to be in conformity with the general trend of the European ius commune further evidence against the proposition that only Roman-Dutch authors are authoritative sources of South African common law

Thirdly, even for the cy-pres doctrine as a special privilege attributed to these charitable trusts, the ius commune provided a niche suited for reception-purposes It is to be found in a fragment taken from Modestini Responsa (D 33, 2, 16) Here a testator had ordered in his will, "memoriae conservandae gratia", that every year games were to be held in his home town However, the celebration of such games was illegal at this place According to Modestinus, the testator's disposition was to be changed so as to preserve the memory of the testator in a legal manner The idea underlying this decision seems to be that the judge is not really interfering with the will of the testator By providing a way in which the memory of the testator can legally be preserved, Modestinus effectively helps the testator's will to become effective This idea is not dissimilar to the requirement of a general charitable intent as a prerequisite for the application of a testamentary disposition cy-pres

All in all, by receiving an English institution into a civilian framework, South African law has on the one hand been able to draw on the experience of English law, on the other hand, it has managed to rid the English rules of certain incomprehensible technicalities which with centuries of casuistry have grown around especially the concept of "charity" [102]

One last additional point may be of interest if one traces the development of cy-pres in English law one will find that it goes back to the same Modestinus fragment which has been quoted by the South African courts [103] Thus we have the interesting situation that an idea, originating in Roman Law, has been received in England at first via Canon law by the ecclesiastical courts, then taken over by the Court of Chancery into Equity, developed in the course of centuries into a comprehensive doctrine before it has come "home", back into the last resort of the old European ius commune

FOOTNOTES

1 Cf R Zimmermann, "Das römisch-hollandische Recht" in Sudafrika, Einfuhrung in die Grundlagen and usus hodiernus, 1983 with further references

2 Codification was advocated by Wessels, C J, as ultima ratio to save Roman-Dutch law against the onslaught of English law, cf e g SALJ, VOL 37 (1920), p 265ff ("To save the Roman-Dutch law we must take its essential principles out of the Latin folios and arrange them methodically in a well thought out, compact, but efficient code" p 284) Hahlo/Kahn, The South African Legal System and its Background , 1968, p 72ff

3 This is the title of Franz Wieacker's famous (as yet untranslated) book, 2nd ed , 1967

4 As to the (potential) role of classical Roman Law in South African practice (as opposed to "Roman law as corrupted by the Byzantines" Pahad v Director of Food Supplies and Distribution, 1949(3) SA 695 (AD) 710/ cf Kaser, (1964) 27 THRHR 177ff

5 P R Spiller, The Natal Supreme Court its Origins (1846-1858) and its Early Development (1858-1874) , PhD thesis, Durban, 1983

6 On this, see de Smidt, Acta Juridica, (1981) p 83ff

7 In January 1983, a Southern African Society of Legal Historians has been founded and it published its first newletter in November 1983

8 Hahlo/Kahn, op cit , n 2, p 499

9 Cf e g Coing, us Romanum Medii Aevi, V, 6, 1964, Wieacker, op cit , n 3, p 97, P Bender, Die Rezeption des romischen Rechts im Urteil des deutschen Rechtswissenschaft, 1979, D Giesen, "Rezeption" in Handworterbuch der Rechtsgeschichte, forthcoming

10 A famous example is the reception of the Swiss code in Turkey cf A B Schwarz, Das Schweizerische Zivil gesetsbuch in der auslandischen Rechtsentwicklung, 1950, pp 47ff, E E Hirsch, Rezeption als sozialer Prozess, 1981

11 "Types of Reception", in Gesamelte Schriften, Bd 1 (ed H G Leser), 1979, pp 261ff

12 Cf e g Visagie, Regspleging en Reg aan die Kaap van 1652 tot 1806, 1969, pp 69ff, D H van Zyl, Geskiedenis van die Romeins-Hollandse Reg, 1979, pp 421ff

13 Cf Hahlo/Kahn, op cit, no 2, p 572, no 32

14 Cf Visagie, op cit, n 12, p 25 and passim, De Wet, (1958) 21 THRHR, 85, Pauw, 1980 TSAR 39

15 Cf Zimmermann, loc cit n 1, p 6 with further references

16 Roman Law in South African Practice, 1952, p 16

17 SALJ, Vol 68 (1951), 306ff at 307

18 de Montmorency, in Macdonell and Manson, Great Jurists of the World, 1913, p 476

19 J P Dawson, Oracles of the Law, 1968, pp 349ff, cf also Dawson, Gifts and Promises, 1980, p 142

20 A more detailed analysis of Pothier's influence on the Roman-Dutch law in South Africa will be published

21 1954 (3) SA 94 (T)

22 1955 (1) SA 158 (AD)

23 Commentarius ad Pandectas, 46, 1, 29

24 De Actionum Cessione, VI, 33

25 Traite des Obligations, para 281

26 Commentaries on the Law of Suretyship, 1849, p 417

27 art 1214, 2033

28 Cf e g Munchener Kommentar/Self, Vol 2, 1979, para 426, n 11

29 Wolson v Gerber, 1954 (3) SA 94 (T) 99

30 Gerber v Wolson, 1955 (1) SA 158 (AD) 170ff

31 Ibid, p 183

32 Ibid, p 164, 175

33 Gounder v Saunders and Others, 1935 NPD 219, cf also Bird v Sumerville and Another, 1961 (3) SA 194 (AD) 204, Landsbergen v Van der Walt, 1972 (2) SA 667 (R) 669, Kerr, The Principles of the Law of Contract, 3rd ed, 1980, pp 26ff The rule is taken from Pothier, Traite des Obligations, para 19

34 Cf Cels D 12, 1, 32

35 System des heutigen Romischen Rechts, vol 3, 1840, pp 267, 270

36 De Wet en Yeats, Kontraktereg en Handelsreg, (3rd ed), 1978, p 22

37 This is the classical formulation in Hadley v Baxendale, (1854) 9 Exch 341 Cf Victoria Falls Transvaal Power Co , Ltd v Consolidated Langlaagte Mines, Ltd , 1915 AD 1 (22)

38 Lavery & Co v Jungheinrich, 1931 AD 156 (162ff), Schatz Investment (Pty) Ltd v Kalovyrnas, 1976 (2) SA 545 (AD) 551 (554)

39 Cf Wessels, J A , in Lavery & Co v Jungheinrich, 1931 AD 156 (176)

40 Tractatus de eo quod interest, para 49ff

41 Traite des Obligations, para 160

42 Holmes, J A , in Kroonstad Westelike Boere Ko-operatieve Vereniging Bpk v Botha and Another, 1964 (3) SA 561 (AD) 571

43 para 163

44 para 214

45 Tractatus de eo quod interest, paras 49ff, cf Honore, in Studies in the Roman Law of Sale, dedicated to the memory of Francis de Zulueta, 1959, pp 147ff

46 Commentarius ad Pandectas, 21, 1, 10, cf Van Warmelo, Vrywaring teen Gebreke by Koop in Suid-Afrika , Leiden (thesis), 1941, pp 91ff

47 1904 TS 365 (374)

48 O'Leary and Another v Harbard, (1888) 5 HCG 1

49 Traite des Obligations, para 82

50 Cf J C van der Horst, Die Leerstuk van die "Undisclosed Principal", 1971, pp 47ff

51 Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Kooperasie Bpk, 1972 (1) SA 761 (767)

52 Pp 40ff

53 Cf generally Beinart, Acta Juridica, (1981), 7ff, Dannenbring, in Studi in onore di Cesare Sanfilippo, vol 1, 1982, pp 133ff, Zimmermaan, loc cit, n 1, pp 9ff

54 Op cit, n 11

55 Cf Van Blerk, De Rebus Procuratoriis, 1977, pp 561ff

56 D V Cowen, Acta Juridica, 1959, p 8ff

57 Cf Zimmermaan, in Festschrift in Honour of Paul van Warmelo, 1984

58 Thus, one may well question whether it is a very suitable system for reception-purposes

59 Cf Zimmermann, "Conjunctio verbis tantum, Accrual, the methods of joinder in a will and the rule against partial intestacy in Roman-Dutch and Roman Law", Zeitschrift des Savigny-Stiftung fur Rechtsgeschichte, Romanistische Abteilung, vol 101 (1984), pp 234ff To this article I would like to refer the reader for a detailed analysis of the development in Roman and Roman-Dutch law and for full references

60 Cf e g Ex parte Knight In re Estate Gardner, 1955 (3) SA 577 (C) 587, Corbett/Hahlo/Hofmeyr, The Law of Succession in South Africa, 1980, p 250

61 (1893) 10 SC 56

62 Commentarius ad Pandectas, 30-32, 61

63 Cf e g Kaser, Das romische Privatrecht, I, (2nd ed), 1971, p 730

64 Inst 2, 14, 5, cf e g Windscheid/Kipp, Lehrbuch des Pandektenrechts, III, 9th ed, 1906, para 537, n 2, Schmidlin, BIDR, Vol 78 (1975), 1ff

65 Cf e g Paul, D 50, 16, 142, Pomp D 28, 5, 67

66 Cf e g Groenewegen, "Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus", II, XIV, 9

67 Grotius, Inleiding tot de Hollandsche Rechtsgeleertheyd, II, XVIII, 21

68 Observationes Rerum Forensium ac Notabilium in Suprema Frisiorum Curia Judicatarum, obs LXX

69 Vol 1, III, VI, 8, n 3

70 Cf Zimmermann, loc cit n 59 pp 258ff

71 Cf e g Winstanley v Barrow, 1937 AD 75

72 Administrator of Estate O'Meara v O'Meara, 1943 NPD 144 (149)

73 Carelse v Estate de Vries, (1906) 23 SC 532, Glazer v Glazer, 1963 (4) SA 694 (AD) 706ff

74 Supra, n 66, XXXIV, I, 15, cf Beinart, Acta Juridica, (1958), pp 92ff

75 Succession Act 23/1974 (Cape)

76 Cf Wessels, SALJ, Vol 37 (1920), p 272

77 The following is based on my contribution to the Festschrift in Honour of Paul van Warmelo, 1984 "Die Rechtsprechung des Supreme Court of the Cape of Good Hope am Ende der sechziger Jahre des 19 Jahrhunderts"

78 Buch 1868, 51 (60ff)

79 Buch 1868, 51 (62) The point in question was, when and under which circumstances a surviving co-testator loses the power to revoke his own part of a mutual will Connor is trying to refute the opinion that the surviving spouse is only bound once he has adiated by accepting a benefit under the mutual will

80 Buch 1868, 51 (63)

81 Regsgeleerd Practicaal en Koopmans Handboek, 1806, 1, 9, 9

82 Cf e g Lake v Simmons, 1927 (AC) 487 (501) per Viscount Haldane, Smith v Wheatcroft, L R, 9 Ch D, 223 (230) per Fry, J

83 Smith/Thomas, MLR, Vol 20 (1957), pp 38ff

84 (1854) 9 Exch 341, cf the analysis from a socio-historical point of view, by Danzig, Journal of Legal Studies, Vol 4 (1975) pp 249ff

85 Cf Chalmers' Sale of Goods Act 1893, (17ed ed), 1975, p IX

86 Generally speaking, the nineteenth century was a time of innovation in English contract law cf Simpson, LQR, Vol 91, (1975), pp 247ff One of the most influential sources in the shaping of the law of contract was Pothier cf e g Baker, An Introduction to English Legal History, (2nd ed), 1979, p 293

87 Transvaal Silver Mines Ltd v Brayshaw, (1895) 2OR 95 (102), Retief v Groenewald, (1896) 10 EDC 140 (148)

88 Emslie v African Merchants Ltd , 1908 EDC 82 (91)

89 I am in the process of preparing an article on the history an origin of cy-pres which will contain full details and references

90 Cf e g Sheridan/Delaney, The Cy-Pres-Doctrine, 1959 with further references, for a more recent analysis cf Chesterman, Charities, Trusts and Social Welfare, 1979, pp 212ff

91 Cf e g Ex parte Bosman, 1916 TPD 399 (401), Erasmus, in Lee and Honore, Family, Things and Succession, (2nd ed), 1983, N 702

92 Cf Beinart, Acta Juridica, (1968), pp 157ff, 194ff

93 1915 AD 491 (499)

94 Cf Honore, The South African Law of Trusts, (2nd ed), 1976, pp 13ff, Beinart, The Journal of Legal History, Vol 1 (1980), pp 43ff Today the development towards a genuine South African law of trust seems to have reached the stage, that the dogmatical egg-shells of fideicommissum can be thrown off cf Braun v Blann and Botha NN O and Another, 1984 (2) SA 850 (AD) 859ff, 866 (per Jansen, J A,)

95 Cf e g Hagemann, Die Stellung der Piae Causae nach justinianischem Rechte, 1953

96 Zeitschrift fur Civilrecht und Prozess, N F , vol 8, (1851), p 215

97 "De Privilegijs piae causae tractatus", in Opera Omnia, (1574), Vol V

98 Cf e g Tierney, Medieval Poor Law, 1959

99 Cf discussion and references in Tiraquellus, loc cit , n 97, Praefatio

100 43 Eliz I, c 4 cf Jones, History of the law of Charity, 1532-1827, 1969, pp 27ff

