The History of South African Law and its Roman-Dutch Roots

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I. Contents

I would like to express my sincere thanks to those who have helped me to write this essay by recommending and supplying the necessary literature, especially WILLEMIEN DU PLESSIS of the Universiteit van Potchefstroom, PROF. DR. J.C. SONNEKUS of the Rand Afrikaanse Universiteit (RAU) in Johannesburg and the Institut Suisse de Droit Comparé in Lausanne (ISDC).

II. Table of Abbreviations

AD	Anno Domini (after Christ)
ANC	African National Congress
cit.	cited
Codesa	Conference for a democratic South Africa
Ed.	Edition
Edt.	Editor
f.	following page
ff.	and following pages
finV	final version of the South African constitution of 1996
SWA	South West Africa / Suid-Wes Afrika (today Namibia)
VOC	Ostindische Kompanie (Vereenigde Geoctroyeerde Oost-Indische Compagnie)
Vol.	Volume
vs.	versus

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V. Table of contents

A Introduction

South African law is neither a classical Roman, nor a Roman-Dutch law nor an English common law and certainly not a traditional African law. It merged however, as the following essay will show, in its long and exciting history elements of all mentioned laws to a specific South African law. Up to today, the legal systems of South Africa, Lesotho, Swaziland, Zimbabwe, Botswana and Namibia are based on Roman-Dutch law.[1] While formerly modernists, who wanted to modernise the Roman-Dutch law with English law debated with purists, who wanted to remove English influence, the main disputes today are over the influence of apartheid on the legal system.[2] Many authors speak of a genuine "South African law".[3] This essay will first explain the necessary historic backgrounds, and then continue with the development of the South African law and its numerous sources.

B History

B.1 The history of the Netherlands

The republic of the United Netherlands was formed after the independence of the northern provinces from the Spanish Netherlands. After establishing the union of Utrecht of 1579, they freed themselves from the Spanish rule. In 1584, the constitution the "Staten Generaal" (Parliament) was drafted. Representatives of the seven republics met in The Hague under the chair of Holland.[4] In 1609, a twelve-year truce with Philip III of Spain was concluded. The German empire officially acknowledged the Hague peace treaty of 1648, as part of the Westfalian peace, which ended the thirty-year war, and the independence of the Netherlands from Spain. The 17th century were the golden ages of the Dutch republic. Successful and aggressive, it became one of the most important naval powers, with colonies in the Americas and the Indies. In 1652 JAN VAN RIEBEECK occupied the Cape of the Good Hope. After a series of wars and the ascent of England to the leading maritime and colonial power, the United Netherlands collapsed in 1795 and the Batavian Republic emerged. It was influenced by ROUSSEAU'S "Contrat Social", the American declaration of independence and the French revolution's declaration of the human rights. The freedom of assembly, opinion and press were created. The aristocracy was swept away. Catholics and Jews emancipated themselves. In 1806, Napoleon turned the Netherlands into a constitutional monarchy and installed his brother Louis as king. In 1810, the Netherlands were absorbed by France. After Napoleon's defeat against the allied powers, the congress of Vienna created the kingdom of the Netherlands in 1815. The southern provinces revolted in 1830 and became the Belgian kingdom.[5]

B.2 The Dutch East-India Company

The VOC (Vereenigde Geoctroyeerde Oost-Indiese Compagnie) was formed on suggestion of the Dutch Staten Generaal, by amalgamating several Dutch companies to a stock corporation. Its statutes were drafted on March 20, 1602. The VOC was directly

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[1] KLEYN, 44; DU PLESSIS, 66; LEE, 12.

[2] See KLEYN, 46 ; HOSTEN et al., 212, cit. WATERMEYER und DU PLESSIS, 52-58, see F.1.

[3] KLEYN, 48 ; DU PLESSIS, 66.

[4] DTV, 245.

[5] Vgl. HAHLO/KAHN, SA Legal System, 526.

subordinate to the Staten Generaal of the Netherlands and it was composed of six chambers, whereby Amsterdam dominated.[6] Each chamber was composed of a directorate (so-called Bewindhebbers). To fill vacancies, the chambers nominated three shareholders as candidates. Altogether there were 65-75 Bewindhebbers. The executive board of the VOC was the "Heeren Zeventien" (the council of the 17). They were nominated from the Bewindhebbers, 8 for Amsterdam, 4 for Zeeland, one for each of the remaining chambers plus one more in rotation for the smaller chambers. The Staten Generaal granted the VOC a trade monopoly for all countries to the east of the Cape of the Good Hope and west of the Magellan straits. The VOC was authorised to close agreements with eastern sovereigns, decide over war and peace, build stations and forts, impose punishments, manage their trade missions, appoint governors, generals and judges and do everything necessary to ensure trade and order.[7] The VOC was thoroughly structured. Each ship featured a ship's council, though with executive powers of the captain, and each convoy a Breede Raad (expanded council) of the ship's commanders. The eastern headquarters were located at Batavia,[8] ruled by a governor-general and a Raad van Indie (Council of India). Around 1660 there were Buiten-comptoiren (Subsidiaries) in Amboyna, Banda, Ceylon, Macassar, Malacca, the Molucces and the Cape. Each Subsidiary was led by a Opperhoofd (first officer), which was supported by a council, similar to a ship's council.[9] In 1794, the VOC fell insolvent and by 1796 it was wound up.[10]

