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Legal Education in South Africa with Specific Reference to the Uncertain Future of Roman Law and Legal History*

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The present four-year LLB (Bachelor of Laws) degree, the only undergraduate law degree in South Africa, was introduced in 1998 as part of the transformation process after apartheid. The law deans then agreed on the following, namely that the South African legal system exists in and applies to a diverse or pluralistic society; that during their studies students should acquire skills suited to the legal profession; and that law faculties should strive to make students aware of ethical values[1].

In 2009 the Council for Higher Education launched an investigation into the effectiveness of this new LLB degree. This LLB Curriculum Project was designed to investigate what law students learn during their studies and the extent to which they are prepared for their various professional career paths. The study also provided an opportunity to assess the impact of changes made to the LLB curriculum since 1998, and particularly the introduction of the four-year undergraduate LLB, on graduate preparedness. Academics, legal practitioners and employers took part in the survey.

After publication of the Report[2], it served before the South African Law

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1) C Nicholson "A new LLB for a new South Africa 1999" (40-1) *Codicillus* at 27-35.

2) G Pickett "The LLB Curriculum Research Report. A Research Report Produced for the Advice and Monitoring Directorate of the Council on Higher Education" November 2010 (hereafter *Research Report*). This Project was undertaken by the Council for Higher Education, in cooperation with legal academics and practitioners, because of the "growing

Dean's Association and the National Legal Education Liaison Committee. It was thereafter presented at a national stakeholder's colloquium on 11 November 2010 and, finally, to the Society of Law Teachers of Southern Africa on 18 January 2011.

The Council asked for feedback about the *purpose of legal education*, first, from the members of Law Schools. More than 62 per cent agreed that graduates should be able to handle legal terminology and should be able to contribute to the legal profession and society. This represented the general opinion that the law is not a purpose on itself, but constitutes part of a larger social context. It agrees with the South African Qualifications Authority's expectation that "[a]n LLB-graduate (should be) a well-rounded, educated person"[3]. A smaller group of respondents stated that it was the purpose of legal education to develop the knowledge, skills and values that are needed to prepare students for a professional career.

The South African Law Deans' Association[4] said that the LLB programme provides basic learning in law, foundational to various law-related professions[5], and then went on to enumerate the knowledge, skills and abilities that LLB graduates need to have acquired during their LLB studies[6]: (1) Knowledge of the key disciplines of South African law as a distinct field of learning, including the essentials of the history, sources and practical operation of the law; (2) skills associated with the effective articulation and communication of legal solutions to problems governed by law. These include advanced language skills (oral and written), analytical skills and an understanding of the prevailing social and legal culture; and (3) the ability to keep abreast of new developments in law, to research the sources of law effectively and to develop new and specialised expertise in one or more disciplines of the law independently.

The Council Report further asked for feedback on the *skills* that were considered important for a successful career in the law. First, and most important, was the ability to understand and analyse problems, examine them and eventually

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complaints, from legal academics and legal practitioners, about the quality of many LLB graduates, and their preparedness for the practice of law" (Chapter 1: Introduction at 9).

3) See "South African Qualifications Authority Registered Qualification: Bachelor of Laws" under "Exit Level Outcomes" available at *http://regqs.saqa.org.za/viewQualification.php.id=* 2293 (accessed on 11 October 2012).

4) This association (SALDA) is constituted by incumbent deans of South African faculties of law and heads of law schools.

5) For example, attorneys, advocates and legal advisers.

6) Pickett *Research Report* (n 2) at 141.

solve them. Secondly, students must be proficient in reading, writing and speaking English. The bad news was that knowledge of the historical development of the law was very last on the list. Academics, however, regarded legal history as important. The Society of Law Teachers of Southern Africa[7] were of the opinion that graduates should be able to handle a variety of legal material meaningfully, and that they should understand the historical basis of the law in order to obtain a proper understanding of the working of the law, to analyse problems and to do research. Knowledge of legal history (and we should here include Roman law), according to the Law Dean's Association, is essential. According to them an LLB graduate should have knowledge of the key disciplines of South African law, and this should include legal history, sources and practical operation of the law as well as the ability to do research. The Council's Report did not test the respondents' opinion about Roman law as such.

No specific curriculum is prescribed for the LLB degree and the Council of Higher Education does not aim at making all LLBs identical, "but rather to provide a framework within which providers can be innovative and stakeholder-driven in a liberated way"[8]. What is to be regarded as essential to the curriculum differs depending upon the individual approached. For the legal profession the emphasis will be different from that of the academic, the business person or the student. A thorough examination of the Council's Report discloses that, although the report is not statistically representative[9], there is consensus amongst respondents that the degree is either too short in duration or, if not too short, needs to be remodeled to adapt it to the available time[10]. The report should thus result in a re-evaluation of the LLB curriculum and its core components.