101 Grotius, op cit, n 67, 2, 17, 31, 2, 23, 20, van Leeuwen, Het Roomsch-Hollandsch Recht, 3, 11, 4, cf however Van Leeuwen, Censura Forensis, Pars Prima, 2, 25, 12

102 Cf Keeton, Current Legal Problems, Vol 13 (1960), pp 22ff, Keeton and Sheridan, The Law of Trusts (10th ed), 1974, pp 159ff

103 Cf Attorney-General v Lady Downing, 1 Wilm 1 (33) (per Wilmot, C J)

THE RECEPTION AND DEVELOPMENT OF ROMAN-DUTCH LAW IN BOTSWANA

Athaliah Molokomme

INTRODUCTION

While the reception of a foreign legal system can be quite a straightforward process which may lend itself easily to discussion, the development of that law thereafter is much more difficult and always ambiguous This is especially true in countries such as Botswana where more than one legal regime operate, so that one cannot isolate the development of one from the other In the case of Botswana, it would be impossible to discuss the development of Roman-Dutch law without discussing some aspects of the wider legal system which include customary law and Acts of Parliament Thus, although this paper deals primarily with the reception of Roman-Dutch law and its development, aspects of the development of customary law and legislative enactments of the Botswana Parliament will be discussed where relevant

The term "Roman-Dutch law" will be used in this paper to refer to the law that was originally received into the territory as well as that later applied to it by proclamation during the period of British occupation Emphasis will however be laid on the reception and development of the Cape law of marriage, the family and succession

HISTORICAL BACKGROUND AND THE ACTUAL RECEPTION

When the Queen by Order-in-Council [1] established the Bechuanaland Protectorate, she delegated to the High Commissioner for South Africa "all powers and jurisdiction which her Majesty

had or may have subject to such instructions as he may from time to time receive from her Majesty or through a Secretary of State " [2] These powers included power to appoint officers such as a Resident Commissioner, Deputy Commissioners , Judges, Magistrates and others to administer the territory More important for our purposes was his power to legislate for the Protectorate by proclamation and provide generally for the administration of justice It was in exercise of these powers that he passed the proclamation which introduced the Roman-Dutch law into the country, thus opening a new chapter in the legal history of what is today known as Botswana

The first reception was embodied in section 19 of the General Administration Proclamation of 10 June 1891 which reads

> Subject to the foregoing provisions of this proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit,be the same as the law for the time being in force in the Colony of the Cape of Good Hope Provided that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory

As Brewer [3] rightly points out, the above provision was rather vague as to the extent to which the law applicable in the Cape was received, as well as the fact that a date was not provided to govern the application of the received law as was the practice in other colonies More importantly, he cautions that the term "Roman-Dutch law" as used to refer to this received law is inappropriate because the original system had since 1814 been substantially influenced by English law He suggests the use of the word "Cape colonial law" instead which, it is submitted, is more appropriate

In the words of Aguda, "that system of law as at 1891 is, in the eyes of modern jurists, primitive, and it is that law that is regarded as the common law, not that law as subsequently developed in other countries and there were no professional judges in this country to develop it " The latter will become significant later when we consider the persons who were charged with the administration of the received law and their ability to properly develop it

As far as statute law is concerned, it is submitted that by implication, only those statutes promulgated by the Cape Parliament prior to 10 June 1891 were received into the territory[5] When, on 22 December 1909, the High Commissioner issued the General Proclamation no 39 of 1909, for the purpose of removing doubts as to the effect of the above section 19, he changed the terminology but hardly made the nature and extent of the applicability of the received law any more certain

> the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate

What became certain, however, is the date at which the law was received, as well as the applicability of Cape Statutes

> but no Statute of the Colony of the Cape of Good Hope promulgated after the 10th day of June 1891 shall be deemed to apply, or to have applied, to the said Protectorate unless specially applied thereto by Proclamation

Thus Pain[6] observes that except for statutes, the reception of Roman-Dutch law as it stood at 10 June 1891 was "timeless", although he maintains that the law introduced was intended to apply only to the "transient" European population

Two reasons have been put forward why the Roman-Dutch law, and not English law, was introduced into the three High Commission Territories The first and less plausible one is that the then High Commissioner was "himself by association closely connected with the South African 'establishment'" [7], hence his fondness of the Roman-Dutch law The second, which is borne out by history, is that Britain had visions of the subcontinent, including the three High Commission Territories, as a "white dominion" run from the Cape Colony It will be remembered that Cecil Rhodes and the British South Africa Company had been presuming the British Administration to hand over the three territories to the contemplated Union of South Africa

It is submitted however that the shape of the legal system was mainly determined by the retention of legislative power by the High Commissioner sitting at the Cape As far back as 1891, when setting up new courts for the Protectorate, he had appointed administrative officers such as District Officers to perform judicial functions in courts of law From this, Aguda concludes that Her Majesty's government never intended to create an independent judiciary for the Protectorate, "indeed, it was never contemplated that professional lawyers would be appointed to judicial positions" [8] Whatever British intentions were at the time, it is clear that the original absence of legally trained officers to administer the received law had important implications for its future development Without any legal training these administrative officers could not be expected to consciously develop the law - they would rather be concerned with the everyday business of solving disputes and maintaining "order and good government"

It will also be remembered that the received law was originally intended to apply to Europeans while the indigenous population would continue to be subject to their traditional law As time went on however, "native matters" increasingly came under the jurisdiction of the new courts and aspects of "the law of the territory" began to apply to the indigenous population This was especially true after the 1930s, when crimes such as rape, treason, murder and others were taken away from the jurisdiction of tribal institutions, as well as matters unfamiliar to indigenous law Appeals from the courts of the tribal chiefs to the "modern courts" were provided for as far back as 1919 [9] In these cases where "natives" were involved, the requirement was that tribal law be applied unless it was unascertainable or incompatible with "peace, order, and good government"

Interaction between indigenous people and the European settlers also made the parallel development of the two legal regimes impossible, so that internal conflicts became more and more of a problem Even when a "special court" was established

in 1912, the Proclamation gave it jurisdiction over Europeans in "serious crimes" and civil matters in which the claim exceeded £1,000 [10] It fulfilled the function of a High Court until 1939 when a permanent High Court was established At last an attempt was made to appoint persons with legal training to sit in the special court usually, a Judge of the Supreme Court of South Africa or the High Court of one of the Territories would sit with two assistant commissioners [11] The reporting of proceedings in this court only began in 1926, in the form of combined reports of proceedings of special and later the High Courts of the three High Commission Territories Some aspects of the received law and its later development follow below

CRIMINAL LAW AND PROCEDURE

Although Roman-Dutch criminal law was received and applied in the Protectorate, this "common" law was mostly unwritten It was supplemented by Proclamations issuing from the office of the High Commissioner until 1961 After 1961, a Legislative Council was established which was given power to legislate At a meeting of the Law Reform Committee held in Francistown on 18 and 19 December 1961, [12] the then Assistant Attorney-General explained the advantages of introducing a penal code, one of which was consistency, which the other members greeted with enthusiasm The idea was not to codify the existing criminal law as this would be difficult, but rather to adapt a code from another territory A penal code bill was later drafted and discussed at the 2nd meeting of the Law Reform Committee held in Lobatse on 7 February 1964 [13] When the Botswana Penal Code [14] finally came out, it was, according to Brewer,

> simply based on the latest versions of East and Central African Codes and it was, therefore, founded largely, though not exclusively, on English Law rather than Cape Colonial Law [15]

When it acquired force of law on 11 June 1964, section 2 effectively brought to an end the unwritten Roman-Dutch criminal law in force in the Cape and received into the Protectorate in 1891

> From and after the commencement of this law, the unwritten substantive criminal law in force in the Colony of the Cape of Good Hope of 10 June 1891 shall no longer be of force in the territory

Thus, till the present day, Botswana's criminal law became contained in a code which is based on English criminal law concepts Although judges in criminal cases normally resort to English decisions as authority, there has been some deviation from this practice mainly due to the administration of the criminal law by South African trained judges and the predominance of attorneys from the Republic of South Africa

THE LAW OF MARRIAGE AND FAMILY

It will be remembered that the original intention of the colonial government was that the "received law" would apply only to Europeans In the Proclamation of 10 June 1891, the original section 8 denied the newly established courts of the Resident Commissioners and Magistrates jurisdiction over any matter in which Africans only were concerned, "unless in the opinion of such court, the exercise of such jurisdiction is necessary in the interests of peace, or for the prevention or punishment of acts of violence to person or property " Although Proclamation no 2 of 1896 gave these courts jurisdiction over and against all persons in civil and criminal cases, Africans in their family relationships and other "private law" transactions continued to use their traditional institutions of adjudication which applied their own tribal laws

Marriage by civil rites (or as it later came to be known as the "Proclamation Marriage", or "Marriage under the common law"), was first introduced and regulated by the Marriage Proclamation of 1917 The Proclamation applied to all marriages

other than customary marriages, and made it quite clear that nothing contained in it was to be taken to cast doubts on the validity of customary marriages This Proclamation mainly provided for the procedure of publication of banns or issue of a special licence, appointment of marriage officers, solemnisation and registration of marriages, as well as impediments and penalties characteristic of christian marriage The present Marriage Act is broadly similar in principle to the original proclamation, although it was later amended (as more and more Africans married in church) to make special provision for marriages of Africans These were required always to fill in a form declaring either that they had never been married under customary law or that whatever marriage they had contracted had been dissolved under the law

THE CONSEQUENCES OF MARRIAGE

The personal consequences of marriage under the law of the Protectorate were those applied in the Cape on 10 June 1891 These include the spouses' obligation to cohabit with one another, reserve to one another exclusive conjugal rights, support one another, marry no one else, and other attributes of the monoganous marriage The status of the woman became "absorbed" into that of the husband, she henceforth lost the capacity to acquire a domicile of choice the husband alone determining the domicile of the marriage In addition, the husband as a result of the marriage became head of the household having the final say in family matters, having sole guardianship of the minor children of the marriage This is often referred to as the "personal" aspect of the husband's marital power, which is an invariable consequence of a marriage under the common law In its strict form, this gave the husband power to decide whether or not his wife could work, how many children she would have and gave him the right moderately to chastise her

The proprietary and invariable consequences of marriage depended on whether the marriage was in or out of "community of property" Where it was in community, this entailed a pooling together of the spouses' assets into one "joint estate" which, although strictly each spouse held a half share, was administered solely by the husband by virtue of his marital power The wife required the assistance of her husband to transact or litigate and there was community of profit and loss Marriage out of community was effected by a contract entered before marriage (ante-nuptial contract) which, normally, excluded all the attributes of marriage in community although strictly, one must specifically exclude the marital power by contract, otherwise it attaches Under the common law, all marriages were assumed to be in community of property, unless the contrary was provided in an ante-nuptial contract

Later, however, an exception to this was made for the proprietary consequences of proclamation marriages between Africans which, unless an ante-nuptial contract was entered into and registered in the Deeds Office, would be "held, may be disposed of, and unless disposed of by will, shall dissolve according to the customary law" The only other situation in which the common law could be applied to the property of married Africans was under the "Native Marriage Proclamation" (later known as African Divorce Proclamation), Proclamation no 19 of 1926 By this law, courts of District Officers were given jurisdiction to hear civil actions for divorce and nullity of marriage where both spouses were Africans, and were in addition empowered to apply the common law in cases where they considered it would be unjust or inequitable that matrimonial property should be dealt with according to African law, regard being had to their mode of life or prior dispositions of property

POST-INDEPENDENCE DEVELOPMENT

The above was the state of the law relating to marriage until Bechuanaland attained independence in 1966 The 1966 Independence Constitution created a Parliament which was empowered to pass laws, although some of the proclamations (including the Marriage Proclamation) were retained substantially with few amendments (especially in terminology)

It was only in the late sixties and early seventies that Parliament made a move to amend the common law of marriage and related matters It is interesting to see the direction which legal development in this area took

THE CONSEQUENCES OF MARRIAGE

The only development in this respect relates to the proprietary and not the personal consequences of marriage under the Common Law Changes were introduced by the Married Persons Property Act, No 69 of 1970, which reversed the position at common law the three elements of marriage in community were excluded from all marriages whose matrimonial domicile is Botswana contracted after 1 January 1971 unless the spouses express their wish to be married in community though a document registered in the Deeds Registry The motive behind this development, according to the then Minister of State, was as follows

> Under the common law the property of married persons, who are not Africans, falls into a common pool which, although jointly owned by the spouses, is entirely controlled by the husband unless the spouses execute an ante-nuptial contract before marriage This places the wife, in relation to the property of the marriage, in almost the same position as a minor child This is considered to be inconsistent with the status of women today The bill makes provision for community of property to disappear after 1 January 1971 unless the spouses wish to be married in community [16]

Thus, for those who married after 1 January 1971, an ante-nuptial contract was no longer necessary should they wish to be married out of community, those who wished to be married in community had to fill out the form provided in the First Schedule This procedure is much cheaper than executing an ante-nuptial contract as it is administered at the Office of the District Commissioner

There is a significant departure from the above as far as the proprietary consequences of marriages between Africans are concerned The property of Africans married under the Act continues to be governed by customary law (as was the case under section 19 of the Marriage Proclamation) unless the spouses specifically opt out of the customary law The Second Schedule to the Act provides two forms which are both opting out mechanisms as well as a method of indicating that the spouses wish to be married in or out of community The retention of this special provision for marriages between Africans caused much concern among members of Parliament, many of whom felt there should be "one law for everyone in Botswana" The Minister of State, however, soon allayed their fears when he explained