B.3 The colonisation of South Africa

When Jan VAN RIEBEECK landed at the Cape of the Good Hope on April 6, 1652, to establish a refreshment post for the Vereenigde Geoctroyeerde Oost-Indiese Compagnie (VOC), he did not suspect that he had laid the corner stone to the mightiest and richest nation of Africa. The Cape was only very thinly populated by Khoikhoi and San.[11] In 1680, French Huguenots arrived. Slaves were imported from East Africa, Malaysia and India. Out of this mixture, the coloured population[12] emerged. In 1779, Xhosa migrating southward and Boers trekking north clashed in the battle of the Great Fish River. In 1795, the Cape came under British rule. From 1803 to 1806, South Africa was restituted to the (Dutch) Batavian Republic.[13] In 1806, the British returned as a result of an agreement with the Netherlands and the payment of 5 Million pound sterling.[14] In the "Groot Trek", from 1836 to 1848, the Voortrekkers moved to the areas of the present Oranje Vrystaat, Transvaal and Natal, where they founded the so-called Boer republics. In the Boer war (1899-1902), England fought for dominance in the Boer republics which were rich in gold- and diamond resources. The Union of South Africa was formed in 1910. South Africa's independence from England was first acknowledged in 1931 and again in 1936. After the 1948 elections, when prime minister Jan SMUTS was voted out

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[6] HAHLO/KAHN, SA Legal System, 534; HAHLO/KAHN, Union of SA, 11.

[7] See HAHLO/KAHN, SA Legal System, 535; Hahlo/Kahn, Union of SA, 11.

[8] Today's Jakarta.

[9] See HAHLO/KAHN, SA Legal System, 536; Hahlo/Kahn, Union of SA, 12.

[10] HAHLO/KAHN, Union of SA, 4, but does not mention why it went bankrupt.

[11] Khoikhoi are bushmen with cattle stock, San are bushmen as hunters and gatherers.

[12] HAHLO/KAHN, SA Legal System, 567-568.

[13] The name of the Netherlands from 1795 to 1806, see B.1.

[14] HAHLO/KAHN, SA Legal System, 570.

of office,[15] South Africa turned more and more to unconcealed racism, especially under president H.F. VERWOERD (1958-1966). In 1960, the military arm of the liberation movement ANC, "Umkhonto We Sizwe"[16] was founded. It was responsible for some spectacular attacks until its disbandment in 1994. On 31st of May 1961, the Republic of South Africa was established and the Commonwealth membership terminated. Apartheid was at its peak. Under president P.W. BOTHA (1979-1989), apartheid was phased out tacitly. On February 2, 1991 F.W. DE KLERK lifted the prohibition of several political organisations and ordered the release of the political prisoners. The government, the ANC and other political parties began to debate. Codesa I[17] resulted in a stalemate, but in 1993, Codesa II came to a breakthrough, when agreement was reached on the first democratic constitution of South Africa. The first free elections took place in 1994, whereby a - at least nominally - democratic constitutional state was formed. 1994 to 1996, the final constitution of 1996 was written. It no longer requested a government of national unity and the paragraph on the basic rights was revised.

C The Roman-Dutch Law

After the breakdown the west roman empire, the Netherlands mainly applied the leges barbarorum. These consisted not only of Germanic common law, but were also expression of the original Roman law,[18] "of course incomplete and falsified, but still Roman law".[19]

After the collapse of the Eastern Frankish Empire around 900 AD, the Netherlands had no general legislation anymore. The courts thus began to apply Germanic common law, and subsidiary and unsystematically Roman law. The law was complicated by many Handvesten (Civic privileges).[20]

Although Roman law was only applied where the customary law had no answer, it played an important role in practice. Parts of Roman law had already been taken over explicitly or implicitly into customary law and one could only refer to local customary law if the custom could be proven. In the 15th and 16th century, when the rulers of the Netherlands asked the regions and cities to codify their common law and to submit it for authorisation, a clause declaring Roman law as subsidiary applicable was compulsory.[21]

The expression "Roman-Dutch law"[22] was used for the first time in 1652 by Simon VAN LEEUWEN as a subtitle of his work "Paratitla Juris Novissimi". In 1664, his most important work "Het Rooms Hollandsch Recht" was published.[23]

The Roman law was received completely differently in the different parts of the Netherlands. Some parts were under the influence of Germanic right, others under the

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[15] More information in CAMERON, 177ff.

[16] Xhosa for „spear of the nation".

[17] Official acronym for „Conference for a democratic South Africa".

[18] With roots in the Codex Theodosianus of 438 n.Chr., see LEE, 3.

[19] See HAHLO/KAHN, SA Legal System, 486.

[20] LEE, 3.

[21] HAHLO/KAHN, SA Legal System, 516.