Curricula often reflect a specific spirit of the age, and the design and development thereof may be described as a political phenomenon[11]. The danger exists that the present recurriculation will be "politically correct" and that it will move away from what is considered Eurocentrism. Will this benefit the students? Do they merely want to train legal technicians or jurists? Do they want to turn out

7) This Society (SLTSA) promotes research and teaching in the field of law, it furthers the professional interests of its members and acts as the mouthpiece of legal academics.

8) See "South African Qualifications Authority Registered Qualification: Bachelor of Laws" under "The Purpose and Rationale of the Qualification", available at *http://regqs.saqa.org.za/viewQualification.php.id*=2293 (accessed on 11 October 2012).

9) Pickett *Research Report* (n 2) at 21.

10) *Idem* at 43-47.

11) C van Wyk "Romeinse reg en regsgeskiedenis in die LLB kurrikulum" ("Roman law and Legal history in the LLB curriculum") 2012 (18-1) *Fundamina* at 185.

fully-rounded, culturally literate persons with universal skills? Do they want the university to be but a "factory of knowledge", supplying the immediate needs of the market and practice? Thus far no obvious steps towards recurriculation have been taken, and one will but have to wait and see what the effects of such recurriculation will be.

Since this Report of the Council has been issued, the question whether Roman law and Legal history should remain part of the LLB-curriculum has again come to the fore. At present Roman law and Legal history are presented at all seventeen universities in the country in some form or another[12]. A brief overview of the current Legal history and Roman law offerings at South African Law Schools reveals that there is no consistency in the manner in which universities are approaching the teaching of Legal history and Roman law in the LLB degree. Certainly the amount of time and energy dedicated to these courses has declined over the last decade at the majority of institutions[13]. This reduction in the time

12) See Pickett *Research Report* (n 2) at 132: "All 17 universities offer some form of legal history, if not as a stand-alone module then as part of an Introduction to, or Foundations of, Law, module". The same comments are found regarding Roman law.

13) Currently the Faculty of Law at the University of Pretoria offers legal history in combination with Roman law in the form of the Historical Foundations of South African Private Law. This approach is mirrored by that of the University of South Africa that presents legal history and Roman law as two modules entitled Origins of South African Law and Foundations of South African Law. The University of the Witwatersrand recently (2011) abolished their course entitled Foundations of South African Law. The University of the Western Cape offers an introduction to legal studies which may include some elements of history and Roman law. The University of Cape Town offers Foundations of South African Law and an "Introduction to legal history in South Africa" is one of the seven elements of this course. Comparative legal history constitutes one of these elements and aims at giving students a solid background to the development of private law. The first semester begins with an overview of the development of the law since the classical period of Roman law, through the Middle Ages to current law. Most of this semester is devoted to a consideration of Roman law rules in identified areas. The University of KwaZulu-Natal also offers Foundations of South African Law. It incorporates the following: an overview of the origins of South African law and its development; and it includes Roman-Dutch law, indigenous law and English law. Furthermore it pays particular attention to various other subjects, such as ownership; possession; contract law; access to justice; HIV/AIDS; legal writing; etc. The University of Stellenbosch still presents Roman Law and Introduction to Law. In the former they teach both the external history, including the Roman constitutional law and sources of law as well as Roman private law. Rhodes University offers Foundations of Law in the first year. In an interesting second semester-course certain themes, institutions and rules of particular importance in modern South African law are identified and their development is traced from Roman law to modern law. The University of the Free State offers a semester

spent on Roman law and Legal history may be attributed to a number of factors, including a declining belief in the value and relevance of Roman law, Legal history and the legal historical argument as core components of the modern LLB degree.

The Law Society of South Africa demands "a core knowledge" of requirements for the LLB, and Roman law does not form part of this core knowledge nor is it on their list of recommended subjects[14]. On this list we do, however, find the law of contract, law of delict and property law, three subjects that are strongly based on Roman law. The Law Deans are the only group who regard Roman law as essential. The following arguments are aired *against* the continued inclusion of Roman law: It has very little practical value; judges do not like it when advocates base their cases on Roman or Roman-Dutch law; Roman law as contained in the *Corpus Iuris Civilis* is seldom quoted in Court; Roman law is elitist and inaccessible; it is a relic of the colonial and apartheid past which does not fit into the new democratic dispensation; and in a developing country such as South Africa practical subjects and basic skills are more important.

