

Orality in African customary- and Roman law of contract: a comparative perspective¹

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OPSOMMING

Oraliteit in Afrika gewoonteregtelike- en Romeinse kontraktereg: 'n Vergelykende beskouing

Suksesvolle hervorming van Afrika gewoontereg hang saam met 'n begrip van die historiese antesedente van die regstelsel. Antieke Romeinse reg met haar uiterste formalisme, rituele en simboliek bly 'n belangrike vertrekpunt om antieke gewoontereg te belig wat preliterêr van aard was. Die bestaande persepsie is dat Afrika gewoontreg, na analogie van die Romeinse reg, slegs reële kontrakte ken en dat aanspreeklikheid slegs volg op gedeeltelik of volle nakoming van verpligtinge van 'n party. Die geldigheid van herdie aanname asook bestaande interpretasies van ander geselekteerde aspekte van die kontrak in die Afrika gewoontereg word getoets by wyse van vergelyking met die *stipulatio* van die antieke Romeinse reg. Die analise geskied teen die agtergrond van oraliteit en die fokus is op die verhouding tussen woorde, bedoeling en kontraktuele aanspreeklikheid, konkretisering van verbale kommunikasie en seremonie en die rol van *fides*.

1 Introduction

African customary law is frequently scrutinised against the yardstick of the Constitution of the Republic of South Africa, 1996, with a view to its reform. But successful law reform is dependent on an understanding of the fundamental values of the legal system to be reformed and the true nature of its historical antecedents. This presents a particular problem for customary law. African culture was characteristically preliterate and there are no ancient written sources of customary law compiled by indigenous Africans themselves. The fact that existing knowledge of that law is mostly confined to interpretation by non-African jurists only exacerbates the difficulty in finding information on the true traditional African law.

The most basic information on customary law may be gleaned from non-legal materials on African culture. These include the texts of early

¹ This is a much expanded version of a paper presented at at the 64th Session of the *Société Internationale "Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité* on "*Communication et Publicité dans l'Antiquité: Profiles, Juridiques, Sociaux, économiques*", held 2010-09-28 to 2010-10-02 in Barcelona, Spain. The paper was published in 2010 (4) *Studia Iurisprudentia* (<http://studia.law.ubbcluj.ro>). The paper is available at <http://studia.law.ubbcluj.ro/articol.php?articollid=366> (accessed on 2010-10-25).

travellers, some of which date from as early as the fifteenth century,² and anthropological and ethnological writings which started appearing from the mid-nineteenth century onwards. However, it is not an easy task to extricate information on customary laws and institutions from these sources since their principal focus was not substantive law. Importantly, though, they contain information on the traditional African law untainted by foreign extrapolations and preconceived Western ideas. Moreover, they prove that already as early as the fifteenth century, Southern African societies were socially and politically well-ordered and had established legal orders.

Other sources of law are colonial reports of commissions of enquiry and parliamentary committees. Although there was initially little interest in the laws and institutions of the indigenous populations in Southern Africa, colonial administrators soon realised that African customary law was tenacious and that it had become necessary to regulate the application of that law formally. Moreover, they had insufficient knowledge of it and this prompted them, from the 1830s onwards, to compile reports on customary law and the regulation of its application. These reports provide additional information on the law, especially those which deal exclusively with substantive law. The first book on South African customary law as such, appeared in 1858. It was Colonel Maclean's *Compendium of Kafir Laws and Customs* which was a compilation of various sources of the laws of the amaXhosa.³ It took

2 Examples of such works, dealing with Southern Africa, are Olfert Dapper *Kaffrarië, of Lant der Hottentots* (1668), Willem ten Rhyne *Schediasma de Promontorio Bonae Spei* (1686) and Johannes Gulielmus de Grevenbroek *Gentis Africanæ circa Promontorium Capitis Bona Spei Vulgo Hottentotten Nuncupatae Descriptio* (1695). These works were published in 1933 with translations and annotations by the Van Riebeeck Society in Cape Town as Schapera (ed) *The Early Cape Hottentots*. Also of interest is Ioannis Leonis Africani *De Totius Africae Descriptione, Libri IX* (1556). John Mensah Sarbah *Fanti Customary Laws* (1897) published in London, which deals with the customary laws of the Fanti and Akan tribes of the Gold Coast, is based on the works of travellers of the fifteenth, sixteenth and seventeenth centuries. It also contains judicial decisions on customary laws. The Hakluyt Society has issued numerous works by early travellers to and in Africa (especially the West Coast) which, with careful scrutiny, yield interesting information on customary laws. See, *A Description of the Coasts of East Africa and Malabar in the Beginning of the Sixteenth Century* by Duarte Barbosa (1514, tr Henry E J Stanley 1865) and *The Chronicle of the Discovery and Conquest of Guinea* by Gomes Eannes de Azurara (1540, tr Charles Raymond Beazley 1896); Willem Bosman *A new and accurate description of the coast of Guinea, divided into the Gold, the Slave, and the Ivory Coasts* (1700, tr 1705).