[22] HOSTEN et al., 215, criticize the english term „roman-dutch law", as only the law of the province of Holland is concerned, not the law of the entire Netherlands.

[23] See LEE, 2; HOSTEN et al., 213.

influence the northern French "droit coutumier" (customary law). In Friesland, Roman law was already partially re-introduced in the 13th century and its reception completed by the end of the 15th Century. In the southern Netherlands (today's Belgium), the reception of Roman law began in the 13th century and was completed by the 16th century. Groningen, Gelderland, Overijssel and Drente received little Roman law. In Holland the judges of the "Prinzengericht" (princes' court) referred since the second half the 14th century to Roman law ("de gescreivene rechten"), when customary law had no answer. In the first half of the 15th century, reconstruction of the customary law within the meaning of the "written law" began. In 1495, Roman law was officially declared as subsidiary applicable in Germany. This is also regarded as the date of its official reception in the Netherlands.[24] The most important legal rules from 1075 to 1795 were recorded in the "Groot Placaetboek". There are several groups of decisions, of which the "decisions of the court of Holland and Zeeland" are the most important for South African law. Many of these compilations of legal decisions were composed by lawyers as work papers, complemented with personal commentaries and left to universities under the condition that they never be published.[25]

The most important lawyer of the 14th and 15th century was Philips OF LEYDEN, who was a lecturer at the university of Leiden. In the 16th century, the outstanding legal academics were WIELANDT, DAMHOUDER and EVERARDUS. DAMHOUDER became famous in South Africa for his theories of criminal law.[26] EVERARDUS, a classicist, was a member of the large council of Mechelen and later president of the Dutch supreme court. He contributed considerably to the reception of Roman law in the Netherlands. Many of these so-called "old authorities" lectured at the university of Leiden during this period of the 17. Century, so Hugo DE GROOT, PAULUS, Johannes VOET, VINNIUS, MATTHAEUS II, GROENEWEGEN, VAN LEEUWEN, HUBER, NOODT and VAN BIJNKERSHOEK.

In the 17th and 18th century, legal commentaries gained a large influence on the judicature. Up to the codification of the Dutch law (from 1806), these commentaries were important resources for the interpretation of law.

Further sources of the Dutch law were Handvesten (town charters and regional laws), which consisted of a system of legal and administrative rules, which had been granted by kings and knights as privileges. Additionally plakkate,[27] ordinances and decisions, such as the "politieke ordonnansie" of 1580 and the Oktrooi[28] of the intestate law of succession of 1661.[29] The Justinian texts were taken over in the form the glossators.[30]

In 1838, the introduction of the codified Burgerlijk Wetboek (Civil law code) ended the application of Roman-Dutch law in Holland.[31]

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[24] HAHLO/KAHN, SA Legal System, 515.

[25] Die privacy of the author (and those concerned) should not be violated.

[26] Which he had actually copied from WIELANDT.

[27] Statutes published by placards.

[28] Literally „Decree", equivalent to an ordinance.

[29] LEE, 3.

[30] See HAHLO/KAHN, SA Legal Systems, 517; KLEYN, 42.

[31] See also DU PLESSIS, 48; HAHLO/KAHN, Union of SA, 18.

D The genesis of South African law

D.1 The development of the multi-layer law

When the Heeren Zeventien[32] were asked which law was to be applied at the cape, they answered, that the laws of the province Holland were applicable, i.e. the political ordinance of 1580, the eternal edict of 1540 and the plakkate of 1599 on the intestate law of succession. Roman law was to be applied where the former laws had no answer. Probably the statute of the VOC or the new statute of India were also in force.[33] Some local Plakkate were enacted.[34] After the British invasion of 1795, a proclamation was made that the law and the administration of the cape would be continue unchanged. The cruel punishments were abolished, however.[35]

Even during the second British invasion (from 1806), Roman-Dutch law continued to be in force. From 1827 all legal processes had to be held in English and all documents prepared in English.[36]

In 1823, the COLEBROOKE-BIGGE commission analysed the situation of the legal system at the cape and was shocked at its condition. The commission proposed to replace the existing legal system gradually - through legislation - by the English system. Consequently, English civil and criminal law were introduced in 1828 and English law of evidence[37] in 1830, while only qualified lawyers admitted to the bars in England, Scotland or Ireland were allowed to practise as judges or lawyers.[38]

More and more of these english-trained lawyers and judges practised in the cape. They referred to English law, whenever they did not know the Roman-Dutch law or did not understand it. Often, the courts argued, that there was no difference between Roman-Dutch and English law or that the Roman-Dutch law offered no solution and thus decided according to English law only.[39] The literature of the "old authorities" gradually lost importance.

Many merchants closed contracts according to English law, since the main trading partner was England. English constitutional and commercial law was introduced. Merchants were subjected to English mercantile-, insolvency-, insurance- and intellectual property law. The law of contract and the law of delict were influenced by English law.[40] It had less influence on matters of the law of succession, family law and the law of persons. In the law of succession, the institutions of the trust and the executor were taken over from the English law. The estates of Englishmen, whose will was made in terms of English law were automatically administered according to English law of succession, strengthening thus its influence.