These arguments are not convincing. Both the South African Qualifications Authority and practice regard it as very important that law graduates have a good understanding of the basic principles of the law. The ability to do research and to work critically with the material is essential. It is expressly stated that legal research should employ the legal-comparative and legal-historical methods. Another valuable skill is the ability to compare solutions in other legal systems critically. Knowledge of Roman law and legal history are essential for the development of these skills.

In South Africa, Roman legal institutions are still of vital importance. The law

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course in Legal History in which their objective is "to enable students to trace and critically evaluate the sources and historical development of the South African law". A second-semester course in Legal History is presented in the fourth year. Roman law is taught in a semester course during the first year. In this course students study the Roman law of persons, succession, things, obligations and procedural law. Nelson Mandela Metropolitan University offers a semester course in Legal History that covers, *inter alia*, the history and development of South African private law. Zululand University offers a semester course in Foundations and Sources of South African Law. This course entails discussions of the history of South African law, including Roman-Dutch law, English law, and other sources such as indigenous law, common law, legal precedent and the Constitution.

14) This Society (LSSA) is the umbrella body of the attorneys' profession in South Africa and comprises approximately 20 000 attorneys and 5 000 candidate attorneys. See Pickett *Research Project* (n 2) at 137-138.

of property is, to a large degree, based on Roman law. Thus, despite modern adaptations and advances it still requires that Roman law concepts and institutions be fully understood. The law of obligations, too, has retained its Roman law character and cannot be properly appreciated by a jurist ignorant of the development of the modern laws from their ancient roots. A large number of legal concepts and institutions have been received from Roman law, for example the protection of possession; elasticity of ownership; the *nemo plus iuris*-rule; *dolus*; *culpa*; the principle of no liability without fault; the *exceptio* and *actio doli*; the protection of reputation, dignity and personal integrity; liability for damage caused by animals (strict liability); the concept of the reasonable man; and many more. These examples of the Roman-law heritage are obvious. There are, however, many more that are less obvious. Since Roman law constitutes the basis of large parts of our common law, knowledge of Roman law, the development of the law and the authority of sources are necessary to fully understand the principles of the law. This is the case not only for students, but also for lecturers, researchers and legal practitioners.

Since South African law is not codified, Roman law is still applied in South African courts and the *Corpus Iuris Civilis* is occasionally quoted in our courts. Roman law therefore remains a primary and living source of our law. A recent example from the law of delict is *Le Roux v Dey*[15]. In this case the court discussed the meaning and application of the defence of lack of *animus iniuriandi* within the context of the *actio iniuriarum*. Harms DP inquired, *inter alia*, into the meaning of *animus iniuriandi* as discussed by the Roman-Dutch authors and the Pandectists[16]. From his discussion the importance of Roman law, whether systematised by the Pandectists or received as part of the Dutch law in our law today, is obvious. Without a Roman and legal-historical background most modern lawyers and students would have had no concept or understanding of this

15) 2010 (4) SA 201 (CSA) 210-232.

16) See *Le Roux v Dey* (n 15) at 214E-G and 219H-220A-C. *Cf* also *Maisel v Van Naeren* 1960 (4) SA 841 (C) 840E-F to which Harms DP referred at 223B-D and where Acting Judge De Villiers stated as follows: "Underlying the conception of *animus injuriandi* is the principle stated by *Ulpian* in the *Digest: injuriam nemo facit nisi qui scit se injuriam facere* (*D*. 47.10.3.2). Thus, as is the position for *dolus* in general, it is essential that the alleged wrongdoer should be conscious of the wrongful character of his act … *Dolus or animus injuriandi* is therefore consciously wrongful intent." See further the case discussion by J Neethling "Onregmatigheidsbewussyn as element van *animus iniuriandi by iniuria*" ("Wrongful awareness as an element of *animus iniuriandi* in the case of *iniuria*") 2010 (31-33) *Obiter* 702-714.

discussion.

Another example from the law of delict where it was apparent that knowledge of Roman law and the later historical development of the matter at hand was important in order to apply the law correctly, is that of *Crots v Pretorius*[17]. In this case a claim on the basis of cattle-stealing was instituted. The Supreme Court of Appeal applied the *condictio furtiva* (a delictual action by which the stolen cattle could be claimed) on this case. Unfortunately the Court did not sufficiently deal with the historical motivation. Nor did it discuss the relevant Roman-law principles or the common-law principles. It merely referred to a secondary source[18].

