
BACK TO THE FUTURE: TEACHING LEGAL HISTORY AND ROMAN LAW TO A DEMOGRAPHICALLY DIVERSE AND EDUCATIONALLY UNDER-PREPARED STUDENT BODY

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South African tertiary education is faced with the difficulties associated with teaching a student body characterized by cultural and economic diversity which could potentially alienate students from, *inter alia*, their study material, teacher and educational institution. The challenges posed by cultural diversity are exacerbated by the fact that sections of the student body come from an educationally disadvantaged background. Such students are often under-prepared for tertiary education.¹

Education will not be truly accessible to all South Africans until a means is found to support the educationally under-prepared student to achieve his or her full potential. South Africa cannot afford to lose the potential these students offer, and the cost of academic support strategies to support these students alongside their mainstream activities must be weighed against the cost of their failure to complete their studies.

The introduction of the four-year LLB in South African law schools in 1998 afforded an opportunity for legal academics to evaluate what they were doing and how they were doing it. The need to revise the curriculum to be multicultural, socially relevant, and internationally competitive was identified.² As the new curriculum did away with the requirement of a first degree as a prerequisite for those embarking upon legal study, teaching outcomes were redefined to include reading, writing, verbal and research skills, alongside transfer of knowledge.

The current challenges facing legal academics worldwide are that their student bodies are ethnically diverse. Multiculturalism may well be a positive context for

1 Kleyn "The role and function of Roman law in South African legal education" in Spruit, Kamba & Hinz (eds) *Roman Law at the Crossroads* (2000) ix 73.

2 Greenbaum "Foundations of South African law: Teaching legal history from a thematic perspective" 2003 *Fundamina* 95; Le Roux "The de-romanisation of legal history courses at South African universities" 2000 *Fundamina* 129-130; Ogunronbi "The challenges to legal studies in an era of transformation" 1998 *SALJ* 499-500.

legal education but it is also the source of difficulties associated with teaching and learning.³

In the early 1990's there was a call for the Africanisation of South African tertiary education.⁴ The objectives of the process were "massification" and democratisation.⁵ This call reflected the need to review tertiary education to address the racial discrimination, segregation of educational institutions, disparities in resource allocation to institutions at all levels, and wealth and skills differentials of apartheid South Africa. The process of Africanisation called for increased numbers of African students and staff at tertiary institutions, and an Africanisation of the curricula at such institutions. Consequently, increasing numbers of students from historically disadvantaged schools were admitted to the study of law. Many of these students are under-prepared for tertiary education.

Tertiary legal education has thus been systematically flooded with increasing numbers of students requiring academic support. Academic support strategies are vital and must be supplied alongside mainstream academic activity. Resource constraints, however, prevent the provision of adequate academic support to meet the needs of all these students and many are condemned to failure. In addition, where academic support is available, it is often resented by those who need it. Students often do not perceive their own inadequacies and resent attempts to address them.

Under-prepared students are often a result of deficiencies within the school system, and it has been suggested that tertiary institutions should seek to start where schools actually leave off, rather than attempting to make up for these deficiencies. In other words, standards should be lowered. This is not, however, an option for institutions providing graduates to a global workforce. The government thus requires that tertiary institutions address the problem of under-prepared students by implementing integrated support programmes.⁶

Moulder called upon South African tertiary institutions to teach a basic undergraduate degree rather than attempting to match the standards of its

3 Vernon "Something old, something new. Confronting poor retention among first year law students by restructuring aspects of the teaching and learning experience" 2002 *Law Teacher* 48.

4 Moulder "Africanising our universities: Some ideas for a debate" 1988 *Theoria* 1; Moulder "Universities and Africanisation" 1995 *SAJHE* 7.

5 Kleyn (n 1) 74.

6 *Ibid.*

colonial masters. This degree, he indicated, should reflect a new teaching method and a new curriculum. He called for the abandonment of academic support programmes and an acceptance on the part of lecturers, of the responsibility for each and every student in their teaching group.

The views of writers such as Moulder have led to a shift in emphasis from theoretical to more practical training. Hence the importance of history, the humanities, and social sciences is undermined, and the interconnectivity of legal theory and practice is overlooked in the quest to create law graduates fitted for the practical legal environment.