3 Colonel Maclean was Chief Commissioner in British Kaffraria. His *Compendium* consisted, among others, of papers of a certain Reverend Dugmore, initially published in 1846 and 1847 in *The Christian Watchman*; a letter from Maclean; notes of Warner, the Tambookie agent in British Kaffraria in 1856; and notes of Brownlee, Commissioner of the Gaika People. Brownlee was the Secretary of Native Affairs at the Cape and was actively involved in "Native Administration". He was later appointed as Gaika Commissioner in the Transkeian Territories. He spoke fluent Xhosa

continued on next page

more than half a century before further works started appearing⁴ and during the 1950s the School of Oriental and African Studies embarked upon the first comprehensive project on the restatement of African customary law in former British colonies.

In view of the dearth of legal sources compiled by indigenous Africans themselves, scientific analyses of African law are generally moulded in what is accepted as universally intelligible, or rather “Western” legal language. In turn, because there are superficial likenesses in the legal phenomena of most legal systems in the primitive and the early stages of their development, customary law has frequently been described by analogy to Roman law. Even though there is a common perception that African law has never progressed beyond a primitive stage,⁵ early Roman law remains a useful point of reference, as it, too, had many features that scholars believed to be relics of the primitive point of its development. These include the extreme formalism, ritual, symbolism and the ubiquitous magic.⁶ It is therefore not surprising that scholars have frequently turned to Roman law to elucidate customary law. This jurisprudential method unfortunately frequently led to the imposition of Roman legal rules on the traditional African law and consequently the attribution of questionable characteristic features to African legal relations and the law regulating them.

Some sixty years ago already, the Director of the School of Oriental and African Studies project on the restatement of African customary law, Professor Anthony Allott, warned that the traditional African law of contract was being re-interpreted by the western courts and was consequently rapidly being displaced by the imposed colonial law.⁷ It is

and authored various books and papers on African laws and customs, among others *Reminiscences of Kafir Life and History and Other Papers* (1896). His “Laws relative to religion and other customs” were taken up in *Maclean’s Compendium*.

- 4 Seymour’s *Native Law and Custom* was published by Juta & Co in Cape Town in 1911.
- 5 Menski *Comparative Law in a Global Context* (2006) 466.
- 6 See Diósdí *Contract in Roman Law: From the Twelve Tables to the Glossators* (1981) 42-43; Wasserstein & Fassberg “Form and formalism: A case study” 1983 *American Journal of Comparative Law* 627 627-630; Tuori “The magic of mancipatio” 2008 *RIDA* 499ff; Kaser *Das römische Privatrecht Vol 1* (1971) 39. MacCormack “Formalism, symbolism and magic in early Roman law” 1969 *Tijdschrift voor Rechtsgeschiedenis* 439 445-446, referring to the anthropological works of Gluckman and Malinowski, avers that the lack of formalism in African law and culture illustrates its primitivity: “[I]ndeed ... the more primitive the legal system the less likely it is to be formalistic.”
- 7 See Allott’s “Introduction” which appears in all the African Law Project’s publications in the *Restatement of African Law Series*. Examples of publications in this Series are: Cotran *Kenya: The Law of Marriage and Divorce* (1968) Vol I (Restatement of African Law: 1); Cotran *Kenya II: The Law of Succession* (1969) (Restatement of African Law: 2); Ibik *Malawi I: The Law of Marriage and Divorce* (1970) (Restatement of African Law: 3); Ibik *Malawi II: The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (1971) (Restatement of African Law: 4).

indeed true that a reliance on a “non-African” framework to explain and interpret customary law threatens its continued existence and today, in South Africa only fractions of the true traditional African law form part of the official state law.