> It should be appreciated Mr Speaker that most of the Africans here still prefer their customary law to be applied as far as their property is concerned The word 'Africans' was not used to bring in some sort of discrimination [17]

An interesting question which arises quite often has been the extent to which a statute modifies or replaces the common law In this particular case for instance, what is the effect of the exclusion of community of property, profit and loss and the marital power or the invariable consequences of marriage at common law? In particular, what aspect of the marital power is excluded? It is submitted that since the statute deals with the property of married persons, only the property aspect of the marital power was being excluded In any event, one should normally assume that a statute modifies the common law only when it uses direct language to that effect

THE LAW OF DIVORCE

The common law grounds for divorce have undergone much change in many countries and Botswana has been no exception to this trend The traditional Roman-Dutch law grounds for divorce were based on proof of a matrimonial offence adultery or malicious desertion The Matrimonial Causes Act of 1973 changed this

> After the commencement of this Act the sole ground on which an action for divorce may be presented to the court by either party shall be that the marriage has broken down irretrievably [18]

The party alleging marital breakdown must prove one or more of four facts laid down by the Act These are briefly defendants' adultery which makes life intolerable for the plaintiff, defendants' behaviour being such that plaintiff cannot reasonably be expected to live with defendant, defendants' desertion of plaintiff for a continuous two year period immediately before the action and, lastly, living apart for two years immediately before the action and defendant consents to the divorce In addition to proof of one or more of the above, the court must be satisfied on all the evidence that the marriage has broken down beyond repair A considerable volume of case law has developed on this issue some of which show all signs of critical judicial interpretation

THE LAW OF SUCCESSION

This area, like marriage, is one in which there has been legislative developments, some of which had the effect of altering Roman-Dutch law concepts The freedom of testation generally recognised by the common law with some restrictions has been retained subject to compliance with established procedures for the execution of wills Originally, there were doubts as to whether Africans could validly execute a will but these were cleared as recently as 1964 [19] As far as intestate succession is concerned, alterations were made as early as 1934 when the Succession Proclamation was passed The proclamation was intended to give succession rights to someone whose spouse had died without leaving a will and to whom they were married out of community It was amended in 1970 [20] to increase the amount recoverable as well as to provide for spouses married in community of property This Act also allows dependants of a deceased person who has not made adequate provision for them in his or her will to claim maintenance from the estate This is a significant innovation especially in view of the potentially harsh consequences complete freedom of testation may bring It is important to note, however, that the Act does not apply to

> the estate of any person who dies either wholly or partly intestate where the rights of succession to such estate are determinable in accordance with customary law [21]

The above effectively means that the Act is not available to Batswana whose breadwinner dies intestate since, according to the Customary Law (Application and Ascertainment) Act of 1969, the intestate heirs of tribesmen and the nature and extent of their inheritances are determined by customary law

CONCLUSION

The above account has attempted to identify some of the developments which have taken place in specific areas of the received Roman-Dutch Law As has already been observed, the law which obtained in the Cape Colony at 1891 was not the "pure" Roman-Dutch law applied in Holland during the Dutch Republic - rather, it was a mixture of that law and English law The course taken by that law was influenced by a number of factors, some of which operate to this day

Firstly, the persons charged with its administration, District Officers, Resident Magistrates and so on initially did not always have legal training This obviously had implications for their capability or interest to develop the law into a sufficiently rich and coherent legal system adaptable to changing social and other conditions The political orientation of these officers, especially the High Commissioner who viewed the Protectorate as an appendage of South Africa also played a part in its development or retardation The development of the legal system along racial lines also played its part in this process that the common law originally did not apply to Africans meant that less cases came to court calling for its application This must have had an impact on the development of the Roman-Dutch law, in view of the fact that it applied only to a small minority of the Protectorate's population Thus although Pain [22] considers the High Commission Territories to have been fortunate in their inheritance of such a rich legal system as the Roman-Dutch law the political atmosphere at the time of reception might have transformed the "fortune"

Although Parliament has introduced some innovations into aspects of the common law, there is no doubt that some of its archaic concepts and institutions remain to be altered As to whether it is desirable to "develop" the common law, the usual answer may be furnished, which is that the parts which are relevant or appropriate for local conditions be retained Finally, changes should not be cosmetic or create more confusion especially in matters concerning choice of law in private law matters for Batswana, who constitute the majority of the country's population and whom the law does not "reach"

FOOTNOTES

1 9 May 1891

2 Ibid, s 2

3 "Sources of the Criminal Law of Botswana", JAL, Vol 18, No 1, p 24

4 "Legal Development in Botswana from 1885 to 1966", Botswana Notes and Records, No 5 (1973), p 52-63 at 57

5 See the wording of the 1959 General Law (Cape Statutes) Revision Proclamation

6 "The Reception of English and Roman-Dutch Law in Africa, with reference to Botswana, Lesotho and Swaziland" Comparative and International Law Journal of Southern Africa, Vol 11 (1978), p 137-167

7 This is suggested by Aguda, ibid, at 57

8 Aguda, ibid, at 54

9 See Proclamation No 1, 1919

10 See Proclamation No 40, 1912

11 "The History and Nature of the Judicial systems of Botswana, Lesotho, and Swaziland - Introduction of the Superior Courts" Quoted in B Foster, History of the Administration of Justice of the Republic of Botswana (unpublished mimeograph)

12 Folio 8/1, R64 Law Reform Committee

13 Folio 18/1, R64 Law Reform Committee

14 Law No 2 of 1964

15 Brewer, loc cit, Note 3 above, at p 28

16 Hansard, vol 34, 1969 at p 16

17 Ibid, at p 18

18 See Section 14

19 See Frankel Makwati and Another v Sechele, 1964 HCTLR

20 See The Succession (Rights of Surviving Spouse and Inheritance Family Provisions) Act, 1970

21 Ibid, section 3

22 Pain, loc cit, note 6 above

THE RECEPTION AND DEVELOPMENT OF THE ROMAN-DUTCH LAW IN SRI LANKA

C G Weeramantry

INTRODUCTION

Sri Lanka is the only jurisdiction outside the African continent in which the Roman-Dutch law is a living system Having had my training under that system, practiced under that system, taught under that system, and judged under that system, I have a great affection for it It has worked well for our people and as far as I can read the indications it will continue to serve them well

I detect no clamour for its replacement although intensely nationalist sentiment has caused the rejection of many other alien institutions I see rather an acceptance of its mellowness of principle as being in harmony with the mood and the needs of our people Our traditional systems have been based upon a non-formalist, non-technical and readily accessible apparatus of courts and concepts, and it may be that some of those features have been discerned by our people in the Roman-Dutch Law

For the benefit of those unfamiliar with our history I must at this point digress into a short historical sketch This is necessary because there has been a very long existing system of traditional law in the country going back to the date of the founding of Sri Lanka in 543 B C For upwards of two thousand years we have had a continuous chronicle of our history maintained from generation to generation, and this gives us many insights into the legal attitudes and judicial structures of our ancient civilisation

There was a very early flowering of culture and commerce in Sri Lanka and we have records, for example, at the time of the Roman Emperors that Sri Lanka maintained an embassy in the court of Rome This is recorded also in Gibbon and various Roman chronicles Many of you will remember Milton's lines in Paradise Regained referring to the embassy at the court of Rome from Sri Lanka This civilisation flourished for centuries

Under the impact of a series of invasions from south India the original Sinhalese Kingdom which had its capital in the north-central part of the island withdrew into the hills and by the time Western invasions began a powerful kingdom had developed in the hills around the city of Kandy Here, even while European powers occupied the coastal areas, the ancient law was preserved The term Kandyan Law thus refers to the ancient law that was preserved in that mountain kingdom which held its own against the Portuguese, against the Dutch, and against the British up to 1815

During the period of European interference or intervention in the affairs of the island which commenced from 1505 there were three successive regimes the Portuguese (1505 - 1656), the Dutch (1656 - 1796, and the British (1796-1948) The Kandyan provinces still held out against the British from 1796 and it was only in 1815, nearly 20 years later, that the Kandyan provinces were ceded to the British

The British then began their dominion over the entirety of the island only in 1815 The Portuguese and the Dutch and the British up to 1815 had no dominion over the central area but were confined only to the maritime provinces

Apart from the Kandyan law you will also find in any discussion of Sri Lankan law a reference to various other legal systems We have today a population of about 15 million people in Sri Lanka and of them close on a million are followers of the Islamic faith They are people who came over to the island as traders at various times from the thirteenth or fourteenth century onwards and they settled in the coastal areas in great numbers The Muslim law or Islamic law has always been applied to this group

Descendants of those who came from South India, who are the Tamils, have been in the northern part of the island for centuries, if not thousands of years Their system of law, known as the Thesawalamai, is a customary system which has certain well-defined rules in regard to succession, personal property, and matrimonial affairs This system continues to be applicable

We have then the Kandyan law, the Islamic law, the Thesawalamai in addition to that, during the period of Dutch rule there were also systems of law applicable to smaller sections of the population For example there is a group of people indulging in trade and commerce known as the Chetties of Colombo who had their own particular system of laws There was a set of people on the east coast, who were fishermen by trade, who had another set of personal laws applicable to them known as the Mukkuwa law Likewise the people of the province of Puttalam also had a set of laws which was particular to them

This preliminary sketch will, it is hoped, convey some general idea of the various legal systems in the island at the time of the advent of the Dutch

For upwards of two thousand years a continuous system of courts has thus functioned in Sri Lanka, generating high expectations of the justice system in the country This expectation, by and large, the Roman-Dutch system has fulfilled The law's delays, the formalities of structured courts, the expense of legal representation, the exclusiveness of a privileged legal profession - all of these have in one form or another interfered with the achievement of such a result but it is not at the door of the Roman-Dutch Law that the blame for such impediments can be laid Our court structure, our legal procedures and our legal profession have not been based upon the corresponding Roman-Dutch institutions In southern Africa far more of these adjectival institutions are based upon the Roman-Dutch law In Sri Lanka we have only the substantive content of Roman-Dutch law and that too only in relation to civil disputes The applicability of Roman-Dutch principle is thus perhaps more limited than it is in the southern African Roman-Dutch jurisdictions

Despite the formalism, delay and expense of some of our court procedures - shortcomings which we no doubt share with many other jurisdictions - the functioning of the substantive Roman-Dutch law has not been a cause for criticism at any level

The reputation of the Roman-Dutch law as a system of well-rounded principles, equitable and egalitarian, stands high in Sri Lanka It is worth reminding ourselves in this connection of a fundamental thread running through the Roman-Dutch system, to which all judges administering the Roman-Dutch law are committed as part of their judicial calling So fundamental is this that no legal system professing to be based upon the Roman-Dutch law can ignore it, and this dovetails into the principles of equality built into the Sri Lankan constitution

A quote from Voet [1]

> The law ought to be just and reasonable both in regard to the subject matter, directing what is honourable and forbidding what is base, and as to its form, preserving equality and binding citizens equally

To paraphrase, the Roman-Dutch law is the embodiment of equity Equality lies at the heart of equity Without equality before the law there can therefore be no Roman-Dutch law or truly Roman-Dutch legal system That insistence on equality runs through our legal system as it runs through our national life

This insistent demand for equality manifests itself at all levels of social and national affairs Indeed in Sri Lanka, the people, not satisfied with political equality and legal equality, fought hard for social equality and an important social revolution occurred in 1956 in which the common man, feeling left out from the world of privilege, demanded and received greater social recognition - a 'place in the sun', as some political slogans put it The best evidence of the reception of the Roman-Dutch Law into the minds and lives of Sri Lankan people is that at no stage in this great campaign was the Roman-Dutch law seen as being an oppressive instrument by which those in power and privilege entrenched themselves The courts, the profession, the legal procedures, might have attracted some of the blame, but not the Roman-Dutch law

Having made these general observations I shall now proceed to examine in greater detail the manner of the reception of the Roman-Dutch law into Sri Lanka

RECEPTION OF THE ROMAN-DUTCH LAW IN SRI LANKA

Frederick North, the first British Governor of Ceylon, wrote on 27 October 1798 to the Directors of the East India Company, referring to the legal system of the Dutch era which the British had inherited, and more particularly to its procedural aspects

> I confess a nearer acquaintance with that jurisprudence and the mode of its administration here has convinced me that a more dilatory, expensive, inefficient and negligent system could not be imagined

Yet one hundred and eighty six years later, the system continues in full vigour, surviving a century and a half of British rule and close on forty years of indigenous rule

How came it that the British who prided themselves on their own legal prowess and institutions were content to accept the law left in the conquered country by a defeated alien ruler? How came it that an independent nation with great legal skills and a desire to make a break with its colonial past still clings to these vestiges of an age of foreign domination? What prognoses can be made for the future?