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[32] Council of the 17, the executive board of the VOC.

[33] Controversial, because there are no historical records.

[34] LEE, 8; HAHLO/KAHN, Union of SA , 16; most of the Plakkate were abolished in 1934.

[35] ZIMMERMANN, 7.

[36] See LEE, 9; ZIMMERMANN, 9; HAHLO/KAHN, Union of SA, 17.

[37] HAHLO/KAHN, Union of SA, 19.

[38] ZIMMERMANN, 11.

[39] See ZIMMERMANN, 12-14.

[40] HAHLO/KAHN, Union of SA, 19.

Since appeals were transferred to the Privy Council in London, cases adjudged according to Roman-Dutch law were decided according to common law. The institute of "stare decisis"[41] - unknown to Dutch law - percolated into South African law .

A countermovement towards Roman-Dutch law was initiated in 1828 by chief judges Sir William BURTON and William MENZIES. Large hopes of promoting Roman-Dutch law were set in the faculty of law of the university of Cape Town, founded in 1859. However, it was short of lecturers and from 1875 to 1916, classes were only held in private. Scholastic literature and translations of the old authorities were only developed from the beginning of the 20th century.[42]

The boer republics of the Oranje Vrystaat and the Transvaal utilised Roman-Dutch law,[43] the latter combined with VAN DER LINDEN'S Koopmanshandboek. Where this offered no solution, VAN LEEUWEN'S and DE GROOT'S works were consulted. The Cape's criminal- and civil procedure law of 1827 was taken over. Although Natal was annexed by the British in 1843, it continued the use of Roman-Dutch law.

After the end of the Boer war the Roman-Dutch law and its principles of equality and justice were gradually replaced by English law. The focus shifted to Boers fighting for survival and Englishmen claiming resources, while the rest of the population remained unnoticed, and the infiltration of racism was hardly noticed.

With the establishment of the Union of South Africa in 1910, a standardisation of the law was concluded, but it was only commenced, however, in beginning of the 1940s.[44]

By 1945, English law had established itself so strongly, that it was even considered as subsidiary applicable. In the 1950s and 60s, a countermovement emerged around Chief Justice L.C. STEYN, in order to purify the South African law from English influences.[45] From 1959 English law was only applied, where it had already been received. The courts stopped intruding into Roman-Dutch law and left this largely to the legislator.[46]

After the political turn of 1948, apartheid was introduced. In 1950, the "Suppression of Communism Act" was passed. Legislation and law were increasingly dominated by politics and "social engineering". The South African "social engineering" differed from that in other states of the world, as it was never attempted to cover up for it, to put in a good light or to question it. The apartheid was legislated by parliamentary acts, which stood in blatant contradiction to the English principle of legality and the Dutch principles of equality, fairness and justice.[47]

On 31st of May, 1961 the Republic of South Africa was declared. However, its constitution contained not even a catalogue of basic rights, leaving it to the judges to decide over the application of unjust laws.[48] The apartheid legislation led to a debate between positivists, which regarded the law detached from politics and economics and

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[41] The law of precedents.

[42] ZIMMERMANN, 16-18.

[43] HAHLO/KAHN, Union of SA, 21.

[44] ZIMMERMANN, 24.

[45] ZIMMERMANN, 36-37.

[46] ZIMMERMANN, 40.

[47] KLEYN, 46; very bold in SA Rule of Law, 67, bottom.

[48] ZIMMERMANN, 27.

non-positivists, which regarded the law in its socio-political environment. The South African doctrine rejected positivism as early as 1970.[49]

1978-1989 it became evident that racial segregation could not be maintained. More legislation was passed, without any success, though. Sanctions were imposed against South Africa. In 1985, the status of emergency was declared and severe measures taken to stop the violence.[50] A year later, an attempt to abolish micro-apartheid failed. Throughout the 1980s, the application of apartheid legislation was gradually reduced.[51]

Since 1991 various acts were passed to replace apartheid legislation, The 1991 "Abolition of Racially Based Land Measures Act 108" replaced the "Land Act" of 1913 and the Group Areas Act. Although the laws were cancelled, the ordinances based on them continued to exist, since rights and privileges obtained in terms of this legislation had to be considered. Since the constitutional reform of 1994, the courts have held many pioneering decisions in the areas of death penalty, visiting rights and free access to medical services. New laws are passed in the areas of - inter alia - education, police, property and environment.

The present South African law is composed of at least five layers (multi-layer-law):[52]

1. Tribal law and islamic law (sharia)
2. Statute law
3. English law
4. Roman-Dutch law as common law
5. Roman law (Corpus Juris Civilis)

D.2 Major categories of the South African law

The *criminal law* was reformed 1806 and 1828 according to English law, but is still based on Roman-Dutch roots.[53] *Constitutional law* and *administrational law* are basically English.[54]

The South African *law of persons* remained largely untouched by the English influence. Individual areas, such as the law of adoption and divorce were codified.[55]

The *law of obligations* is subdivided in contract law and extra-contractual law. The Roman-Dutch law is intermixed with many elements of English law, particularly in the field of the law of evidence.[56] Only few areas have been codified, such as the area of the consumer protection. Direct reference to Roman law is made, where no specific commercial laws apply.[57] Commercial law, maritime law and insurance law are dominated by English law.[58] English law was also received in the area of the improper

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[49] See DU PLESSIS, 60-63; KLEYN, 47; interesting WITZSCH, 53-54, who reported this attitude as late as in 1988.