One of the most challenging areas of the law to teach to such a culturally and educationally diverse student body is that of legal history. Alienation of students from their study material is nowhere more evident than in relation to the teaching of Roman legal history in a post-apartheid South Africa. There is strong resistance to the teaching of Roman law, especially in its present form, as part of the South African legal curriculum. Before the implementation of the four-year LLB, Roman law and legal history constituted two separate courses at most South African universities. However, with only a four-year period within which to convey the full range of legal knowledge to the student body, there was increased pressure on the core curriculum, and consequently the number of core courses within the curriculum was limited. Roman law and legal history were amongst the casualties of curriculum redevelopment. The reason for this is that courses such as legal philosophy and legal history are regarded as peripheral to legal study rather than central to it.⁷

Unlike many courses that were relegated to the ranks of elective courses, legal history and Roman law did not disappear from the core curriculum altogether, but were merged by most South African universities to create a course on the foundations of South African private law.⁸ The University of Pretoria dubbed this course “Historical Foundations of South African Private Law” (Historical Foundations). Historical Foundations is offered in the first year of the four-year LLB, and stretches over two semesters. In the first semester the history of South African legal development is discussed. This history includes, but is not

7 Thomas “*Fin de siècle* of funksionele Romeinse reg?” 1998 *THRHR* 205; for a discussion of the re-curricularisation of the LLB degree see Kleyn (n 1) 74-75, and Olivier & Du Plessis “Re-curricularization and legal history: Imperatives, needs and the new higher education context” in Spruit *et al* (n 1) 105.

8 For a discussion of the thinking behind the decision relating to the future role of Roman law and legal history, see Olivier & Du Plessis (n 7) 110ff.

limited to, a detailed discussion of the history of classical Roman law, its reception, and the reception of Roman-Dutch law into the Cape Colony. The substantive Roman law of things also forms a module for study in the first semester. The second semester deals in some detail, with the substantive Roman law of obligations, both contract and delict (tort).

Historical Foundations is targeted at first-year law students who lack a background in Latin and classics. An advanced course in Roman law is offered as an elective course in the final year of the LLB for students who wish to acquire a more advanced understanding of the Roman law sources. In order to make the study material more interesting and accessible to first-year law students, the course materials were examined. Without Latin, first-years were not equipped to make use of primary sources. Existing textbooks also proved to be less than ideal as they targeted students conducting a more advanced and detailed study of Roman law. South African law schools require that first-year students are given an overview of Roman legal history and grasp the general principles of specified areas of substantive Roman law. In order to meet the clearly defined needs of this student group, textbooks were written by legal academics for the specific purpose of supporting the course. At the University of Pretoria, the course Historical Foundations is currently supported by a textbook written for students registered for the course, and designed to make the work accessible to a lay-person.⁹ The book gives a clear overview of how South African law was influenced by Roman law, English law and African law. It attempts to teach the substantive Roman law in such a way as to highlight the relevance of it to modern South African law.

The presence of such a strong Roman law element in South African legal history has led to accusations that South African legal history has been, incorrectly, "Romanised" to reflect the strict divide between public and private law that exists within continental systems. A divide, which it has been argued, is premised upon the view that the essence of a legal system is to be found in its private law. Furthermore, the same critics argue that the presumption of legal historians who accede to the Romanist approach, that legal rules are systematically and logically developed, is faulty. The critics either ignore the fact that legal historians have been able to trace a golden thread from Roman times to South African law, or alternatively view the thread as a manipulation of the true situation for political purposes.

9 Thomas, Van der Merwe & Stoop *Historical Foundations of South African Private Law* (2000) 2nd ed.

The challenges to Roman law as a core element of South African legal education predated the implementation of the four-year LLB. In 1994 a conference was held in Namibia to explore the place that Roman law should hold within the legal curriculum of Southern African countries that share a Roman-Dutch heritage.¹⁰ One of the myriad questions posed at the conference was the question of whether or not Roman law should be discarded along with the colonial oppression with which its introduction was synonymous. Certainly the development of Roman law would be of little importance in cultures which would prioritise the development of customary laws and cultures.¹¹