The study is a fascinating one, with deep relevance to jurisprudence, history, sociology, psychology and politics Must law, as Savigny held, necessarily reflect the historical evolution and needs of a people, to be thrown up spontaneously and gradually in the course of its voyage through the centuries? Does the Sri Lankan experience join other phenomena of juristic history such as the American-imposed Constitution of Japan in providing examples of the flourishing of totally imported institutions upon an alien soil? Does history shape the destinies (including the legal destinies) of a people, or do the people shape their legal history or does the truth lie in-between? What insights can sociology, psychology and politics provide for the survival of this juristic phenomenon? There is rich material here for the researcher, especially in the post-independence period It would be beyond the scope of this paper and beyond the competence of the author to attempt to answer these questions, but some suggestions regarding possible reasons will be offered

The Sri Lankan experience has special relevance for Lesotho in its centenary year of Roman-Dutch law, for, unlike South Africa, both these countries are not dominated, as South Africa is, by a group directly linked with Holland Indeed in Sri Lanka the descendants of the Dutch, the Burghers, no longer occupy the position of influence they occupied under the British Many of the more influential have migrated Many of the rest are merging with the local population Their influence as a community is no longer what it was, but still the law their ancestors introduced continues

We have already noted that the Dutch occupation of Sri Lanka did not extend to the whole territory of the island The ancient kingdom of Sri Lanka continued in Kandy, the hill capital to which successive waves of foreign invasion had driven the monarchy, but from Kandy the Kandyan King exercised sovereignty over a substantial part of the island The Dutch occupation was confined to the maritime areas

This had a significant legal effect, for whatever the conqueror might do, the ancient Sinhalese laws and customs were not a dead system but continued to live on in the Kandyan kingdom The blanket imposition of Dutch law upon the Sinhalese was thus, if it were even attempted, a more difficult task than would have been the case if the Dutch held sway over the entire island Moreover there were other systems of law as well, such as the Muslim law and the Thesavalamai, which could not be overlooked

The laws administered by the Dutch were the following

(a) The Statutes of Batavia,

(b) Local Statutes and Regulations passed by the Dutch Government in Sri Lanka,

(c) The Personal Laws of various sections of the population,

(d) The Roman-Dutch Law (using that term in a wide sense to include not only the law stated in the textbooks of the great Dutch jurists but also to enactments of the federal and provincial legislatures in The Netherlands)

THE STATUTE OF BATAVIA

Under instructions issued in 1632 by the Council of the Seventeen, justice was to be done at Batavia and other places under the dominion of the Dutch East India Company in accordance with the institutions and practices observed in the provinces of the United Provinces These statutes appeared in two collections known as the Old Statutes of Batavia or Van Diemen's Code (1642) and the New Statutes of Batavia or Van der Parra's Collection (1784)

It is important to note in this connection the last paragraph of the Old Statutes of Batavia It provided that unless special provision is made in the Statutes, the laws and statutes and customs in use in the United Netherlands shall be observed and maintained, and, failing them, recourse shall be had to the written laws so far as they are consistent with the circumstances of those countries and capable of application. The New Statutes contained a similar provision in its preamble which recited that it was intended "for the enlightenment and direction of all judges and judicial officers at all the settlements of the Netherlands Indies outside Java in so far as they shall be applicable there and the condition of those places and our authority there shall apply "

During the period of Dutch rule the Statutes of Batavia were made applicable to Sri Lanka When and how this introduction occurred has been a matter of some controversy

While in 1822 Chief Justice Sir Hardinge Giffard noted[2] a report by the Keeper of the Dutch Records that there was no information on the date of their introduction, in 1904 the Supreme Court noted a report from the Government Archivist that they were introduced by a resolution of the Governor in Council dated 3 March 1666[3] On a perusal of the instructions issued by the Governor General and Council in India (compiled by Rycklof van Goens) to the Governor of Ceylon in 1656 we find it stated however that justice must be administered "in accordance with the Statutes of Batavia as in force here, making no alteration therein "

This points to the conclusion that they were made applicable in 1656 itself, the year of commencement of Dutch rule Again, while the memoir of Zwardecroon, Commandeur of Jaffnapatam,[4] which gives us much information about the legal system, makes no mention of a date, the memoir of Governor Cornelius Joan Simons (1707) states that the Statutes of Batavia and the Placaats "have been more than four times proclaimed here"

The available material seems thus to point to the statutes having been administered by the Dutch in Ceylon from the commencement of their rule, a conclusion reinforced by the memoir of Governor Rycklof van Goens[5] to the effect that no other forms of justice ought to be introduced other than those "presently in force as regulated by the laws of the fatherland and the Statutes of Batavia "

Whatever their precise date of introduction, these statutes certainly were of great importance to the reception of the Roman-Dutch law in Ceylon, for they were an attempt to alter or modify the jurisprudence of Holland so as to "reconcile the Company's government to the spirit of the people whom the Dutch conquered "[6]

These Statutes have been judicially recognised after the commencement of British rule as having legislative force in Ceylon[7]

LOCAL STATUTES AND REGULATIONS

The Statutes of Batavia were of course not the only legislative instruments made applicable in Sri Lanka during the century and a half of Dutch rule Plakaten applicable to Sri Lanka were issued from time to time both from The Netherlands and from Batavia These were entered in registers known as the Plakaatboeken[8]

THE PERSONAL LAWS

The Statutes of Batavia contained, as we have seen, a provision for their modification to the extent necessitated by local circumstances The civil courts in the maritime provinces included local inhabitants especially for decisions in cases concerning land, as their advice was essential on matters of local custom In the result the personal laws and customs of the indigenous population received practical recognition [9]

Sri Lanka was rich, moreover in the area of the personal laws, for it had at least four recognizable sets of personal laws in the Dutch territories - low-country Sinhalese, Jaffna Tamil, Muslim and Mukkuvar

(1) Low-country Sinhalese Custom

Hendrick Zwaardekroon, Commandeur of Jaffna, in his memoir of 1697[10] observed the existence of many native customs according to which civil matters have to be settled "as the inhabitants would consider themselves wronged if the European laws had to be applied to them " Though he was speaking with reference to the province of Jaffna, this shows a readiness on the part of the Dutch to apply local custom in other provinces as well - a willingness evidenced by the presence of experienced Sinhalese on the landraads

There is controversy however regarding the extent to which low-country customary Sinhalese law survived through the century and a half of Dutch rule, for an early Chief Justice, Sir Richard Ottley, observed in answer to questions addressed to him by the Royal Commission of inquiry that the Sinhalese generally abide by the Dutch law Despite the willingness of the Dutch to administer customary law among the low-country Sinhalese, it may well be, therefore, that this body of law lost some of its vitality during the Dutch occupation

ii) Thesawalamai

Dissawe Claas Isaacs in 1707 compiled a code of customs applicable to the "Malabar inhabitants of the province of Jaffna" The Thesawalamai was a system of personal law applicable to this group of persons and was administered by the Dutch

iii) Muslim Law

The Dutch administered the Muslim law to the Muslim inhabitants of the provinces under their rule Indeed they had compiled a Code of Muhammedan Law known as the Byzanderwatten, to govern the Muslims in the East Indies and this seems to have been applied to the Muslims of Ceylon

iv) Mukkuva Law

A group of sea fishermen thought to hail from the Malabar coast were known as the Mukkuvas They lived on the East coast in Batticaloa and the adjacent districts and were subject to their own customary laws These were never interfered with by the Dutch courts of law This system of law was in existence at the commencement of British rule but eventually died out and was implicitly abolished by legislation in 1876 [11]

v) Other Systems of Personal Law

In addition to all the personal laws mentioned, the Dutch recognised also the personal laws of other small groups such as those of the Chetty inhabitants of Colombo and of the inhabitants of the province of Puttalam The Dutch Governor Falck in fact expressly ordered, when the province of Puttalam was ceded to the Dutch by the King of Kandy, that all civil cases should be decided according to local custom

THE ROMAN-DUTCH LAW

It will thus be seen that the Roman-Dutch law was not applied as a blanket system governing all the people under Dutch rule but that careful exceptions were made for specific groups

The Roman-Dutch law was in fact only applicable in the event of there being no rule already contained in the Statutes of Batavia or in local ordinances and in the absence of local custom governing the matter

The extent of applicability of the Roman-Dutch law during the period of Dutch rule has been summarised by De Sampayo J in these terms

> It is of course true as a general proposition that the Roman-Dutch law prevailed in Ceylon under the Dutch Government But I think it more correct to say that what so prevailed was not the whole body of Dutch laws, including legislation due to peculiar circumstances of time and place, but only what may be called the Common Law of Holland, or so much of it as was suitable to local needs and circumstances, while this was supplemented from time to time, as necessity arose, by local legislation Thus for example, land tenures peculiar to Holland were never received into our law "[12]

Illustrative of this principle is the fact that the rules of Roman-Dutch law prohibiting donations to religious houses and gifts for pious causes were never enforced in Ceylon, as being a measure peculiar to Holland [13]

The foregoing background enables one to appreciate the legal situation which greeted the British upon their assumption of the rulership of the maritime provinces

THE BRITISH PERIOD

The reader will also remember that though the period of British rule in Sri Lanka commenced with the capitulation of the Dutch in 1796 it was not until the annexation of the Kandyan Kingdom in 1815 that the British became the rulers of the entire country

By proclamation of 23 September 1799 the law and institutions which "subsisted under the ancient Government of the United Provinces" were declared to be the basis on which the British would conduct the administration of justice

The various customary systems of law to which reference has been made were then inherited by the British In addition, the Kandyan law also became applicable to the Kandyans with the annexation of the Kandyan Kingdom in 1815

The systems of personal law which survived under the British were only the Kandyan law, the Thesawalamai and the Muslin law Low-country Sinhalese law, Mukkuva law, the customs of the Chetties of Colombo and of the people of Puttalam all fell into desuetude for one reason or another and the persons who were governed by those systems came under the Roman-Dutch law as the residuary common law applicable in the absence of governing local custom The Roman-Dutch law would also operate as the residuary law where a recognised personal law is silent[14]

The settled principle of English law and policy that colonies acquired by cession or conquest retained their old law so long and so far as it remained unaltered by the new ruling power no doubt was one of the reasons for the Proclamation of 23 September 1799 This did not of course mean that the British had no intention of making a different dispensation once they had the time to settle into the government of their new territory It would not be unreasonable to infer that prevailing international conflicts and uncertainties regarding the future of specific colonial territories caused the British to defer a firm decision on the system of law they would choose for the future governance of the island Indeed Governor North, the first British governor (whose views regarding the Roman-Dutch law we have already noted), received specific instructions from the East India Company's Directors advising him that

> His Majesty has deemed it expedient and has accordingly directed that, for the present, the <u>temporary</u> administration of justice and police should, as nearly as circumstances will permit, be exercised in conformity with the Laws and Institutions that subsisted under the Dutch government "

The prolonged nature of the hostilities with France, which culminated in the same year in which the Kandyan Kingdom was annexed, was also a factor which must have delayed a definitive decision on the island's future common law The interim adoption of the Roman-Dutch law would not naturally have been very welcome to many British administrators who perhaps shared Governor North's dim view of the merits of this system This attitude stemmed partly from lack of the necessary interest to acquire a knowledge of the rudiments of a different legal system, from the common lawyer's traditional belief, widely prevalent in England through the writings of Blackstone and others, that the English system was the epitome of legal excellence and partly no doubt to sheer intellectual laziness

Thus we find an early English judge observing that "the laws of contract except in a few unimportant points are the same in principle in the English and the Roman-Dutch law "[15]

Likewise Sir Hardinge Giffard, an early Chief Justice, writing after a quarter century of British administration of the Roman-Dutch law thought that "A short Code recognising the English law of contract and intestacy seems all that is required for the civil jurisdiction "[16]

There were no doubt many English judges and officials who continued to chafe against having to administer this alien system After nearly a hundred years of its prevalence under their rule we find Mr Justice Clarence, Senior Puisne Justice, writing in the Law Quarterly Review in 1886 "All remains of the Roman-Dutch law should be cut down and grubbed up, root and branch "[17] It must not be thought however that these were the attitudes of all English officials There were notable exceptions Thus Berwick D J , who functioned in the early part of the nineteenth century, was reputed for his knowledge of the Roman-Dutch law and was one of the foremost authorities of his time on this subject About a hundred years later R W Lee, the author of many noteworthy books and articles on the Roman-Dutch Law

(including the well-known textbook Introduction to Roman-Dutch Law which formed the staple diet of many students of the subject), was a magistrate in Ceylon But these were perhaps exceptions There was much ignorance on the part of many British judicial officials concerning the Roman-Dutch law

However a new force was growing up which helped in altering attitudes and retaining the Roman-Dutch law Indigenous legal education started early in Sri Lanka, with a Council of Legal Education being responsible for the education and examination of those desiring to be Proctors or Advocates of the Supreme Court Barristers called to the bar in England were entitled to automatic admission in Ceylon, but they constituted only a small proportion of the total strength of a legal profession which was growing in numbers and influence From the last quarter of the nineteenth century lawyers trained in Ceylon were developing an affection for the Roman-Dutch law and taking a pride in administering it Probably there entered into this also a feeling that the locally trained lawyers enjoyed in this respect an advantage over their England-returned brethren and that a knowledge of the various legal systems in the country - Kandyan, Muslim, Thesawalamai and the Roman-Dutch were the essential prerequisites to success at the bar Outstanding lawyers appeared, who had made their name on their knowledge of the Roman-Dutch law and indeed outstanding legal families also appeared - the Pereiras, the Dias's and the Jayewardenes for example - who carried on this legal tradition Through successive generations so much was this feeling prevalent that in many legal families whose members were reading for the bar there was a deliberate preference for the local law school rather than the Inns of Court The Jayewardene family, which produced five outstanding advocates in one generation (two of whom became judges of the Supreme Court) and the Pereira family, which produced both outstanding Roman-Dutch scholars and practitioners and judges, are prominent examples [18]