[50] Detailed in Witzsch, 41.

[51] See WITZSCH, 3 and 55; different WITZSCH, 5.

[52] ZIMMERMANN, 9.

[53] HAHLO/KAHN, Union of SA, 18; SA Rule of Law, 11.

[54] HAHLO/KAHN, Union of SA, 42.

[55] ZIMMERMANN, 75.

[56] ZIMMERMANN, 97-98.

[57] Corpus Juris Civilis, see ZIMMERMANN, 110, 125ff. and VISSER, 319-323.

[58] LEE, 21.

contracts.[59] In the field of the law of delicts a mixture of Roman, Roman-Dutch, English and proper South African law is applied.[60]

The *law of property* is based on Roman-Dutch law, whereby roman law is dominating, leaving little difference to continental law of property.

The *law of succession* is influenced by Roman-Dutch common law, English law and modern legislation. In the intestate law of succession, the Dutch Schependom law was taken over, and later modified by additional laws. The legal portions of the heirs was done away under English influence. Only the children's right to maintenance is acknowledged. The institute of the trust was taken over from English law.[61]

D.3 The South African Judiciary

There were no professional courts during VOC rule (1652-1795). The supreme court was the Raad van Justitie and Landdroste and Heemraden acted as lower courts. They continued to exist during the first British occupation of 1795-1803, the restitution of 1803-1806[62] and well after the beginning of the second British occupation. The first and second charter of justice of 1827 and 1832 created a Supreme Court instead of the Raad van Justitie and replaced the Landdroste and Heemraden with Magistrates Courts. A court of appeal was created in 1886 and transferred to Bloemfontein in 1910. The English distinction between advocates and attorneys was introduced by an Oktrooi of 1827. Jury trials - completely unknown to Roman-Dutch law - were introduced in 1831 and only abolished in 1969. In 1864, the Eastern Cape districts got their own Eastern District Court, which was a subsidiary of the Supreme Court in Cape Town. It was supplemented with a High Court of Griqualand in Kimberley. In certain cases appeal could be made to the Privy Council in London.[63] Natal received a District Court in 1845, which was replaced by a Supreme Court in 1857.[64]

According to the Grondwet van die Transvaal (constitution) of 1858, the legal system consisted of Landdroste, Heemraden and jurors. In 1877 a High Court of Justice with legally trained staff was created. After the British annexation in 1900, the legal system was changed. The higher courts were converted into the Supreme Court of The Transvaal, with the right of appeal to the Privy Council in London. Magistrates' Courts were created as primary lower jurisdiction. In the Oranje Vrystaat, the Grondwet (constitutional law) of 1854 created a high court with three Landdroste and lower courts with one Landdrost each. In 1902, the High court was replaced by a High Court of the Orange River Colony, with limited access to the Privy Council.[65] Magistrates had legal and administrative functions, inter alia the authorisation to stop black riots. Courts of appeal were officially deemed politically neutral, yet they applied racist laws without hesitation.

The South Africa Act of 1909 united the Cape Colony, Transvaal, Oranje Vrystaat and Natal to the South African union and the (seven!) Supreme Courts of the four provinces

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[59] ZIMMERMANN, 102.

[60] ZIMMERMANN, 139ff. and VISSER, 335.

[61] ZIMMERMANN, 185-197.

[62] In this period, J.A. DE MIST initiated some important reforms.

[63] Highest English court and appellation court of the Commonwealth.

[64] HAHLO/KAHN, SA Legal System, 238.

[65] HAHLO/KAHN, SA Legal System, 238.

to divisions of the new Supreme Court of South Africa in Bloemfontein. Appeals of the lower courts were taken to the provincial divisions and from there to the Supreme Court in Bloemfontein. Under certain circumstances a judgement could be taken to the Privy Council in London. In 1941, Afrikaans was admitted as language of the courts.[66] The Eastern Cape Provincial division and the SWA division (with provincial status) of the Supreme Court of South Africa were created In 1957, as parts the Supreme Court of South Africa.[67] Today, the highest court is the Supreme Court of Appeal, followed by the provincial High Courts and the Magistrates' Courts.[68] The South African judiciary tried to preserve their independence even during the times of apartheid. This was eroded, though, by political malice.[69]

D.4 Interpretation

The South African interpretation of statute law is much more literal than in Europe. There are long-winded Term catalogues and an interpretation act. Other than literal interpretations are only permitted if not in conflict with the "ordre public". Materials may not be used at all, gaps may not be filled and open rules must be interpreted restrictively.[70] According to the principle of "quieta non movere", interpretation must never conflict with common law, jurisdiction of the courts or rightfully-acquired rights.[71]

E Sources of South African law

E.1 Several sources

The South African law is an uncodified legal system, i.e. several sources are available, namely statute laws, precedents, common law, custom, customary ethnic law, newer doctrine and the constitution. Not all sources have the same authority.[72]

E.2 Statute law

In Roman-Germanic systems, the law has been codified for the best part. The South African system, however, is uncodified to a large part. Legislation is only made where newer technical developments or gaps make it necessary. Certain sections were codified comprehensively. The South African doctrine criticises mainly the rigidity of codification[73] and the difficulty to codify precedents reaching back a couple of hundred years.[74] The positivist interpretation of laws has the effect that they are applied very strictly on one hand and interpreted in conformity with common law on the other hand.[75]

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[66] ZIMMERMANN, 35.