The prevailing perception is that by analogy with the Roman concept, customary law knows only real contracts, and that liability accordingly ensues only where one party has in fact partially or completely fulfilled his obligation.⁸ In this article, the objective is to test the validity of this assumption and of existing interpretations of other selected aspects of African customary law of contract by way of a comparative analysis with ancient Roman law and by retracing available historical sources. It should be borne in mind that there was no “general model of a contract”⁹ in African customary law and attempts to explain that law with reference to Roman should be approached with caution.

This analysis will be primed against the backdrop of one of the shared characteristic features of African customary and Roman law, namely the general emphasis on orality.¹⁰ The focus will be on the best known verbal contract in Roman law, the *stipulatio*,¹¹ a contract which, significantly, has been referred to as a method of contracting rather than as a contract of a specific kind.¹²

The pre-eminence of orality in African culture is a well-established fact, and understandable, given its preliterate tradition. In Roman law, though, this feature is rather unexpected, bearing in mind that it developed, from early on, in a literate culture. In the fifth century BC, already, the Twelve Tables were inscribed on tablets. However, there are conflicting views on when exactly writing was first introduced in private

8 Gluckman *The Ideas in Barotse Jurisprudence* (1972) 177-179 describes a case adjudicated by a traditional court: A fisherman had paid in part for a net to be manufactured. Upon completion of the net, the King's steward forced the net maker to sell the net to the King. Although the court found against the fisherman, general opinion was that had one of the “judges” not been corrupt, the decision would have been in the fisherman's favour in terms of Barotse law; see generally Gluckman 177-182. See, Prinsloo & Vorster “Elements” in *Indigenous Contract in Bophuthatswana* (Centre for Indigenous Law)(1990) 6-7, 10-11; Whelpton *Inheemse Kontraktereg* (LLD thesis 1991 UNISA) 81-83.

9 Gluckman 176; see generally 175-176.

10 The emphasis on orality was not limited to these two ancient societies; see Kaser Vol 1 39ff, 230ff; Kaser *Das römische Privatrecht Vol 2* (1975) 73ff, on the shared characteristic features of formalism and orality in ancient societies.

11 Anecdotal evidence of this contract abounds in the literature: see, eg , Plautus *Bacch* 880-883; Cic *Rhet Her* 2 13-14 and *Ep Att* 16 11 7; *De Or* 2 100; *De Leg* 1 14; Quintillian *Inst* 4.2.6. See also generally on verbal contracts: Ulpianus *Inst* 3 15; D 45 1; Modestinus D 49 7; Kaser Vol 1 538-543.

12 Nicholas *An Introduction to Roman Law* (1962) 166 193; Diódsi 41; Harrill “The influence of Roman contract law on early baptismal formulae” Papers Presented at the Thirteenth International Conference on Patristic Studies, Oxford 1999 Belgium 2001 (35) *Studia Patristica* 277.

legal acts.¹³ The Twelve Tables confirms that during the fifth century BC orality still dominated in private legal acts and that legal documents were not an essential component of the legal process in early Roman law. Hence, Table VI 1 states: “When a person makes bond and conveyance, according *as he specified with his tongue* so shall be the law.”¹⁴ By the end of the Roman Republic,¹⁵ purely verbal contracts still existed, even though by that time legal documentation was firmly established in legal practice.

2 Words, Intent and Contractual Liability

The relationship between the objective verbal utterances, the subjective intention of the parties and contractual liability in the Roman *stipulatio* will be considered first and then I will consider the extent to which Roman-law principles could enlighten African customary contracts.

2 1 Roman Law

In Roman law, there was an inextricable link between form and the spoken word. Legal significance was attached to a verbal contract only if the words used to reach an agreement were cast in a specific form. Accordingly, liability ensued on the contract only if the parties conformed to prescribed ritualistic formal requirements.