It is significant that the first President of the Ceylon National Congress and the father of the University movement in Ceylon, Sir Ponnambalan Arunachalam, spoke of "our precious inheritance of the Roman-Dutch law" in the preface to his Digest of the Civil Law of Ceylon (1910) and that he attempted in that work to restate the Roman-Dutch law as modified by the English law up to this time

Eminent judges such as Walter Pereira, Thomas de Sampayo, the Jayewardenes and Thomas Garvin adapted the Roman-Dutch law to local situations, rendering it an increasingly suitable tool for the resolution of civil disputes

The judiciary was indeed a very active agency for the development of the Roman-Dutch law, sometimes being ahead of the South African courts in this regard A prime example of this comes from the sphere of causa in regard to which Wendt J, in Lipton v Buchanan,[19] defined the concept as denoting "the ground, reason or object of a promise giving such promise a binding effect in law" He pointed out that it had a much wider meaning than the English term 'consideration' The Supreme Court, in confirming this decision in review, drew attention to the contrary view then prevailing in South Africa It will be remembered that in South Africa there was till 1919 a strong school of thought headed by Lord de Villiers that causa could be equated with the consideration of English law - a view decisively rejected only in Conradie v Rossouw[20]

To these forces there were added also the forces of nationalism which were taking shape in Sri Lanka in the first quarter of this century These forces spelt out certain attitudes, one of which was the emphasis of things local as opposed to British, and the Roman-Dutch law with now a century of adaptation to local needs behind it, was among the 'local' institutions which contrasted with the ruling power's impositions There was by now no viable body of indigenous law which could have supplied a legal system for the whole country beyond the Roman-Dutch law and as such it tended to develop and prosper

The concepts of reasonableness and egalitarianism which underlie the Roman-Dutch law have certain important historical connotations not without relevance in considering that system's appeal to a colonially subjugated or newly liberated people

It will be remembered that the Dutch themselves were fighting a war of independence against Spanish colonialism The jurists were exhibiting a reaction to the heritage of Spanish imperialism and, perhaps, the excesses of the Spanish inquisition[21] There was a conscious appeal to natural law and to the ideal element of equality because this ran against the colonialist scheme of creating different classes

Nationalists struggling for independence from colonialism or its immediate after-effects would see rationality as a counterpoint to the colonial yardstick of power, equality as a counterpoint to the colonial structure of domination and subordination

In countries like emergent and newly independent Sri Lanka as, I fancy, in Lesotho, there can hence be a remarkable degree of harmony, perhaps not consciously articulated, between nationalist ways of thinking and the underlying spirit of the Roman-Dutch law

It might have been true that the Roman-Dutch law had itself been the law of conquerors But, as we have observed, it had been only gently introduced without a wholesale attempt to superimpose it blanket style upon the pre-existing legal systems At any rate it was now sufficiently distant in time to have lost the quality which a conqueror's law must often subserve

Moreover the Common Law of the period of British imperialism often spoke in a language of uncertain import What was right and just for the mother country was not always right and just for the colonies What was right and just for the ruling castes and cadres was not always right and just for others

When Lord Mansfield for example announced in ringing tones that the air of England was too pure for slavery to flourish he was only talking of the law of England In the colonies it was quite in order Contracts for indentured labour which violated

basic principles of individual freedom were quite in order in the colonies long after all English lawyers had agreed they were unfit for England Blackstone's version of the Common Law of England was not necessarily the version that went into the colonies In other words the English Common Law was not based upon the idealistic element but was often bent to accommodate the realities of power and special interests

Sri Lankan lawyers of the British colonial period may well have felt this contradistinction between the inherited law and a possibly imposed English law when they worked hard for the development and adaptation of the Roman-Dutch

Historically we must remember also that at the time the Dutch lawyers were working out the Roman-Dutch law, Holland was in advance of all European countries in the notion of individual egalitarianism England was still in the clutches of a rigid class system In France the people were still weighed down by a monarchy and nobility which continued to enjoy privilege while loading the poor with taxes In Russia the vast bulk of the people were no better than serfs Germany, struggling to repair the ravages of the Thirty Years War, was in tatters In Holland alone the individual had come into his own and the prosperous merchant class, successful through their own efforts, were fierce apostles of the rights of the individual

It was therefore Holland which was the source of inspiration of those who cherished the egalitarian ideal Not unnaturally John Locke, the great apostle of individual liberty, derived much of his inspiration from Holland and spent considerable time in that country gathering ideas for his great work which became a cornerstone of American egalitarian thought as well as of French revolutionary idealism

It is natural, therefore, that the spirit of individual equality shines transparently through the Roman-Dutch law, free of the class or special interest bias of the colonial English law Perhaps it is not to be wondered at that it commended itself to those who were seeking a regime of equality free of the various forms of dominance and subordination inevitably associated with colonial rule

It is not suggested in this paper that this was the conscious motivation of the lawyer class that guided the Ceylon independence movement and at the same time showed an affection for the Roman-Dutch law or that the affinities explored in this paper were specifically articulated by them It is suggested however that there is more than mere coincidence in the correspondence of the strivings of that group and the spirit of that legal system The one complemented the other and there was no need to look elsewhere except, where possible, to research and resuscitate so much as might be applicable of our own traditional law

When today we are looking at the reasons for the retention and survival of Roman-Dutch law in such diverse jurisdictions as Sri Lanka and Lesotho there may be something in these thoughts which could be a pointer to the future course and development of the Roman-Dutch law in these jurisdictions

PRINCIPLES OF THE ROMAN-DUTCH COMMON LAW

A few more leading principles which have been judicially stated regarding the extent of applicability of the Roman-Dutch law must now be noted Among these are the following

(a) It is only so much of the Roman-Dutch law as may be shown or presumed to have been introduced into Ceylon, that is in force [22]

(b) The principle just stated does not apply to fundamental principles of the common law enunciated by authorities regarded as binding wherever the Roman-Dutch law prevails Although such principles may be capable of being modified in their local applications by judicial decisions it would be only by a series of unbroken and express decisions that such a development could take place [23]

c) There is a presumption that every part of the Roman-Dutch law as it "subsisted under the ancient Government of the United Provinces," if not repealed by the local legislature, is still in force [24]

d) The Roman-Dutch law has been modified in many directions, both expressly and by necessary implication, by statute law and also by judicial decision [25] Illustrations of judicial decision modifying the Roman-Dutch common law may be drawn from many areas of law, and in some of these the Sri Lankan courts have at times applied the Roman-Dutch law in a manner even contrary to its express formulations and interpretations by the Appellate Division of South Africa [26]

The works of the Dutch jurists from the sixteenth to the nineteenth centuries are accepted by the Sri Lankan courts as being of high authority The jurists most frequently cited are Johannes Voet, Hugo Grotius, Simon Van Leeuwan, Van der Keessel and Van der Linden Of these writers Voet is the most highly regarded in Ceylon[27] and Voet would usually be followed in case of a conflict of authority This is not of course an invariable rule, and there have been occasions when the opinion of Voet has been passed over and other jurists have been followed where their views seemed more acceptable, having regard to circumstances in Ceylon [28]

Collections of Dutch decisions such as those of Naeranus, Neostadius and Sande are rarely cited in Ceylon However through reference to them by jurists they become in practice a source of law in Ceylon Also not unimportant are the opinions of eminent Dutch lawyers such as those collected in the Hollandsche Consultatien

These general observations will convey some idea of the extent of reception of the principles of the Roman-Dutch common law

What, then, of the statute law?

Readers will be familiar with the South African principle that all placaats passed before 1652, the year of Van Riebeck's arrrival at the Cape, are considered binding in that country In Ceylon the corresponding year was 1656 but the extent of applicability was not the same Although Dutch legislation prior to that date was presumed to be part of Ceylon law, such legislation, though applicable, was not always applied by the Dutch [29]

Dutch legislation subsequent to 1656 is presumed to be inapplicable unless shown to have been specially introduced This corresponds to the rule of English law regarding the inapplicability to a colony of English legislation passed after its conquest or settlement Acts of Parliament passed subsequently will not be construed so as to extend to the colony without express words showing such to be the intention of the legislature So also, in the language of the Supreme Court[30]

> It is for those who assert and rely upon the operation of a Roman-Dutch law promulgated since the capitulation of the Portuguese in 1656, where there is doubt whether that law is extant in Ceylon or rot, to show beyond all question that it operates and applies

It should be noted for this purpose that the exact date of the capitulation of the Portuguese to the Dutch was 11 May 1656

An instance of success in showing the special applicability of legislation subsequent to 1656 is the case of the Placaat of 26 September 1658 relating to a lessor's right to compensation for improvements This rule was held to have been accepted and consistently acted upon in Ceylon for over forty years [31]

All that has been said so far relates to general legislation Special and local regulations, such as fiscal and revenue legislation, do not apply in Ceylon even though enacted prior to 1656, as they have no extra-territorial operation Dutch usury laws, being merely local enactments and unsuited to conditions in Ceylon have been held not to be in force in Ceylon [32]

In relation to Dutch statute law, it must finally be noted that even statutes applicable in Ceylon may be shown to have been abrogated by disuse [33]

ENCROACHMENT ON ROMAN-DUTCH LAW

This brief survey will have shown the extent of applicability of common and statute law Not all of this remains, of course, and there have been many methods of displacement of rules of Roman-Dutch law which unquestionably were received into Ceylon [34]

Chief among these, naturally, is the displacement of such rules by legislation and not unnaturally the chief source of principles for that legislation has been the English law

Ordinance No 5 of 1852, commonly known as the Civil Law Ordinance, displaced a large segment of the Roman-Dutch common law by introducing the law of England in maritime and commercial matters unless there was contrary statutory provision in Ceylon Among the maritime matters referred to are those relating to ships and the property therein, freight, demurrage, insurance and bills of lading Among the commercial matters are those relating to partnerships, corporations, banks and banking, principals and agents, carriers by land and life and fire insurance Other important statutes are the Bills of Exchange Ordinance and the Sale of Goods Ordinance, which are in the main reproductions of the corresponding English enactments Apart from the specific provisions of these statutes, which are based upon the English

law, there are also provisions attracting the law of England in more general terms As De Sampayo, J , observed of the Sale of Goods Ordinance "The whole spirit of the legislation was to abolish the Roman-Dutch law upon the subject "[35]

There are numerous other enactments which, without introducing the English law in specific terms, nevertheless introduced certain principles of English law in statutory form Where such provisions exist they introduce also the relevant English case law upon those principles

Among such statutes are The Prevention of Frauds Ordinance, the Registration of Documents Ordinance,[36] the Money Lending Ordinance and the Business Names Ordinance Important statutes displacing some Roman-Dutch principles in the family law area were the Matrimonial Rights and Inheritance Ordinance of 1876 (abolishing community of goods between husband and wife) and the Married Women's Property Ordinance of 1923 (sweeping away the last vestiges of community of property and equating the contractual position of a married woman with that of a feme sole in England)

Not all statutes introducing principles of English law displaced the relevant rules of Roman-Dutch law altogether The Pawnbrokers Ordinance of 1942, for example, introduces only certain particular provisions in relation to pawns and pledges and does not displace the general Roman-Dutch law in this field

Judicial decision is another means of introduction of the English law, as in the case of undue influence,[37] a doctrine which the Roman-Dutch law did not appear to develop English principles have likewise been judicially invoked to grant equitable relief to a lessee against forfeiture if he pays up arrears of rent[38] The general principle, however, would be that even though on a given topic of law similar English principles do exist, the Roman-Dutch law will be consciously applied[39]

English law has also imperceptibly introduced itself into the Sri Lankan legal system through the use, especially by legal draftsmen, of terms peculiar to English law - such as 'bill of sale', 'goodwill' and 'conversion' The term 'consideration' had the potential to undermine Roman-Dutch principles, but a great awareness of the need for vigilance, in the light of the Roman-Dutch concept of causa, has preserved the latter concept intact

SURVIVAL AND FUTURE OF ROMAN-DUTCH LAW

While in these ways there have been many encroachments upon the Roman-Dutch law, there has also been a conscious judicial reaction against its displacement While the courts are of course helpless against a statutory replacement of the Roman-Dutch law, they have resisted the tendency which was prevalent in the early days of British administration to be unwilling parties to the imperceptible displacement of the Roman-Dutch law by reliance on English concepts and phraseology, when such reliance is not altogether necessary

In this regard it must be observed that the Sri Lankan judiciary has manifested varying degrees of scholarly interest in the Roman-Dutch law There have been peaks of interest as for example during the Chief Justiceship of Sir Anton Bertram Surviving practitioners from that period used to regale young advocates during the author's junior days at the bar with tales of the judicial insistence on a battery of Roman-Dutch authorities relating to the matter in hand The bench was apparently dissatisfied with a young advocate's preparation of his case unless the bench was loaded at least to eye level with legal citations The heyday of such deep research into the Roman-Dutch law was perhaps in the first three decades of this century Since then there has been perhaps less citation of authority, but very clear judicial formulations of Roman-Dutch principle indicated that the bench was no less wedded to that system