[67] HAHLO/KAHN, SA Legal System, 238.

[68] KLEYN, 67.

[69] ZIMMERMANN, 32-34; WITZSCH, 53-54.

[70] ZIMMERMANN, 48-50.

[71] ZIMMERMANN, 52.

[72] KLEYN, 52.

[73] It is assumed that interpretation of statute law is not permissible.

[74] HAHLO/KAHN, Union of SA, 28f.

[75] DU PLESSIS, 71-72.

E.3 Common Law

It is generally acknowledged in South Africa, that the common law is the primary source of the law, whereby common law means Roman-Dutch, not English law.[76] The former is much more dogmatic and principled than English law. Private law plays a central role, while the public law was neglected up to now.[77]

Some authors regard the "old authorities" even as a source of its own.[78] These so-called "ou Skrywers", which are often cited, can be divided into four categories:[79]

- The works the old Roman-Dutch authorities
    - Johannes VOET, Commentarius ad Pandectas
    - Hugo DE GROOT, Inleydinge tot de Hollandsche Rechtsgelertheid
    - Simon VAN LEEUWEN, Het Roomsch-Hollandsch Recht
    - Johannes VAN DER LINDEN, Rechtsgeleerd Practicaal en Koopmans Handboek
    - Less known authors like Arnoldus VINNIUS, Gerard NOODT und Simon VAN GROENEWEGEN, Ulrichus HUBER, D.G. VAN DER KEESSEL
- The decisions of the courts of Holland and other courts of the Netherlands in application of Roman-Dutch law (collections of Cornelis VAN BIJNKERSHOEK, Willem PAUW)
- Commentaries of lawyers to practical legal problems
- The laws, which were in effect up to 1652 in Holland, particularly the political ordinance of 1580, the eternal edict of 1540, the Groot Placaet Boek and the Oktrooi of 1661.

The works of the "old authorities" are as important as court decisions. Court decisions ignoring them can easily be overturned.[80] Whether authors from other areas of Europe may be cited, is often debated, but current practice.[81]

E.4 Roman law

It would go too far to discuss Roman law sources comprehensively, but it shall be noted, that South African courts still apply - probably as the last courts on earth - the Corpus Iuris Civilis and the works the Glossators and Postglossators,[82] whereby in case of doubt the Roman-Dutch practice takes priority.[83]

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[76] DU PLESSIS, 70; ZIMMERMANN, 58ff..

[77] ZIMMERMANN, 41-43.

[78] DU PLESSIS, 208.

[79] See DU PLESSIS, 46; HAHLO/KAHN, Union of SA, 35ff..

[80] DU PLESSIS, 75 ; LEE, 6; Introduction.

[81] ZIMMERMANN, 62ff..

[82] Criticized by ZIMMERMANN, 69.

[83] ZIMMERMANN, 65-66.

E.5 Precedents

After the first charter of justice of 1827, a professional legal system, supreme courts, English law of procedure and the principle of the stare decisis[84] were established. Reasons given were the "legal certainty, the protection of vested rights, the satisfaction of legitimate expectations and the upholding of the dignity of the court".[85] Also important were the early introduction of appeal to the Privy Council, the English education of many lawyers, English civil law and criminal procedure law and the nomination of the judges from the ranks of the lawyers.[86]

Initially the stare decisis rule was handled laxly. Judgements were published in excerpts from 1857 and regularly from 1882. MENZIES' collection of the 1828-50 verdicts was published in 1870.. As the number of precedents increased, they were consulted more regularly - although because of their acknowledgedly unsteady quality each decision had to be examined, whether it was of use as a precedent., The stare decisis rule was for the first time officially recognised in 1880 by judge C.J. DE VILLIERS. A judgement of the supreme court in Cape Town was binding, if it had not been overturned by the Privy Council. Only the supreme court itself could override it. Although there were voices, which saw the stare decisis rule as an infiltration of Roman-Dutch law, it eventually prevailed in all South Africa.[87] In isolated cases, judgements against precedents of equivalent or higher courts were held. However it is assumed that eventually even the courts of the Transvaal, Natal and Oranje Vrystaat have followed the stare decisis rule.[88] Apart from two references, in which the stare decisis is mentioned, there are no laws establishing it.[89]

According to C.J. CENTLIVRES, the South African doctrine is less strict than the English, as English law is solely based on precedents, while South African law is based on the teachings of the old authorities of the Roman-Dutch law.[90]