With the end of colonialism came a drive to eliminate the burdens of colonial rule, including European-based legal systems that had been imposed on African culture. This said, Roman law embodies values and institutions that remain valuable today. If it is determined that the value of Roman law is such that it continues to merit a place in the teaching of law in South Africa, then the need arises to address the how of teaching it to a largely African student body who do not identify with the history that imported it into South Africa. Furthermore, what aspects of Roman law should be taught?¹²

The critics of the “Romanisation” of South African legal history are of the view that Romanisation has been displaced by a new constitutional order that demands that a shift take place from a reliance on rules and legal science towards a reliance on values and norms. This approach would, it has been alleged, be facilitated by a recognition that Roman law is but one of a number of legal origins of the South African legal order. Other legal origins include legal pluralism, African customary law and human rights law. Thus, a new approach would call for the “de-Romanisation” of South African legal history and an integrated approach to its teaching.

Such an integrated approach would call for the replacement of legal history as a separate course by the integrated teaching of legal history in each substantive law course. Alternatively, the history of South African private law should emphasise the development of modern South African law, rather than Roman law, and the substantive Roman law element in the course should be replaced by the teaching of the legal development of substantive law in modern South African law.

10 Congress organized by the Department of Roman Law of the University of Utrecht and the Faculty of Law of the University of Namibia, Windhoek 30 June – 1 July 1997.

11 Hinz “Acknowledgements” in Spruit *et al* (n 1) ix.

12 Spruit in Spruit *et al* (n 1) xiv.

Despite these arguments, most South African universities continue to offer a foundation course that showcases the history of Roman law and its reception. Many universities, however, no longer teach a substantive Roman law component. For example, the University of Natal has developed a thematic model of teaching. They too still teach external legal history, including the Roman legal history, but have replaced the teaching of substantive Roman law with the historical development of equality, access to justice, and access to land.¹³

Roman law is indeed a very important component of South African legal history. A part that is worthy of examination and study. It is true that legal historians need to recognise and teach other origins of South African law alongside Roman law, however, this is being done, although perhaps not as extensively as possible.

With the Africanisation of tertiary institutions came a need to Africanise the curriculum. As African customary law is applicable to the vast majority of all South Africans, the need for compulsory courses in African customary law and legal pluralism arose. There are practical problems associated with the teaching of African customary law which are attributable, to some degree, to the colonial policy as it was applied in the Cape in 1652 and subsequently. Legal pluralism has led to the relegation of customary law to a subordinate position.¹⁴ This policy had the effect of marginalising African customary law and severely hindering its further development. Customary law is in fact not a single body of law, but is rather a variety of such systems unique to individual tribal groups. It is passed down from generation to generation by way of oral testimony. Its dynamic nature makes it hard to reduce to writing, and hence the customary law that we find in textbooks is the written law, not the living law. Living law remains inaccessible to all but the members of a given tribal group.¹⁵ The written law is largely a western interpretation of customary laws and, as such, a distortion of the true law that can be both incorrect and misleading. The difficulties associated with accessing the living law have led to its largely being ignored and overlooked. The Constitution, however, recognises customary law insofar as it is not contrary to the provisions of the Bill of Rights. This is an important development. However, the recognition of this law is limited by the

13 Greenbaum (n 2).

14 Van Niekerk "A common law for Southern Africa: Roman law or indigenous African law?" in Spruit *et al* (n 1) 85.

15 *Bhe v Magistrate, Khayelitsha* 2004 (1) BCLR 27 (C).

proviso which might arguable be regarded as acting as a form of modern-day repugnancy clause.¹⁶

To teach customary law as one of the foundations of South African law, which it undeniably is, is thus no easy task. It is for this reason that Historical Foundations of South African Private Law deals only briefly with African customary law as an origin of the modern South African private law. The in-depth teaching of the customary law is left to substantive law courses such as legal pluralism and African customary or indigenous law.

Why is Roman law so important to the teaching of South African legal history? South Africa has a hybrid legal system, having been influenced in its development by the civil law tradition, the common law tradition, indigenous African law and the human rights movement. The primary sources of South African law include the Constitution¹⁷ as the supreme law of the land, legislation, case authority and common law. South African common law has been strongly influenced by the civil law tradition and Roman- Dutch law, or, more exactly, the European *ius commune*.¹⁸

South African legal history cannot simply be rewritten because it is politically expedient. No jurist advocates that Roman law was the sole influence on South African legal development, but it was an important one. The values and principles reflected in Roman law underlie the values and principles entrenched in the South African constitutional order. Despite the fact that Roman society was one that discriminated against women and supported slavery, its underlying values of justice, fairness, reason, and honour persist today.