Roman law also finds application in the law of property. The *Codex*, for example, provided for the revocation of gifts on the ground of ingratitude[19]. In *Fenton v Fenton*[20] this Roman-law rule was applied. Acting Judge Mabuse, however, relied on a secondary source, namely Voet's *Commentaries*[21], whilst a proper concept of the sources would have led to a more correct application of the law.

With reference to the law of contract, I would also like to refer to a recent legal-historical article in which it was shown that consumer credit and consumer protection, generally regarded as modern concepts, are indeed not so modern[22]. In this article the author traces the roots of these concepts back to Roman protection of consumers[23]. The Romans recognised the warranty against latent defects and the *ultra duplum* principle limiting interest[24]. Thus they paved the way for

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17) 2010 (6) SA 512 (SCA) 512-518.

18) See J Scott "Die *condictio furtiva*: gepaste remedie of *deus ex machina*?" (The *condictio furtiva*: Apposite remedy or *deus ex machina*?) 2011 *Journal of South African Law* at 383. He states that Snyders JA referred to the *condictio furtiva* in her judgement. She thereupon simply accepted, without referring to any common law authority, that the mere presence of *dolus eventualis* on the part of the defendant makes him liable in terms of this remedy. This is inconsistent with common-law sources and requires an explanation. The facts of the case should much rather have been considered as an example of the obsolete *actio* furti (388-389).

19) See *Codex* 8 55 1*pr* and 8 55 10*pr*-1.

20) 2006 JOL 17490 (T).

21) See Voet *Commentarius ad Pandectas* 39 5 22. *Cf*, too, *Mulligan v Mulligan* 1925 v WLD 178 at 182 to which Acting Judge Mabuse referred and in which case the Court also referred to Voet *Commentarius ad Pandectas* 39 5 22.

22) J Otto "The history of consumer credit legislation in South Africa" 2010 (16-1) *Fundamina* at 257-273.

23) *Idem* 258.

24) *Ibid*.

consumer protection and very little in consumer protection is consequently entirely new. Usury legislation has precursors in Roman and Roman-Dutch law[25]. Although South African law of contract has obviously become more sophisticated and complex, it too remains fundamentally rooted in Roman law.

With reference to skills required to understand, analyse and solve problems, Roman law has much to contribute. It can assist students to analyse complex problems by applying logical principles. It further contributes towards a better understanding of the social and political implications of legal problems.

Roman law permitted jurists to create and evolve legal principles from the fusion of the old, enabling jurists to deviate from legal principles no longer considered to be just and fair[26]. The application of Roman law was characterised by flexibility that facilitated its adaptation to accommodate changing social needs[27]. Roman jurists may serve as a model for modern jurists in those cases where an institution needs to be retained but its substance needs to be modified. The ability to interpret creatively is a fundamental skill in any legal system where existing institutions must be adapted for new purposes.

Even more important than the reception of specific Roman legal rules, was the scientific reception of Roman law and technique, and the acceptance of Roman legal doctrines, concepts, principles and methods[28]. The structure of South African law derives from Roman law: The difference between private law and public law; the classification of the law into different categories; the difference between real and personal rights; and, for example, the concepts of servitudes, contract, delict and unjust enrichment. The reception of English law from the nineteenth century onwards did not have any significant effect on the structure of Roman-Dutch private law and the application of Roman legal science. Roman law constitutes the basis of the European civil-law legal family and South African law links up with the countries belonging to this family. Knowledge of Roman law is therefore a requirement for both legal-historical and legal-comparative research.

One may presume that having studied Roman law, graduates will have some knowledge of the development of the law and that the legal-historical method will be applied when doing research. The context within which South African law

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25) *Idem* 260-262.

26) C Nicholson "The relevance of the past in preparing for the future: A case for Roman law and legal history" 2011 (17-2) *Fundamina* at 106.

27) R van den Bergh "The remarkable survival of Roman-Dutch law" 2012 (18-1) *Fundamina* at 89-90.

28) See Van Wyk (n 11) at 184.

originated and developed is furthermore important for the evaluation of the present application thereof in terms of the Constitution.

In their *History of Private Law in Scotland* Reid and Zimmermann state as follows: "An uncodified system makes no break with history, so that ancient history remains part of the living law.[29]" This is also true of South African law. If sources of law are to be understood their historical context is of vital importance. To this end "historical sensitivity" is required[30]. This statement is especially true in the South African legal system in which the past remains of vital importance and is still of practical value today[31].