In 1952 Chief Justice Basnayake, unvailing a portrait of Professor R W Lee at the University of Ceylon strongly urged that the Roman-Dutch element in Ceylon law should not be submerged by English law [40]

There have been occasional judges with a tendency to sweep aside citations and get to the heart of the matter with less regard to what they believed to be legalisms and this attitude sometimes reflects itself in lesser devotion on the part of the bar to Roman-Dutch legal research In its present phase there is not perhaps the same inclination to receive deep draughts of the Roman-Dutch law from the mainsprings of its original sources, though here again the receptivity of the members of the bench naturally shows individual variations

Another factor to be noted is the very active contribution of an able bar to the development and adaptation of Roman-Dutch principle The contribution of the bar was made not merely through meticulous research into the principles of the law but also through incisive analyses and scientific formulations of propositions An example of the former was the contribution of Charles Ambrose Lorenz who translated Van der Keessel's Theses Selectae in 1868 An example of the latter was the work of the mathematician-lawyer H V Perera, perhaps the most dazzling exponent of the art of advocacy in the history of the Ceylon bar During a period of over thirty years of undisputed leadership of the profession he contributed new insights, perspectives and analyses of the Roman-Dutch law, in language honed to a fine perfection, which later became embodied in innumerable judgments of the Supreme Court

The law library of the Colombo bar has an immensely valuable collection of Roman-Dutch authorities and these are perhaps not as heavily used as they deserve to be One factor however which is causing bench and bar alike to devote less enthusiasm to these scholarly pursuits of the chase, especially in recent years, is the fact that the country has in the past three decades passed through immense social change and upheavals The leisurely contemplation

of fine points of Roman-Dutch law which was possible in the early decades of this century is less possible when deep social and constitutional issues are debated before the courts Their immediacy is compelling and tends to relegate to a position of secondary importance the property and contractual litigation which enjoyed pride of place in previous decades

In matters of contract and property these new social pressures have resulted in a vast volume of socially oriented legislation bearing on consumer protection, contracts of employment, agricultural tenures, borrowing and lending, mortgage and pledge and a host of other areas The time-honoured institution of fideicommissa on which generations of Ceylonese judges and lawyers spent so much effort and on which scholars produced outstanding monographs[41] was swept away legislatively Thus even in areas where the Roman-Dutch law once held undoubted sway, statute is making steady encroachments, as indeed it is making in the common law countries as well The trend of the age in all jurisdictions seems to be for statute law to hem in and confine the common law within ever narrowing boundaries The Roman-Dutch law is no exception to this trend

It thus has a future in Sri Lanka but one of a lessening dominance over the totality of a lawyer's concerns

One way in which its social relevance to the problems of today can be accentuated is by an increasing study of the social dimensions of Roman-Dutch principles What the Roman-Dutch law has to say on principles of equality, constitutionalism, human rights, the rule of law and international trade is not inconsiderable We can hardly lose sight of the fact that one of the concerns of the great Roman-Dutch writers, of whom Grotius is the pre-eminent example, was broad social justice - a concern which extended beyond the confines of their country to the great questions of the comity of nations, the laws of war and peace and that most modern of world concerns - the law of the sea True, these views may not be directly authoritative in the spheres of human rights and constitutional law

Yet they can help build up a climate of opinion in favour of the attitudes of freedom, fairplay and equality implicit in the Roman Dutch law and at the same time increase the prestige of the Roman-Dutch law by taking it out of the category of bookish and irrelevant academic learning to which it may be relegated by some of the younger lawyers

Indeed this is an aspect of the Roman-Dutch law which countries like Lesotho will increasingly encounter and devotees of the Roman-Dutch law may need to do some more intensive work in this field if they desire to preserve its relevance for the younger generation

It is hoped that this brief survey of the Roman-Dutch law in one of its most significant jurisdictions will have shown some of its strengths and weaknesses and will help in charting a course for its future in some of its other jurisdictions A system of law as rich as the system we have met here to review deserves perhaps a little more assistance from lawyers of this generation if its richness is to be preserved for posterity As Lord Diplock observed in the Privy Council,[42] in terms applicable no doubt with suitable adaptations, to Lesotho

> Although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the common law of Ceylon, it is not the finishing point Like the common law of England, the common law of Ceylon has not remained static since 1799 In the course of time it has been the subject of progressive development by a cursus curiae as the courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon

That precisely has been the objective of the Roman-Dutch Law Conference, and I am thankful for the opportunity to have made this contribution

I conclude, as I began, on a note of appreciation of the efforts of the organisers of this Conference and of admiration for their vision in facing the problem of the future of the Roman-Dutch law as it enters upon its second century in Lesotho

It is hoped that the results of the Conference will provide the authorities of Lesotho with many fruitful ideas for adapting the Roman-Dutch law to the needs of Lesotho and fashioning out of it a legal system that truly mirrors the sentiments, traditions and requirements of the people of Lesotho

FOOTNOTES

1 Voet 1 3 5

2 As recorded in the Appendix to Van der Straaten's Reports, p xxii at xxvi

3 Karonchihamy v Angohamy (1904) 8 N L R 1 at 23

4 Memoir of Hendrick Zwaardecroon, Commardeur of Jaffnapatam, (trans) Sophia Pieters, Ceylon Government Press, 1911

5 (Tr) E Reimers, Ceylon Government Press, 1923, p 31

6 Minute of Cleghorn dated 1st June 1799 on the Administration of Justice under the Dutch Government The minute is reproduced in the Journal of the Ceylon Branch of the Royal Asiatic Society, New Series, (1954) Vol III, pt II, p 125 at pp 128 et seq

7 See the judgment of Berwick, D J in Dona Clara v Dona Maria, 1820-33 Ram Rep 37 at 38

8 M W Jurriaanse, Catalogues of the Archives of the Dutch Central Government of Coastal Ceylon 1640-1796, Colombo, 1943, pp 127-8

9 Paul Peiris, Ceylon and the Hollanders 1658-1796, Colombo, 1918, p 4

10 Sophia Pieters, ibid , at pp 49-50

11 The Matrimonial Rights and Inheritance Ordinance, No 15 of 1876

12 Karonchihamy v Angohamy (1904) 8 N L R 1 at 19 See also Wijekoon v Goonewardene (1892) 2 C L Rep 59 at 64, Silva v Johanis Appuhamy (1965) 68 C L W 26 at 31

13 Godinho v Konig 1843 Ram Rep 132, Silva v Johanis Appuham (1965) 68 C L W 26

14 See Sabapathypillai v Sinnatamby (1948) 50 N L R 367 where it was held that the Roman-Dutch law would apply where the Thesawalamai is silent See also Saravanamuttu v Nadarajah (1955) 57 N L R 332 On the applicability of the Roman-Dutch law to Muslims, see Idroos Sathuk v Sittie Leyaudeen (1950) 51 N L R 509

15 1820-33 Ram Rep 81

16 In sec 17 of his report on the judicial system of Ceylon - see microfilm copy in Ceylon Government Archives

17 (1886) 2 L Q R 38 at 49

18 It is of interest to note that the present of Sri Lanka, Mr J R Jayewardene, is a member of this family

19 (1904) 8 N L R 49, confirmed in review by a bench of three judges in 10 N L R 58

20 1919 A D 279

21 See W P Nagan, "Conflicts Theory in Conflict A Systematic Appraisal of Traditional and Contemporary Theories" New York Journal of International and Comparative Law, vol 3 (1982), p 343 at 415

22 Lamahamy v Karunawathie (1921) 22 N L R 289, F B

23 Samed v Segutamby (1924) 25 N L R 481, F B, Ambalavanar v Navaratnam (1955) 56 N L R 422 at 425

24 Samed v Segutamby, supra, at 496

25 Per Wood Renton, C J in Korossa Rubber Co v Silva (1917) 20 N L R 65 at 74-5

26 See for example De Costa v Bank of Ceylon (1969) 72 N L R 457, differing from the Appellate Division on a question of unjust enrichment

27 Tarrant v Marikar (1934) 36 N L R 145 at 157

28 See Fernando v Weerakoen (1903) 6 N L R 212, Wellappa v Mudalihami (1903) 6 N L R 233, Silva v Silva (1908) 11 N L R 161

29 On the applicability to South Africa and Ceylon of the statute law of Holland, see Lee, Roman-Dutch Law (5th ed), pp 24-5

30 Karonchihamy v Angohamy, no 3 above, at 13

31 Jafferjee v de Zoysa (1953) 55 N L R 124 at 127

32 Ramasamy Pulle v Tamby Candoe (1875) 1872-5 Ram 189, F B

33 Karonchihamy v Angohamy, no 5 above, at 13 For a similar principle in South Africa see Seaville v Colly (1891) 9 S C 44

34 See generally the author's The Law of Contracts, Vol 1, 1967, pp 49-54

35 Attorney General v Abram Saibo & Co (1915) 18 N L R 417 at 427

36 The applicability of the Roman-Dutch law in the setting of the Registration of Documents Ordinance was discussed in Public Trustee v Uduruwana (1949) 51 N L R 193 at 197

37 See Perera v Tissera (1933) 35 N L R 257 at 266, 267

38 Sanoon v Theyvenderarajah (1963) 65 N L R 574

39 See de Silva v Hirdramani Ltd (1955) 56 N L R 481 at 487 where the Privy Council discussed the Roman-Dutch law relating to novation and applied that law while recognising at the same time that the principle in English law in that context was similar

40 See also his remarks in De Costa v The Times of Ceylon Ltd (1959) 62 N L R 269-270 and his reference to Roman-Dutch law as "our law" in Malliya v Ariyaratne (1962) 65 N L R 145, esp at p 160

41 E g T Nadaraja, The Roman-Dutch Law of Fideicommissa, Colombo, 1949, often cited in South Africa and in the Privy Council

42 Kodeeswaran v The Attorney-General (1969) 72 N L R 337

THE RECEPTION OF ROMAN LAW IN GERMANY

Andrees Wacke

PRELIMINARY OBSERVATIONS

In a general sense, the term 'reception' signifies the adoption of alien manifestations of thinking When applied in legal context (which is the rule) we mean the adoption of a legal system or institution or source of law by a society not subject to it As you know, receptions of law have occurred again and again in modern times For instance, Japan adopted a draft of the German Civil Code as early as the end of the nineteenth century In 1926 Turkey, under Ataturk, implemented the civil code of Switzerland, at the time the most modern European code Greece, again, adopted the German Civil Code in 1940 And in the nineteenth century the French Code Civil of 1804 turned out to be the model of a civil code for all Latin peoples

But even in the German Middle Ages, with German trading posts spreading, Landrechte (regional laws) like Sachsenspiegel (mirror of Saxon law) and Stadtrechte (municipal laws), such as those of Lubeck or Magdeburg, were implemented in the depths of the Slavonic east And as much as we speak of families of municipal laws in those days, Rene David has pointed out that for the world of today, we can distinguish several families of law characterised by certain structural resemblances

Every civilised nation has for centuries lived from the fecundity of external currents of civilisation Since law is one of the most important phenomena of civilisation, it is not excluded from such international exchange Rarely has political force been the cause of receptions of law, but, more often than not, it has been a developing need for rules of law, a vacuum of norms due to some lagging behind in development

Proof of this theory is the case of England Nolumus leges Angliae mutare, the Parliament of Merton declared in 1236 The reason for England being saved from a more thorough reception of Roman law is that even then a trained corps of lawyers had developed a legal and judicial system sufficient for practical demands For the wind only flows where there is an area of low pressure for it to fill In England, however, there was some kind of "high pressure in thinking" even in those years

Although the stress here is for Germany, it must first of all be emphasized that the reception was not due to a particularly German affinity to everything alien but an instance embracing all Europe, even of significance to world history According to Heinrich Mitteis, next to the Bible the Corpus Juris Civilis has been the most significant book in the history of mankind To medieval man, who believed in the written word, the Bible and the Corpus embodied the ratio scripta (common sense in written form) Hence the spreading of Roman law may well be compared with missionary work for Christianity

Our international congress in the most southern part of Africa impressively demonstrates the power of Roman law to link and unite the peoples of the universe To Rudolf von Jhering (in his books on The Spirit of Roman Law), the importance for world history and the mission of Rome was to replace the principle of nationality by the idea of universality of mankind

PREDISPOSITIONS FOR RECEPTABILITY OF ROMAN LAW

The transfer of old Roman law into modern national societies of completely different sociocultural mould is an extremely astounding phenomenon in itself Abandoning traditional tribal laws is not less suprising than giving up one's mother tongue A similar adoption of other laws, namely, those specifically coined by religion, like the old Jewish or the Muslim law, by societies of different religious beliefs, is hardly conceivable The feature of receptability distinguishes Roman law from other older laws

Its inner superiority in language, which is both full of wisdom and relatively constant in terminology, may not have been sufficient Another decisive factor was the art of isolating the specifically legal from non-legal ties of man brought about by religion, custom, habit

The Romans succeeded in this art of isolating those two spheres early on in their history, Fritz Schulz gives a masterly description of this in his "Principles of Roman Law" (1934/54, pp 13) But it is already Friedrich Carl von Savigny to whom we owe the true observation

> " law does not exist in isolation, its essential is life itself, looked at from a particular point of view "

It is from this particular perspective that a lawyer considers the world of human life, comparable to a member of staff in a theatre who casts light from one side onto the actors on a dark stage

Roman legal sources appear to us as a first class achievement in abstraction The case material is stripped of all irrelevant ornament The acting persons bear blank names like ego et tu, Titius and Maevius This masterly concentrated method of case exposition comes close to the ideal of "blind Justitia", that is, to judge irrespective of person

The Romans created the basic structures and models as elements of private law, without which no legal system can function such as the distinction between the subject and the object of law, between actiones in rem and actiones in personam, they created the idea of restricted right in rem like lien, usufruct, and so forth In effect, the Romans laid the foundation for the idea of abstract private law, of civil law "as such"

Looking in detail at this process of abstraction, it has developed in several historical steps

The first step was the distinction between human law and divine (or spiritual) law, between ius and fas, between iniuria and nefas The term ius was hence restricted to the secular order, and the spiritual share in the finding of law was reduced to a

minimum hardly to be noticed In Rome, ordeals had, for all we know, not existed, contrary to the German law, where ordeals had been practiced for a long time and had disappeared only with the reception of Roman legal thinking The Roman jurists never trusted in irrational ways of finding the law like in ordeals by fire or water, decision by lot or duel

The famous German scholar Gottfried Wilhelm Leibniz, quite rightly, advocated studying Roman law because he expected it to bring about "more rationality" (A return of archaic finding of law by ordeal would be the proposition of a group of squatters recently mentioned in a German newspaper to carry out their legal dispute with the houseowners by means of a soccer match modern sport as a continuation of medieval tournaments or nineteenth-century-style pistol duels fighting for the "superior" right of the stronger party! What strangely irrational method of settling conflicts!)