The Constitution¹⁹ empowers judges to develop the South African common law, taking account of the principles of justice. Likewise, it provides for the limitation of rights through the development of the common law.²⁰ In developing the common law judges are required to promote the spirit, purport and objects of the Bill of Rights.²¹ If judges are able to support the values of the Constitution by harnessing the Roman Dutch law material in defence of dignity, equality and

16 Thomas & Tladi "Legal pluralism or a new repugnancy clause?" 1999 *CILSA* 358-360.

17 *Constitution of the Republic of South Africa Act* 108 of 1996.

18 For a discussion of Roman-Dutch law as a source of South African law, see Van der Merwe "Roman-Dutch law: From virtual reality to constitutional resource" 1998 *Acta Juridica* 117; Hewett "The Roman law in Roman-Dutch law – weft or woof?" in Spruit *et al* (n 1) 53ff esp 59-61; Kleyn (n 1) 75. For a discussion of the foreign influences on Southern African legal development see Erasmus "Roman law and common-law in Southern Africa: Past and future" in Spruit *et al* (n 1) 43.

19 (n 17) s 173.

20 S 8 (3) (b).

21 S 39 (2).

freedom, then that law continues to play an important role in judicial practice in South Africa as a constitutional resource.²² Roman law may also have a formative role to play in bringing about equity and justice based upon reason in the traditional societies in South Africa. The principles and history of Roman law are analogous to those of customary law.²³ The juxtaposition of Roman law and African values, such as *ubuntu*, create an inappropriate and unnecessary tension between the two.²⁴ Although the underlying principles and values of western law and customary law differ, they are not incompatible. Both are sources of South African common law. The fundamental differences between western legal systems and customary law lie in the stressing of the centrality of the individual in the former and the stressing of the collective in the latter. Customary law is socialist and communitarian in its outlook. This said, however, a compromise to meet the needs of a socially integrated community remains possible.²⁵

The *Corpus Iuris Civilis* is founded upon the timeless values of natural law and justice. Justinian emphasised justice and promoted honesty, justice, and reason, values that persist in the South African constitution.²⁶

Clearly, therefore, one of the most important historical roots of South African law is Roman law, as it was influenced by the Dutch law of Batavia and the rest of Western Europe.²⁷ This law continues to influence modern disputes in instances where reliance is placed upon the common law, especially in relation to certain identified areas of private law.²⁸ Despite this, lecturers have difficulty in conveying to students the relevance of the study of Roman law to the study of modern South African law.

Roman law, legal history and legal philosophy must not be treated as peripheral to legal studies. Without a sound understanding of such courses, students are unlikely to be able to create the critical thinking skills essential to the development of innovative legal approaches. While the importance of

22 See Van der Merwe (n 18).

23 Balatseng "Roman law – to assist law reform and law development" in Spruit *et al* (n 1) 8-12.

24 Bankie "Sources and resources – Roman and Dutch law – a retrospect" in Spruit *et al* (n 1) 15. On *ubuntu* see English "Ubuntu. The quest for an indigenous jurisprudence" 1996 *AJHR* 641; Kaunda *A Humanist in Africa* (1966).

25 See Van Niekerk (n 14) 85ff for a discussion of the different jural postulates underlying the western and the customary legal systems.

26 Domanski "The ethical argument for teaching Roman law" in Spruit *et al* (n 1) 35.

27 See Hewett (n 18).

28 Kleyn (n 1) 75-78

practical subjects cannot be denied, subjects must still be included in the curriculum because of their intrinsic academic value.

Roman law, as an aspect of legal history, is not, however, simply of academic value to the South African law student. Much of South African private law, especially in the fields of property law, the law of delict and the law of obligations was founded upon Roman law, and remains little changed to this day.²⁹ For this reason, suggestions that the teaching of Roman law, as part of legal history, shift its focus from the technicalities of Roman law to the underlying ethical principles, must fail. Indeed, the legal historian must teach the values of justice, honesty, and reason that are fundamental to the Constitutional dispensation existing in post-apartheid South Africa.³⁰ However, the Roman law of Justinian presents a clear union of a sense of these values and positive law.

