

CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

1.1 The relevance of common law sources for contemporary legal practice in South Africa

In the copious field of South African law, two schools of thought regarding the value and application of legal history exist. While “antiquarians” use principles of Roman or Roman-Dutch law to solve legal disputes, “modernists” emphasise the value of *stare decisis* (precedents) and custom as contemporary sources of South African law (Van Zyl, 1983:3). Both schools can, however, be criticised on various grounds. When referring exclusively to Roman or Roman-Dutch law, the “antiquarian” jurist runs the risk of restricting legal development by applying outdated principles created by a society with different values. It is further an arduous task to establish the relevance and value of a specific common law source before applying it to contemporary legal disputes. The “modernist”, on the other hand, runs the risk of impoverishing South African law when ignoring the origin or development of a specific legal rule. An equitable solution is to be found in a synthesis of both points of view. The modern South African jurist should be actively aware of his legal heritage in the form of Roman and Roman-Dutch law. These sources should be consulted to gain a clearer understanding of the origin and nature of specific legal rules in contemporary South African law. The knowledge gained from a legal historical study should furthermore be applied to modern legal developments to enrich South African law and to develop equitable solutions to contemporary problems.

1.2 Common law.

The common law concept has aroused many debates in South African law. On the one hand the term is given a restrictive interpretation, recognising Roman-Dutch law as the exclusive basis of South African law, thereby implying that Roman law as it was taken over by the province of Holland during the seventeenth and eighteenth century, forms the

sole basis of South African common law. This interpretation, however, underestimates the influence of other legal systems on Roman-Dutch law and the existence of a supranational European *ius commune* founded upon Roman law. An extensive interpretation on the other hand, recognises the existence of a supranational European *ius commune* but also acknowledges the fact that Dutch settlers transplanted more than Roman-Dutch law to South Africa in the period between 1652 and 1806.¹ It is generally agreed that South African common law consists largely of Roman law in its *ius commune* form, moulded by different European national legal systems, before being transplanted to South Africa. The debate surrounding the legal boundaries of South African common law has a profound impact on a study of this nature. A restrictive interpretation of the common law concept would confine late medieval² legal sources relevant to South African law solely to those having a direct influence on Roman-Dutch law of the seventeenth century. An extensive interpretation of the common law concept, as supported by this dissertation, would acknowledge the influence and importance of a greater number of untranslated late medieval legal sources on contemporary South African law.

1.3 Problem statement

In 1983, the South African Law Commission published an interim report (project 8) on the accessibility of common law sources. Two main reasons were cited for the decline of common law citations in court decisions and legal monographs (1983:6). Firstly, many common law sources were not easily accessible, being either locked away in special collections or in such a state of deterioration that consulting these resulted in physical damage to the collection. Since 1973, the Law Commission has endeavoured to make common law sources more accessible by providing libraries with photocopied reproductions of important texts and by compiling a priority list for translation (1983:45). Secondly, while many Roman law texts had already been translated into modern languages, works of medieval and Roman-Dutch authors were still mainly untranslated and therefore inaccessible to legal practitioners with little or no knowledge of other modern European languages. To compound this state of affairs, the number of legal

practitioners with a working knowledge of Latin has rapidly declined during the last decade. Even those with a basic knowledge of Latin find it difficult to translate medieval Latin. With the abolition of Latin as a prerequisite for the LL.B degree in 1996, the situation deteriorated further.

The *Tractatus de Fluminibus seu Tyberiadis* (hereafter referred to as the *Tyberiadis*) of Bartolus of Saxoferrato is a legal monograph dating from the beginning of the Italian *Renaissance*. The first book of the treatise discusses the legal consequences of alluvion upon the proprietary rights of riparian owners and is therefore largely concerned with the law of property. Where alluvial deposits increase the extent of riparian owners' property, ownership of the newly formed property and its division between riparian owners, give rise to numerous legal disputes. Although the monograph was translated into German and Italian soon after its publication in 1355, no modern translation exists and its content is therefore lost to most South African legal practitioners.³

1.4 Purpose of the study

The aim of this study is to make the first book of the *Tyberiadis* more accessible to the broad spectrum of legal practitioners in South Africa through translation and historical annotation, thereby providing the opportunity to consult the common law heritage of alluvion. Through translation and annotation, the research methods of the legal school to which the author belonged (commentators) as well as contemporary South African law concerning alluvion will be addressed.