In a second step of differentiation, the republican jurists of Rome had already separated ius from mere custom, habit, or convention mos, consuetudo as well as from morality and ethics boni mores Moral terms in the legal sources like honestas, pietas, and above all fides, and also their counterparts turpitudo and dolus malus give proof of the Romans' great moral demands on the law, "honeste vivere is actually considered the uppermost commandment in law by Ulpian, D 1, 1, 10 Both fields, ius and mores, are related and interwoven in many ways, yet they remain separate in concept

Filling those blank terms that refer to social morale was, and is, the task of counsel and judges Their flexibility enabled the jurists at the time of reception to fill them partly with new, up-to-date meaning For example, the German lawyers, contrary to the Romans, did not consider the restrictions on testamentary freedom by a binding contract of succession to be contrary to boni mores So the Roman prohibition of contracts of succession was not taken over in Germany (contrary to Italy and, in principle, to France) On the other hand, our courts adopted the illegality of a pactum de quota litis (contingency fee of a lawyer)

Thirdly, the distinction between the traditional ius civile, ius Quiritium and the ius gentium (also ius naturale) turned out to enhance the receptability of Roman law considerably Ius civile in this context was the private law applicable to Roman citizens only, ius gentium on the other hand was that which was common to all civilised nations Since the middle of the third century before Christ the praetor peregrinus had created the new, flexible legal field of ius gentium based on bona fides, the duty to adhere to one's promises also among members of different nations irrespective of their race, religion, or language Even then the legal recognition of informal contracts entered upon by consent, above all sale, lease, contract for services and work, partnership agreement, mandate To follow up, the replacement of the clumsy mancipatio by the informal traditio had taken place already in classic times, hence, even then, a kind of usus modernus, the abandonment of formalities and increase in abstraction of law, which is a typical trend in development

So the forum of the praetor peregrinus met the requirements of the trading civilisation of imperial Rome, which embraced the entire Mediterranean Sea a "law of exchange" was created which, for trading purposes at the time of reception, proved superior by far to the backward, locally limited old German particular laws Gaius D 1, 1, 9 calls ius gentium "quod naturalis ratio inter omnes homines constituit", that is, those rules of law which were derived from the nature of the matter concerned or from the nature of man, mainly because they proved to meet the demands of common sense So even the late classic jurist Marcian D 25, 2, 25 could maintain that the condictio possessionis against the unlawful possessor was a rule of ius gentium Originally, though, the condictio had been designed for litigation only among Roman citizens, but as an institution in line with common sense, it was not limited to members of their status and their nation The formation of classical ius gentium up to the Severi emperors was therefore a process of naturalisation begun in antiquity, a "purge" of long-established law And such purges occurred again and again in the course of later history, never was there servile imitation of Roman law

A major contribution was made by Justinian, or rather Tribonian, implementing reform laws and interpolations They completely did away with mancipatio, which had probably died before, and consequently with fiducia To us as law historians, this purge appears to be an impoverishment compared to classical abundance in legal forms, for from now on there was only one form of pignus, only one form of personal surety However, this thinning out of the overabundant arsenal of variation in form which has grown as customary law was an act of necessity long overdue And so it was also Justinian's contribution to a reform in legal studies much in the interest of his students, who were supposed to finish their studies within four years and whom he, in his Institutes, paternalistically exhorts to be hard-working Concise, clear laws are a very important contribution to any reform of law courses, as was already realized by Justinian "In legibus magis simplicitas quam difficultas placet" He also says, in his Institutes "simplicitas legibus amica" Why then are modern laws far too complicated, despite constant repetition of that maxim since antiquity? Should it be that the legal profession has at all times profited from their being complicated?

PERIODS OF RECEPTION IN GERMANY DIFFERENT BASIS OF VALIDITY IN FRANCE

All peoples of southern and central Europe came into contact with Roman law more or less intensely, for the reception was an event covering all Europe It arrived comparatively late in Germany north of the Alps, but left its mark so much the more The northern Italy of the Middle Ages had never quite forgotten parts of Justinian's code But it was only due to the rediscovery of the digests by Irnerius (or Guarneri, most likely a German called Werner who latinized his name) that the predispositions were made for setting up the School of Glossators at Bologna, where in the centuries to come the learned legal profession of Europe was trained

Looking at it closely, reception can be subdivided into three periods, that is pre-reception (12th/13th century), main reception (15th century) and post-reception (19th century)

Pre-reception is concerned with the taking over of Roman vulgar law by the Germanic states succeeding the Roman empire Main reception and pre-reception are related in as much as the acceptance of single foreign words is paralleled to the adoption of a foreign language as a whole (as Otto von Gierke draws the comparison) Latin was the language also of the non-Roman, Germanic tribal laws, the so-called leges Barbarorum (above all, lex Salica, 500 A D), the legal documents were also formulated in Latin, only the language in court was German The Germanic peoples did not know either language or script suitable for legal documentation, for about seven centuries (up to the Sachsenspiegel - the Mirror of Saxon law - of 1235) they used Latin for that purpose

The main reception, also known as practical reception, culminated in the Reichskammergerichtsordnung (Statutes of the Imperial Court) of 1495 The post-reception was brought about by the Historische Rechtsschule (school of historical legal thinking) designed by Savigny, and of his successors the school of pandectists (above all, Bernhard Windscheid)

The initial stage of the pre-reception period was also called "theoretical" reception, because the theoretical foundations for the continuing validity of Roman law in Germany were laid at that time Their basis was the doctrine of translatio imperii the empire was called the "Holy Roman Empire of the German Nation", here the addition "of the German Nation" was meant in a limiting sense, referring to those regions of the former Roman empire where citizens of German nationality had settled Hence the German emperors considered themselves to be successors to the Roman principes, to Augustus, Diocletian, Constantine, and Justinian According to this imposing though, as seen from today, unhistorical concept, Roman law was not thought of as something

alien, it was rather considered the law of the emperor, valid from of old So imperial dignity and the Reichsidee, the concept of empire, were the founding stones for legal reception in Germany

The consequence was total reception, in principle, of the entire Roman law in complexu In this, Germany differs from France France, too, adopted Roman law, but not in complexu, and by no means because it was imperial law On the contrary, the French kings significantly opposed the doctrine of translatio imperii According to a subtle play with words, the French jurists adopted some Roman legal rules "non ratione imperii, sed imperio rationis" in other words, not because they were valid law of the empire, but only in as far as they were dictated by common sense (or reason), as far as they proved sensible and practical For example, the application of the pluris petitio, that is, the "unreasonable" total loss of one's lawsuit in the case of an excessive claim, was never seriously discussed in France (contrary to Germany)

The jurisdiction of the Parisian parliament secured sound balance between the Romance southern provinces of the droit ecrit and the Germanic ones of the droit coutumier to the north of the Seine And so to some extent modern French law has remained more Germanic than the German Civil Code testamentary freedom has never fully had its way, the testator may dispose only of a certain quota of the estate (the so-called 'quotite disponible', and even this only to the benefit of legatees (legataires), not heirs The residue (or reserve) must be left to the statutory heirs

THE SHARE OF CANON LAW

Next to emperor and empire, the popes and the Catholic Church were eminent promoters of reception Apart from the Corpus iuris civilis, the Corpus iuris canonici (with its major part,

the Decretum Gratiani was the source of the received common law (Gemeines Recht, ius commune Secular (imperial) leges and ecclesiastical canones together formed the ius utrumque Legists and canonists (or decretists) studied and taught side by side in the same spirit, at the same time at the same school of law at Bologna, the cradle of both secular and ecclesiastical legal innovation at the peak of the Middle Ages The title Doctor iuris utriusque, however, which later became more frequent, was initially acquired by only few jurists this "doctor of both laws" was a rare, great honour, it required double studies at both faculties which were originally separate And at times the clerics were even forbidden to acquire the secular doctorate It was only in the fourteenth century that double promotion was available by means of one, easier examination The German universities founded in the second half of the fourteenth century (Prague 1348, Vienna 1365, Heidelberg 1368, Cologne 1388) were initially dominated mostly by the professors of canon law For university foundations were often made under papal privileges

Imperial and ecclesiastical law did not fight but complemented each other Canon law was founded on Roman law Pope Boniface VIII transferred numerous regulae iuris antiqui of the digests d 50, 17, into his liber sextus decretalium of 1298, the third part of the Corpus iuris canonici A mutual principle of subsidiarity led to gradual interweaving of the initially separate disciplines ecclesiastical courts applied Roman law where there was no canon law rule, favoured by the sentence "Ecclesia vivit lege romana", the church lives according to Roman law Secular courts, on the other hand, sometimes applied rules of canon law The gradual amalgamation of the two disciplines is reflected in the sentence ius canonicum et civile sunt adeo connexa, ut unum sine altero intellegi non potest However, where there was a conflict of laws, the later canon law took precedence over Roman law (lex posterior derogat legi priori)

A major domain of canon law was the more progressive law of procedure The episcopalian courts since 1221 in Mayence and Treves did not only deliver judgements in matters of faith and confessions, questions of office and status of priests and monasterial inmates, but also in affairs concerning marriage and wills, as well as in cases of poor people, widows, orphans, and crusaders Because of various advantages of the ecclesiastical courts they were often called upon also to act as a court of arbitration in other disputes, not unlike the Episcopalis audientia of late antiquity Hence ecclesiastical jurisdiction gained influence on substantive law, for instance, in the law of possession by recognizing the exceptio and the actio spolii (Spoliatus ante omnia restituendus) in the acquisition of property by prescription where subsequent bad faith was now considered to be detrimental (mala fides superveniens nocet, divergent from Roman Law - section 937 subsection 2 of the German Civil Code)

In the law of obligations by recognizing the enforceability of all obligatory contracts (ex nudo pacto oritur actio, also a step forward when compared to classical Roman law), particularly of promises under oath, because breaking an oath was a sin In the law of succession, the church promoted the recognition of the freedom to make wills, not quite unselfishly because of its teaching of Christ's share in loco filii every Christian was to bequeath a share of his estate to Jesus Christ, as if Christ were one of his sons, and be able to make a will to the benefit of the church or a pious foundation

IUS COMMUNE SUBJECT MATTER AND EXTENT OF ITS IMPLEMENTATION

However, the afore-mentioned total reception of Roman law in Germany in complexu did have some limits the Greek parts of the Corpus iuris civilis, particularly the novellae were not taken over (Graeca non leguntur)

Neither were the leges which were ignored by the glossators (Quod non adgnovit glossa, non adgnovit curia) Hence Roman law was adopted in the shape it had been given by Accursius's Glossa ordinaria Practitioners tended to put the authority of the gloss above the contents of the classically Justinian text "In as much as the old Romans adored the statues of their Gods, the advocates revere the glossators like evangelists" (Sicut antiqui adorabant idola pro deis, ita advocati adorant glossatores pro evangelistis) The important glossator Azo, the author of a summary on the Codex, was so highly esteemed that possession of his book was conditio sine qua non for applicants to be admitted to the bar (Chi non ha Azo, non vale in Palazzo)

In this mould, refined by means of the scholastic method of the Middle Ages, thousands of German scholars took the law they had studied at Bologna home across the Alps, where they occupied influential positions in the judiciary and administration of the Reich, the principalities, local authorities, and municipalities According to the Reichskammergerichtsordnung (Statutes of the Imperial Court) of 1495, half of the members of a judicial tribunal had to be learned lawyers They had to swear to pass judgment "according to the common laws of the Reich" (that is, according to Roman and Canon law), "also according to the sincere, venerable, and reasonable regulations, statutes, and customs of principalities and other authorities brought before them"

Due to this so-called salvatory clause, common law was only subsidiary in effect, the particular laws of municipalities and regions took precedence over it ("Municipal law ousts regional law, regional law ousts common law") This rule is also called the doctrine of statutes, derived from ius statutum, positive law precedence of the lex specialis, the more specific local law

Salvatory clause and doctrine of statutes, however, had only theoretical impact in practical life, subsidiarity of common law was often reversed

Firstly, according to the article of the Reichkammergerichtsordnung mentioned above, local statutes and customs had to be "alleged" by the party, that is, had to be expounded before the court When they were questioned, evidence had to be given on their validity The learned judges at times were extreme in their demands on evidence in that respect, because they were not familiar with those local laws, customs, and old court practices For they had only studied common law, the university professors did not consider the particular laws worth any thorough care So the sentence "iura novit curia" was applicable to common law only

Secondly, where there was doubt on the extent covered by a statutary norm, the glossators had furthermore maintained the rule Statuta sunt stricte interpretanda Local laws were to be interpreted in a narrow sense, gaps in a statute could not be filled by applying the statute law by analogy to similar cases

Thirdly, particular laws were subject to ordre public, for they were to be adhered to only if they were "sincere, venerable, and reasonable" With reference to this clause, it was not seldom that a particular law was declared "unreasonable" because it contradicted the ratio scripta of Roman law

Fourthly and lastly, German rules of law were reinterpreted to be in harmony with the spirit of Roman law (interpretatio romana) The usufructus maritalis, the husband's usufruct from his wife's property is an example of an institution of German law dressed up in Roman clothing "A German - if you like Fritz - in a Roman toga"

This reversal of the salvatory clause in real life is described by Schilter's doctrine of fundata intentio Qui ius Romanum adlegat, habet fundatam intentionem When in doubt, the

party who can refer to a glossed text of the Corpus iuris has a lawful claim It is up to the adversary party to prove the invalidity of the Roman legal rule (that is, its non reception or abrogation)

RECEPTION BY MEANS OF ACT?