It has been proposed that beginners learn Roman law through the *Institutes* of Justinian on the basis that this work illustrates most clearly the practical application of natural law.³¹ This proposal was founded upon the belief that the separation of legal rules from the natural law philosophy is one of the principle reasons for the alienation of the learner from the study material.³² Such a shift in focus is supported by those who view the study of Roman law as a study of the general principles that display the Roman notion of justice and natural law.

Domanski, who makes the proposal, advocates that the Roman law should thus be restricted to Justinianic law, free from extraneous texts and interpretation. Students should, he argues, be exposed to the original text of the *Institutes*, as translated, and be supported by class discussion and notes, rather than have its direct simplicity marred by other works.³³

Domanski then goes further and indicates that, if one accepts that the true object of teaching first year students is to teach them the value and practical operation of natural law, then confining the study of natural law to that of Justinian is unnecessarily limiting. Hence he requires that Roman law be

29 For examples of Roman law legal principles that are little changed in modern South African law, see Kleyn (n 1) 78-79.

30 Domanski "Teaching Roman law on the eve of the millennium 1997" *THRHR* 38. See too the Constitution (n 17) preamble and s 36. For a discussion of constitutional development see Olivier & Du Plessis (n 7) 106-107.

31 Domanski (n 30) 39.

32 *Idem* 40.

33 *Idem* 43-46 48.

replaced by a course in natural law and reason, accommodating the works of all the leading philosophers of the movement.³⁴

Teaching Roman law through the *Institutes* could have benefits from the point of view of transportability of courses both nationally and internationally. It offers a bird's eye view of the law that is not to be found elsewhere. This said, however, there are problems associated with the application of such an approach. The *Institutes* is not universally recognised as the repository of natural law. Furthermore,³⁵ translations are needed if the *Institutes* are to be accessible to modern South African law students.³⁶ Such translations are not always satisfactory. Finally, the work is too big to be covered properly in a single year³⁷ and lacks fundamental definitions, essential to the first year student.³⁸

Thomas, too, is concerned about the positivistic philosophy that underlies modern legal teaching. He is critical of the obsession of positivism with hard fact that can be empirically proven, objectivity, rationality and the elimination of value questions from legal science and the legal profession.³⁹ He is of the opinion that such an approach relieves the jurist of any obligation to explore philosophical and other factors integral to legal development. This is a convenient excuse to avoid analysis of the values that underpin the positivist philosophy. Positivist philosophy also advances interests and values and is not entirely value free.⁴⁰ This positivist paradigm was challenged by the Critical Legal Studies movement that required the underlying values and influences of the legal system to be exposed and explored.⁴¹ This is not being done in the current legal curriculum. Roman law has the potential to introduce students to the importance of extra-judicial factors in legal development and to the fact that there are consequently a multitude of possible solutions to legal questions.⁴²

Roman law is eminently suited to teach students that there is no objective, neutral, correct, juridical solution, but that several solutions

34 *Idem* 40.

35 *Idem* 54-55.

36 *Ibid.*

37 *Idem* 56.

38 *Ibid.*

39 Thomas (n 7) 206

40 *Idem* 206-207.

41 *Idem* 207.

42 For examples see Thomas (n 7) 208-212.

are possible, that the choice is determined by time and place and the result of religious, political, economic, social and other factors.⁴³

Irrespective of the disagreement surrounding the how and what, there can be little doubt that Roman law remains a valuable aspect of the law curriculum. Despite the presence of dedicated textbooks written by authors who are also involved in teaching the course, there continues to be an unacceptably high failure and drop-out rate. This indicates that study skills and strategies are necessary for students to reach their full potential.

The teacher of legal history needs to meet the student's need to acquire study strategies and learning skills within the context of a legal subject that is perceived to be irrelevant, obsolete and Eurocentric.