1.5 Research method

The first book of the *Tyberiadis* has been translated into English using contemporary legal vocabulary.⁴ The aim has been to establish an authoritative dynamic equivalent translation, governed by the rules of textual criticism regarding medieval Latin texts. A historical annotation has been incorporated into the text adding all textual references to the *Corpus Iuris Civilis*⁵ and other known legal texts to indicate the extent to which the

Roman law basis of alluvion was used in this monograph. An exegesis on modern South African law concerning alluvion has been supplied to illustrate comparisons and differences with late medieval Italian law on the same subject.

1.6 Research delimitation

The 1576 Bologna edition, used as the basis for translation, contains numerous *laudationes* and editorial notes which have not been translated as they do not form part of the author's original text and differ with each edition. In a complete translation of all three books of the *Tyberiadis*, it would have been advisable to insert these as they provide insight into the existence of similar medieval legal sources on the subject, but as this study is limited to a translation of Book One concerning alluvion, it was not regarded as necessary to include these.

1.7 Chapter division

The first chapter contains an introduction and problem statement. In chapter two, a brief overview of the author's life and history of the text is supplied, together with an excursus on the legal school to which the author belonged, its research methods and its importance for subsequent legal development. Chapter three discusses the translation of late medieval Latin. The history and development of translation theory is addressed as well as the approach to translation chosen for the purposes of this dissertation. Translation practice as well as the nature of legal palaeography within the text is reviewed. The manner of citation in medieval legal monographs is examined as well as the process of verification of citations. In chapter four, the text is translated and supplied with a historical annotation in the form of endnotes. An attempt has been made to determine the origins of all citations with reference to primary legal sources as well as to classical authors. In chapter five, an exegesis on modern South African law concerning alluvion is supplied. The place of alluvion in modern South African law is discussed as well as the nature and prerequisites for its occurrence. Statutory regulation of alluvion is also

discussed in this chapter. In chapter six, conclusions are drawn and a recommendation is given.

1.8 Scientific contribution

The scientific contribution of this study lies in providing access to a hitherto unlocked common law source on alluvion, a specific legal subject still relevant to modern South African law. This study further aims to contribute to the meagre field of translation of late medieval legal Latin and its problems. A definite need exists for a comprehensive work on the syntax and grammar of late medieval legal Latin as existing sources largely focus on ecclesiastical Latin of the same period containing constructions and specialised vocabulary which are of little or no use to the translator of legal texts.

¹ Most legal historians accept the existence of a European *ius commune*, but legal deconstructionists regard the existence of a supranational *ius commune* in pre-codification Europe as a myth (Du Plessis, 1992:17; Thomas, 1999:4).

² There seems to be a terminological dispute regarding the classification of the fourteenth century as either late medieval or early *Renaissance*. While a distinction of this nature is arbitrary at best, it will be assumed, for the purposes of this dissertation, that 1300 – 1399 refers to the late medieval period. See further 3.3 for justification of this classification.

³ The Law Commission realised the need for translating the works of medieval jurists, but due to the urgency of other projects, medieval legal monographs were not included in the priority list for translation (1983:14). The Law Commission is presently no longer involved with translation of common law sources.

⁴ Sufficient equivalence between BT and the final translation could not be achieved due to the nature and spacing of the printed manuscript. A reproduction of BT has therefore been inserted in an addendum to the dissertation and should be read in conjunction with chapter 4. Page numbers of the MS have been inserted in square brackets where references to the text have been made.

⁵ The *Corpus Iuris Civilis*, a systematic codification of all existing Roman law, was promulgated under Emperor Justinian in 529 – 534 A.D. It consists of the Digest or Pandects, a compilation of juristic law, the Institutes, largely based on an earlier work of the same title by the Classical jurist Gaius and serving as a textbook for legal scholars, the Codex, a compilation of early imperial law and the Novels containing later imperial legislation.