The law constitutes both a product and an instrument of social engineering. Without a grasp of the historical factors that influenced its development there can be no insight into where South African law is today and how it might develop in the future. That law and politics are closely intertwined can be seen clearly when tracing the development of Roman law, Roman-Dutch law and English law and their influences on South African law. The present move to Africanise the LLB curriculum may therefore likewise be seen as a politico-legal action[32]. Much of modern South African law is a direct result of political considerations impacting on South African law in the past. One may consequently state that law and history are as closely entwined as law and politics. In applying and developing modern law, jurists must therefore be able to construct a well-reasoned legal historical argument. And this certainly justifies the inclusion of both Roman law and legal history in the LLB curriculum.

It should, however, be borne in mind that legal skills and practical training are two different things and that reading, writing and thinking skills essential to any jurist, must be developed throughout the curriculum. Lecturers should now assist students to identify the correct juridical solutions as influenced by socio-economic and political factors, prevailing ideology and other factors relevant to the current social reality.

It should further be noted that the syllabus for law modules is extremely

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29) K Reid & R Zimmermann (eds) *A History of Private Law in Scotland* Vol 1 *Introduction and Property* (2000) at 11.

30) *Ibid*.

31) Zimmermann "'Double cross': Comparing Scots and South African law" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Comparative Perspective* (2004) at 4ff.

32) See, for example, D Woolfrey "Curriculum development in legal education – Some reflections" 1995 *South African Law Journal* at 151.

packed and consequently there is little or no time within courses to dedicate to the historical antecedents of the modern law. It is thus feared that any attempt to incorporate a substantial historical component into such courses would be met by some resistance and could result in this aspect of the work receiving little more than a cursory mention.

Although it is apparent that a thorough study of Roman law will find no place in the new curriculum – also because students no longer have any knowledge of Latin – it does not mean that it should disappear altogether. Those parts of Roman law that are still relevant should remain part of the curriculum so that students can obtain a better concept of the principles of the law. At the University of South Africa Roman law is taught as a "service course". It is a first-year course, entitled "Foundations of South African Law", and students learn the basic principles of the Roman law of property, contract and delict. Two or three years later, when they register for South African law of property, law of delict and law of contract, they are familiar with the legal terminology of these subjects, as well as its principles and doctrines. They will also have encountered the scientific structure and systematic method for which the Romans are famous.

While practice seems to want legal mechanics rather than jurists, it must be emphasised that for lawyers to be socially conscious and ethical they need to be exposed to courses such as legal history, Roman law and jurisprudence that will be formative in their development into thinking, humane lawyers who will avoid a simple mechanical enforcement of rules and regulations.

In conclusion, I would like to add a few specifics about legal education at my University. At the University of South Africa, only one law degree is offered, namely the undergraduate LLB degree. It is a four-year degree. Ideally a student should register for and pass five law modules per semester. After four years a successful student will thus have passed forty modules which will qualify him for an LLB. At present thirty four of the modules are compulsory whilst the students may choose the other six from a variety of subjects, for example private international law, comparative law and advanced labour law.

At a number of other universities, students may still qualify by doing, first, a BA or a BCom degree which includes a number of law subjects, and thereafter pass a two-year LLB. This is, obviously, the better option. It provides an extra year of study, as well as a wider academic background.

Because of the poor secondary education system in the country, most universities have during the past few years started teaching "skills" courses that are usually obligatory. In these courses students are taught literacy and numeracy

skills, all of which they should have acquired at school. My university will also introduce, next year, a compulsory skills course in research which will be presented in the first year of study. This obviously places a huge additional burden on law teachers and it furthermore reduces the time available for law subjects.

In South Africa there is at present much pressure on the Department of Higher Education to return to the "old" system (that is, a bachelor's degree and thereafter an LLB) or to extend the length of the four-year LLB to five years. Most of the students are battling to complete this degree within the prescribed period. It is argued that they will do better with an extra year of study. However, there is as much, and more, pressure to retain the four-year degree. It has therefore been suggested that the workload should be lessened in order to make the degree more accessible. These are political viewpoints and quite popular. By doing so more students will obtain the degree, thus adding to the large number of unemployed LLB graduates in South Africa. Another factor which aggravates the enforcement of high academic standards is the Department of Education's policy to grant subsidy to the universities only for those students who pass. This obviously results in Universities putting pressure on the lecturers to improve the throughput rate.

There is no certainty about what the future holds for legal education in South Africa, but one may only trust that, whatever the Department of Higher Education decides, it will result in an LLB degree complying with the requirements as stated by the South African Qualifications Authority; the South African Law Deans Association; the Society of Law Teachers of South Africa; the Law Society of South Africa; and the Independent Association of Advocates of South Africa.