Long, long ago, in a land far away lived a people. These people lived a quiet agrarian life. At first they were ruled by a king but after a time he became too powerful and cruel and the people became discontent. They overthrew the king and replaced him with two elected officials who were responsible for their government for quite a long time. During this time Rome became a center for trade and the people became more sophisticated. Later the elected officials were replaced by an emperor who ultimately became a military dictator. During the various periods of government the law developed. One wise emperor saw that the laws were good and decided to gather all the laws together into a single work. This work was to be of great importance as a cornerstone of legal development throughout Europe.

Does this sound like a fairy story? Well, indeed it is not legal history, nor yet Roman law. Despite this, South African law students constantly rail against the teaching of names, dates and detail in Roman legal history. The "fairy story" above is an example of what Roman legal history might sound like if students were to be allowed to learn legal history in the manner that they choose.

As legal academics it is not enough to simply teach material as it has always been done. Modern realities require of us that our learning materials be both appropriate and relevant. Student-centred learning must be embarked upon, without leading to the bizarre result of turning Roman law into a fairy tale.

43 *Idem* 202. This is a theory to which Van der Merwe too subscribes (n 18) 136-137.

Of vital importance to significant learning is the relationship between the student and his or her lecturer. This relationship depends upon the attitudes of both the teacher and the student.⁴⁴ Lecturers must develop sound relationships with their students through the application of an honest, empathetic, and flexible approach to the learning environment. Rigid learning plans and an unwillingness or inability to empathize engender distrust, resentment or even hostility that is not conducive to learning. A collaborative approach to learning encourages a healthy relationship between student and lecturer which will be characterized by increased participation and active engagement with the study material.⁴⁵

Large classes are the enemy of effective learning.⁴⁶ Small groups can be used to promote interactive learning but these are costly to implement. Using senior students to assist in teaching small groups is one possibility which has been widely accepted by most South African universities. Most law faculties and schools offer tutorial programmes to support students. The purpose of these sessions is to reinforce learning, teach study strategies and contextualise material so as to make it relevant and meaningful to the student.

Supplemental Instruction (SI) is yet another form of peer tutoring that operates within the framework of mainstream academic activity. It is not a remedial programme. The SI programme was developed at the University of Missouri, Kansas City in 1972. In 1993 it was brought to South Africa and implemented at the University of Port Elizabeth. SI leaders actively engage in teaching students learning and thinking skills whilst allowing them to integrate with a small group of students, lessening their sense of alienation in a new and sometimes overwhelming environment. The sessions are characterised by interactive learning opportunities that benefit both the students and the SI leader. The process acknowledges the importance of non-academic factors in a student's success or failure and recognises that study skills cannot be taught in a vacuum and need to be acquired alongside course content.⁴⁷

44 Rogers *Freedom to Learn* (1969) 105-106. See, too, Vernon (n 3) 45.

45 Nicholson "Same game, new name? The more things change in legal education the more they stay the same" (Inaugural lecture 11 May 2004, Faculty of Law, University of Pretoria).

46 Woolman, Watson & Smith "'Toto, I've a feeling we're not in Kansas any more': A reply to Professor Motale and others on the transformation of legal education in South Africa" 1997 *SALJ* 43.

47 Koch & Mallon "Evaluation of supplemental instruction: A performance assessment approach" 1998 *SAJHE* 174.

SI improves upon the tutor system and differs from other support programmes in that it targets “at risk” courses rather than “at risk” students.⁴⁸ SI leaders undergo extensive training in small-group facilitation and study skills.⁴⁹ Their performance is constantly monitored and they work in close co-operation with the member of academic staff responsible for the presentation of the course.

SI is not available in all law faculties or schools countrywide although many of those who have been exposed to SI training hope to implement some of its principles and underlying ethos into their teaching, *inter alia*, in Historical Foundations of South African Private Law.

If students are to benefit from teaching, in Roman law, legal history, or any other course, a move towards active, participative learning and away from simple information transfer is needed. Students must be able to identify the relevance of their study material to their future career. Tutorial and SI sessions may meaningfully be used to assist in making this vital revelation. Legal history, Roman law, Philosophy and other esoteric subjects are doomed if their relevance cannot be conveyed to students and a means found to assist students to master their content.

48 Smuts “The role of student leaders in supplemental instruction” 2002 *South African Journal of Higher Education* 225.

49 *Idem* 226-228.