Often the precedents were wrong.[91] To this Chief Justice J.P. GARDINER said: "It is better, when the law is interpreted historically incorrect, as if uncertainty rules [...] it concerns (commercial men) not at all whether it is a correct interpretation of VOET or AVERIANUS."[92]

E.6 Modern academic legal writings

In Analogy to English law, modern academic legal writings have, unlike in Romano-Germanic legal systems, little authority in South African law.[93]

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[84] HAHLO/KAHN, SA Legal System, 243: "(a) a court is absolutely bound by the ratio of a decision of a higher court or of a larger court on its own level in the hierarchy, in that order, unless the decision was rendered per incuriam or there was subsequent overriding legislation. (b) a court will follow its own past decisions unless it is satisfied it is wrong, when it will refuse to abide by it and so in effect overrule it."

[85] HAHLO/KAHN, SA Legal System, 243; DU PLESSIS, 203.

[86] HAHLO/KAHN, SA Legal System , 243; HAHLO/KAHN, Union of SA, 20 and 29ff..

[87] HAHLO/KAHN, SA Legal System, 240-241.

[88] No records, see HAHLO/KAHN, SA Legal System, 241.

[89] HAHLO/KAHN, SA Legal System, 242, 258-259.

[90] HAHLO/KAHN, SA Legal System, 243; KLEYN, 46; ZIMMERMANN, 54.

[91] ZIMMERMANN, 55.

[92] HAHLO/KAHN, SA Legal System, 243; ZIMMERMANN, 55.

[93] DU PLESSIS, 75 ; KLEYN, 52.

E.7 The constitution

The new constitution of 1996, particularly its catalogue of basic rights, is acknowledged as source of law, but its precedence is still unclear.[94]

E.8 Customary ethnic law

African customary law[95] is unwritten law, which is found in legislation, precedents, custom, reports of commissions, legal literature and anthropological articles. Important is the "compendium", which was compiled in the year 1858 under Chief Commissioner Col. John MACLEAN in British Kaffraria, and the reports and statements before commissions from before 1910, whereby the quality of these sources varies. Courts have often referred to them in their decisions.[96]

In the traditional African law, all details of a case had to be inquired and memorised. There were no summaries, no written notes. Each detail had to be discussed in full, before the leader of a tribe would arrive at a decision. The western ideas of an undefined past, a present and a future are foreign to African communities.[97] The African law does not differentiate between private and public law.[98]

Since the Annexation of the Transkei in the 1880s, the traditional African law could be applied in the Cape Colony and in the Transvaal (but not in the Oranje Vrystaat), as far as it did not transgress the principles of the Roman-Dutch law. In 1927 its alternative application was recognised in the entire South African Union. Presently, customary African law is being adapted into the existing legal system under the auspices of the South African Law Commission. A similar approach is taken towards customary Islamic law.[99]

F currents developments

F.1 The shadows of Apartheid

Since the nationalists took over in 1948, racial segregation was established in many statute laws. The legislation, utilised by courts, state and police, was an ideological instrument to undertake a "social engineering".[100] Thus, it astonishes little that the apartheid-system was attributed by some authors to the family of the socialist legal systems.[101] These apartheid statutes were parliamentary bills, which corresponded neither to South African common law,[102] nor English law. This has led to a situation where neither the English nor the Roman-Dutch law are regarded as guarantor for equality, legality and justice.[103]

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[94] DU PLESSIS, 212; GRUPP, 35, whereby the extent of a horizontal applicability is still debated, particularly because of the reserve in Art. 39 (2) finV.

[95] HAHLO/KAHN, Union of SA, 35 still fails to recognise any importance of traditional law.

[96] KERR, 13-14; SA Rule of Law, 18.

[97] See KLEYN, 47-48.

[98] See DU PLESSIS, 63-65; KLEYN, 48.

[99] See KLEYN, 49.

[100] See DU PLESSIS, 52, 59; KLEYN, 46.

[101] DU PLESSIS, 67-68.

[102] Roman-Dutch law, see HOSTEN ET AL. 213.

[103] KLEYN, 46.

F.2 commentary and outlook

The colourful history of South African law is not only an advantage[104] as some authors like to point out, but also burdened with many serious disadvantages.[105] The law is left exclusively to lawyers. The many cultural influences, the existence of two basically incompatible legal systems[106] and the numerous apartheid statutes make the law hard to understand and difficult to handle[107] - a problem which already surfaced studying the quite contradictory literature. Some voices demand the creation of a completely new, politically unencumbered, codified law - this might be a chance to capture the unique South African law in its current state of development, to simplify it and to make it more easily accessible, but also to leave the system of stare decisis which is unable to cope with apartheid precedents.[108] Officially, there are no statements to the subject unto now.

[104] For instance Chief Judge J. Holmes: "…and splendid roots they are…" in ZIMMERMANN, 39; DU PLESSIS, 72.