The Reichskammergerichtsordnung of 1495 did not introduce Roman law into Germany Instead, Roman law was regarded as having been valid for a long time The German emperors also believed in its binding force from time use This is illustrated by Emperor Friedrich Barbarossa's adding his own feudal decrees to Justinian's novellae in the twelfth century It was not before the sixteenth century that a legal basis for reception in complexu was construed, ascribing the introduction of Roman law to the imposing figure of Emperor Lothar the Third of Supplinburg As was then said, Emperor Lothar had prescribed the application of Roman law in courts and universities after his victory over southern Italy, shortly before his death (1137)

This doctrine, which was, among others, supported by Philipp Melanchthon, was advocated only late in history (sixteenth century) when some explanation for its practical reception was sought for after the weakening of the imperial central power The famous scholar Hermann Conring, however, proved this doctrine to be a fable Since then, it has been known as "Lothar's legend" His book De origine iuris Germanici established Conring as the founding father of research on German legal history When published in 1643, towards the close of the Thirty Years' War, what is called Reichsidee, the "Concept of Reich", had collapsed, and with it the idea of universal law So Conring overcame the doctrine of translatio imperii, the uninterrupted continuation of imperial tradition since antiquity, his book reveals an anti-imperial tendency He replaced translatio imperii with a purely pragmatic doctrine of reception Roma law had only been "usu sensim receptum", gradually taken over by mere usage, it had slowly "slipped in on pussyfoot" (as Georg Dahm puts it)

Where there had been a political concept of Roman continuity, which had been refuted by Conring, there was now the "cultural idea of Roma", that is, the Renaissance idea to attribute model character to ancient manifestations of civilisation and law Paul Koschaker appreciated this transition fully in his magnificent book Europa und das romische Recht (Europe and Roman Law)

All in all, there had never been an all-embracing act implementing Roman law But since the sixteenth century there has been a number of acts concerned with specific matters, such as the imperial statute on notaries of 1512 and several imperial statutes on police, the contents of which were close to Roman law and so they were in fact merely authentic interpretation of what had already been the law And reception was not confined to private law Charles the Fifth's imperial criminal code, the Constitutio Criminalis Carolina of 1532, followed the older Constitutio Criminalis Bambergensis in adopting a great deal from Roman criminal law

Later developments in the territories can only be sketched here At the end of the Thirty Years' War Switzerland and The Netherlands separated from the Reich, no longer accepting the authority of the Reichskammergerichtsordnung The municipal and territorial laws were repeatedly reformed After the teachings of Usus Modernus and the school of Ius naturale (seventeenth to eighteenth century) the territorial rulers proceeded to create codes for their lands The Bavarian Codex Maximilianeus bavaricus civilis, implemented in the year of Mozart's birth (1756), is the first coherent codification which, however, grants to Roman common law subsidiary validity In so far it is only a fore-runner of the three major codifications of ius naturale, which - in their respective territories - did away with common law as such (although they took over most of the latter's contents) These are the Prussian Allgemeines Landrecht (Carl Gottlieb von Svarez 1794), the Austrian Allgemeines Burgerliches Gesetzbuch of 1811 (Karl Anton von Martini and Franz von Zeiller), and the Code Napoleon of 1804, which was introduced into the Germany west of the Rhine and, in an adapted version, in Baden

DEVELOPMENT IN THE NINETEENTH CENTURY

After the successful War of Liberation against Napoleon, French law remained in force in the Rhineland and in Baden In 1814, the influential Heidelberg scholar A F J Thibaut (1772 to 1840 A D) demanded a national codification for Germany comparable with the Code civil Still in 1814, this demand was opposed by F C von Savigny, who just in the early years of his life had been called to the newly established University of Berlin According to Savigny, time had not yet been ripe for a truly good codification of private law Savigny also quite rightly realized that, after the Vienna Congress in the German Federation under Metternich, Thibaut's plan could not be carried out for political reasons, because the sovereign German territories would have contradicted the implementation of a national code

For that reason, one third of the German people lived under Roman common law for almost another century, that is, the broad strip from the coasts of the north to the Alps in the south, between the areas of French law in the west and Prussian law in the east

The Historische Rechtsschule (School of Historical Legal Thinking initiated by Savigny) considered law, like languages, to be the product of the creative powers of what was called "Volksgeist", the spirit of a people which unfolds itself in history Savigny's school of thinking was directed against the rationalist exaggerations during the preceding periods of enlightenment and the age of reason The programmatic return of Savigny to the "pure" Roman law of the digests isolated the Justinian law from later, falsifying modifications by post-glossators, Usus modernus and the school of Ius naturale While France had, under their influence, accepted mere agreement to be sufficient for the transfer of movables because the constitutum possessorium had long been generalized, the interpretation of the Historische Rechts was more faithful to the original legal sources and led Germany back to the principle of traditio (traditionibus dominia rerum, non nudis pactis transferuntur), and hence also the German civil code in section 929 adheres to it

The task of developing the law could, according to Savigny's point of view, neither be fulfilled by the legislation of the time nor by the judiciary in the courts but only by legal science taught at the universities Updating the law by means of research was enthusiastically undertaken by Savigny himself and by the great number of his gifted pupils Evidence of this is the amazingly great number of important publications, part of which were also translated into foreign languages

There is no exaggeration in maintaining that in the nineteenth century, the German pandectist jurisprudence held first rank in the world Its effect can be seen particularly in Austria where - despite the Allgemeine Burgerliche Gesetzbuch of 1811 - Savigny's teachings found numerous disciples through Josef Unger and induced a far-reaching reform of university courses Working out precise legal terminology and establishing a clear system of law are the incontestable achievements of pandectist legal thinking Precision in term analysis can be exemplified by the elementary distinction between internal and external relations in the law of agency, which Paul Laband developed around 1860 and which is unknown to older codifications such as the French Code civil In the field of systematization, pandectist productivity is reflected in the creation of general basic terms (like Rechtsgeschaft - act of legal significance, which, admittedly, is not a convincing translation - and -Willenserklarung - declaration of intention) and in creating a highly abstract General Part as a characteristic feature of the pandectist textbooks (since G A Heise) and, later on, of the German civil code

Such a General Part is to be found as early as in the civil code for the state of Saxony of 1863, which was law for only three and a half million people (less than one-twelfth of the German population) but is remarkable in that it strongly influenced the German civil code of 1900 and embodied the Roman common law to such to extent that it was actually labelled "a pandectist manual cast into sections"

But the true father of the German civil code must be seen in Bernhard Windscheid, who had for some time personally been a member of the first legislating committee, but, apart from that, even in absentia, he contributed substantially by means of his eminent textbook and manual, which was to see nine editions

The Historische Rechtsschule also furthered research into legal sources of German origin and, with it, into the law of commerce After 1860 the professors of indigenous German law vehemently attacked Roman law at their congresses and called its reception a national catastrophe Long after the storm they had aroused had settled and their congresses had become the Deutscher Juristentag (German Lawyers' Congress) - an institution which still exists - the programme of the national-socialist party co-founded by Hitler in 1920 revived the anti-Romanist tendencies

According to it, the would-be materialistic and individualistic Roman law taken over by the German civil code was to be replaced by a new German common law To this end, after Hitler's seizure of power the Academy for German Law was founded However, setting aside curriculum reforms at the law faculties these endeavours never materialized due to the Second World War, which began in 1939

Even centuries before the reception of Roman law had been subject to popular criticism from time to time, for example, at the time of the Peasants' War in the years of the Reformation It was, however, the caste of learned lawyers that became the main target of criticism Their arrogance and narrowmindedness had sometimes alienated the people from the law in that the lawyers substituted themselves for the lay judges or, as advocates, were merely set on obtaining their clients' money Moods like that are reflected in the saying taken up by M Luther "Iuristen bose Christen" ("Lawyers evil Christians)

What remains true is that due to their studies, first at Bologna and later at German universitities, lawyers were the main promoters of reception But also the travelling merchant was interested in finding a standard ius commune everywhere, instead of differing particular customs Since the professors were often called from one university to another in a different country, and since they wished to be able to work and teach everywhere, they did not develop any deeper interest in the German particular laws In the nineteenth century, industrialisation would not have taken a different course without Roman law, as is illustrated by the example of England Vast fields like industrial law and company law are independent creations of that time, namely of Prussian legislation which, as early as the seventeenth century, had been leading in the law of civil procedure and, above all, of mortgages and registration of titles to real estate If it had not been for the Prussian statutes on land registry and mortgages, a reasonably secure credit on real property as a necessity for industrialization seems almost inconceivable The German system of registering titles to real estate, which originated in late medieval municipal documentations like those of Cologne, may still be called the most satisfactory in the world

Regarding the reception of Roman law as a "national catastrophe" for Germany implies a wrong approach, for there was no alternative, no other way to deeper understanding of our legal system So we have to support Franz Wieacker's analysis that the reception mainly had methodical implications, signifying a process when law became subject to scientific evaluation ("Verwissenschaftlichung") One thing, however, is certain had Germany not adopted Roman law, this paper would have been out of place here So Rome is and remains communis nobis patria Rome the common fatherland to modern people also in areas the soil of which, like Southern Africa in antiquity, had never been stepped upon by a Roman legionary Similarly, Latin remains the mother of all Romance languages, but also (as for the vocabulary) of English and of German

FURTHER DEVELOPMENTS

When the German Civil Code entered into force in the year 1900, Roman law lost its practical significance as the valid law of the country In the university courses, too, as a consequence of repeated reforms, it lost more and more lecturing time due to the immense growth of new fields of law And yet, within the limits of interpretation left to the judiciary, sporadic receptions can be found immediately after the enforcement of the civil code Among these are the recognition of the exceptio doli by the Reichsgericht (Supreme Court of the Reich), and also the ancient fiducia revived in the form of the "Sicherungs-ubereignung", a trust-like lien on movables effected by transfer of title without actual transfer of possession

The fathers of the civil code had tended to oppose both institutes With regard to the jurisdiction of the supreme federal courts after the Second World War, Mayer-Maly stated some unintentional return to older figures of legal thinking, for instance, the culpa levissima with its threefold subdivision of negligence, or the restriction of the doubtful regulation in section 139 concerning partial nullity of contractual stipulations by reintroducing the Roman principle utile per inutile non vitiatur Sometimes such a return is inevitable because there is only a limited supply of suitable solutions to each legal problem (for instance, in case of disappearance in common danger there are only two conceivable possibilities either presumptive survival of the fitter person, or the presumptive simultaneous death of both parties concerned (commorientium non videtur alter alterum supervixisse)

In conjunction with general clauses which require interpretation, but also with the interpretation of legal declarations, numerous legal proverbs have survived praeter legem, the formulation of which in Latin indicates considerable age For instance, venire contra factum proprium nemini licet, dolo facit qui petit quod statim redditurus est, or falsa demonstratio non nocet, protestatio facto contraria non valet, and many more

So even Germany's greatest poet Johann Wolfgang von Goethe, who had studied law at Strassburg and had been an assessor at the Reichskammergericht in Wetzlar, rightly compared Roman law with a duck, which, for sure, dives from time to time and is invisible then but reappears again again alive and therefore never gets lost altogether So I am not worried that Roman law might one day dive and never emerge again At least, not as long as lawyers meet at international congresses to discuss the problems of their modern laws and their origins the way it has been done in the Roman-Dutch Law Centenary Conference in Lesotho

PART 1
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