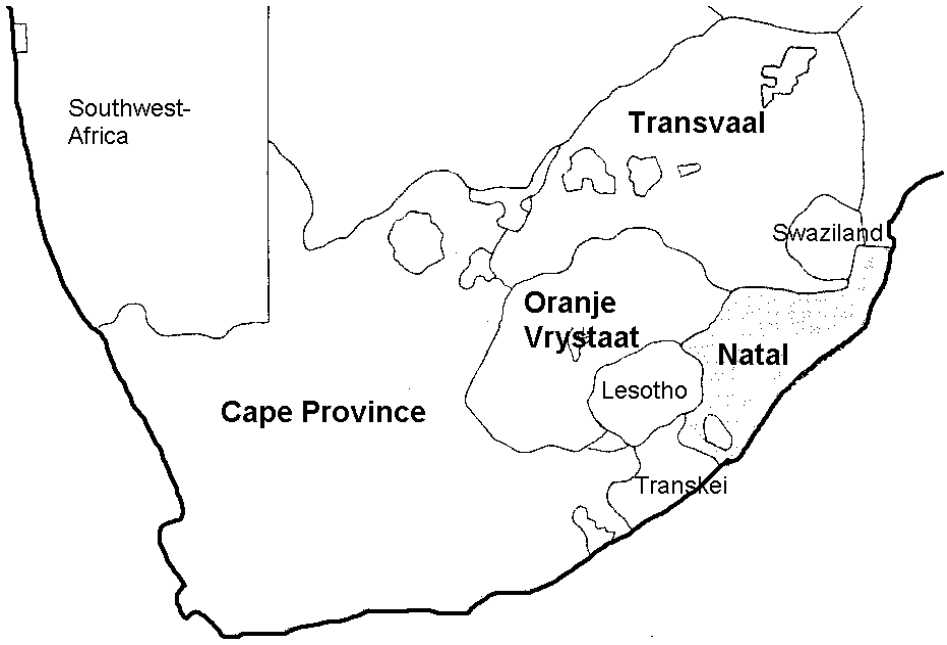
[105] Vgl. ZIMMERMANN, 67, 69, 72, particularly clear in LEE, 23.

[106] But HAHLO/KAHN, Union of SA, 47: "It would be entirely wrong to think of Roman-Dutch Law and English law as mutually incompatible systems which, like oil and water, do not mix".

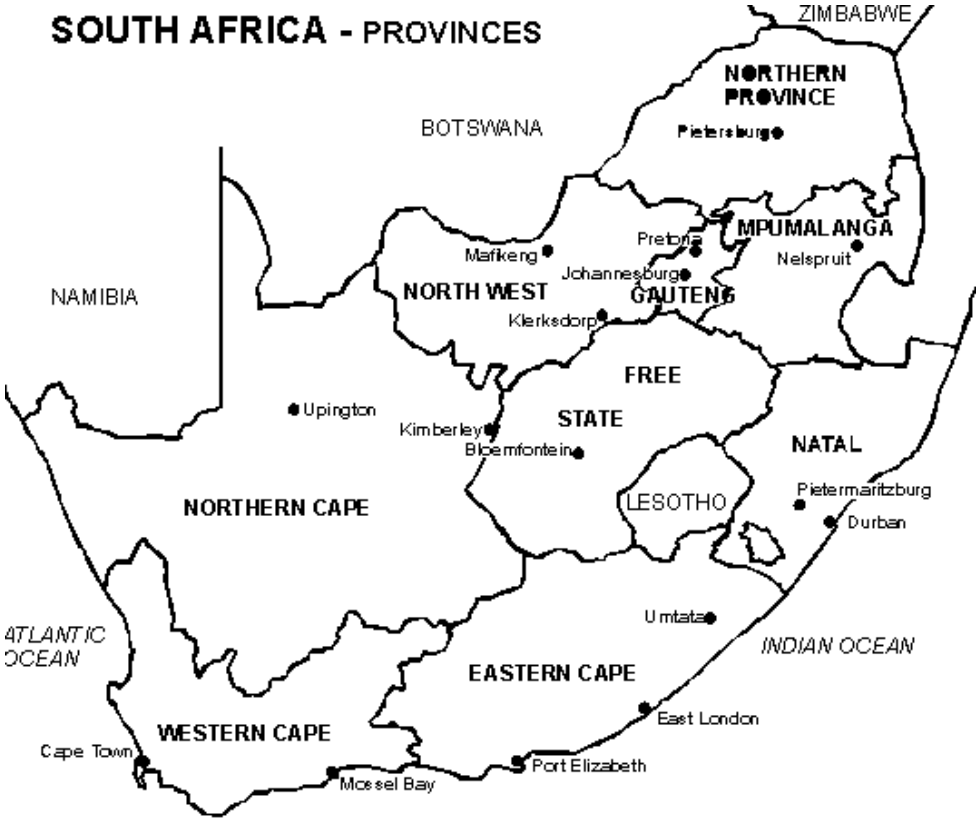
[107] See HAHLO/KAHN, Union of SA, 49, confirming this explicitly.

[108] Contrary ZIMMERMANN, 73 and KLEYN, 47, as well as HAHLO/KAHN, Union of SA, 49.

G Appendix 1: Maps



South Africa's Provinces until 1994



South Africa's Provinces from 1994