Until the post-classical era, Romans drew no distinction between an external and an internal component in the verbal contract, that is, between the external declarations (*verba*) of the parties and their internal intentions (*voluntas*).¹⁶ As a result, there was not necessarily a connection between the formal words uttered and the subjective will of the parties; the words could thus neither be regarded as a manifestation nor serve as proof of their intent. In fact, the intention of the parties in verbal contracts was of minor importance. The Romans were surprisingly indifferent to problems of evidence which were regarded as the domain of the judge, not the jurist. The contracting parties relied

13 See, eg, Kaser Vol 1 230-231; *contra* Schulz *History of Roman Legal Science* (1953) 25; Albrecht *A History of Roman Literature from Livius Andronicus to Boethius* (1997) 631; Meyer *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* (2004) 36ff.

14 My emphasis. *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto.* (Translation by the Yale Law School's Avalon Project at http://avalon.law.yale.edu/ancient/twelve_tables.asp (accessed 2010-08-31)). See further Meyer 37-43. By the second century BC Cato provided written forms for contracts for gathering and milling olives, sales of olives and grapes, lease of land for winter pasture and sale of increase of flock. Cato *de Agr* 144-147 149 150; Varro (first century AD) in *de re Rust* 2 2 5-6, 2 3 5, 2 4 5, 2 5 10-11, for example, gives ancient formulae for the guaranteed purchase and sale of, eg, sheep, goats, swine and cattle.

15 Cicero clearly distinguishes between written and unwritten law, and specifically refers to legal documentation in *mancipatio* and *stipulatio*: Cicero *ad Att* 12 17; 16 11 7, *de Orat* 2 24; see too, Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) 71.

16 Zimmermann 563-565, 622, 626.

principally on *fides* as security.¹⁷ It was only in post-classical law that the emphasis shifted to protection and that the formalities were aimed at securing proof in the event of litigation.¹⁸

The formal declarations manifested intent between the parties themselves and were not intended to communicate their real intention to the outside world. Watson¹⁹ states that the function of these declarations was merely to show the parties themselves “that they intended to make a *contract*”.

The formality, or the external ritual,²⁰ only served as judicial proof that the contract had been concluded.²¹ It did not provide proof of the real intention of the parties, the object of the obligation, or whether one or both parties were obligated to perform in future.²² The law gave consequence to and enforced the actual wording of the *stipulatio* without looking into the surrounding circumstances of the promise or undertaking. The *stipulatio* was thus enforceable in accordance with the wording even when the words did not reflect the intention of the promisor or had no connection with reality.²³

In 66 BC, the introduction of the *exceptio doli* and then the *exceptio metus causa* enabled the judge to start taking cognisance, to a limited extent, of the surrounding circumstances in which the contract was concluded and so to contextualise it. That rendered the reason for its conclusion more relevant.²⁴ Nevertheless, it still did not alter the fact that

17 *Idem* 70, 89, 624-625.

18 Kaser Vol 1 39f, Vol 2 (n 10) 73f, indicates that in certain instances something additional was required to formal words to bring about public knowledge and to serve as evidence of the intention of the parties. Thus, in the acts *per aes et libram* and *confarreatio* witnesses were required and in others, the co-operation of the magistrates. The purpose of these actions was to express the content of the obligation, not to serve as protection in case of litigation as was the case in post-classical law.

19 Watson “Artificiality, reality and Roman contract law” 1989 *Tijdschrift voor Rechtsgeschiedenis* 151.

20 Amos *The History and Principles of the Civil Law of Rome* (1883) 203 refers to it as an “outward ritual”.

21 Amos 202-204; 215; 219.

22 *Idem* 202; De Zulueta *The Institutes of Gaius Part II Commentary* 151-152; Zimmermann 70 83-84; Wasserstein & Fassberg 1983 *American Journal of Comparative Law* 627.

23 Harrill 276ff states that validity of the legal act came from its form not from *consensus*. Cf, too, Amos 202, Watson 1989 *Tijdschrift voor Rechtsgeschiedenis* 151 155-156; Kleyn “The reality of real contracts” 1995 *THRHR* 16 16-17. This is in line with Watson’s view (at 147-148) that law is an artificial creation of legislators, judges and jurists which gives a distorted view of social reality.

24 See, eg, G 4 116a: Thus, if I have taken a stipulatory promise from you of a sum of money, on the understanding that I will advance you the amount on loan, and then I do not advance it, it is undeniable that an action lies against you for the money; for you are legally liable to pay it, being bound by the

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in essence the law gave consequence to the formal words rather than to the will of the parties.

2 2 African Customary Law

It is generally accepted (in the literature) that contractual negotiations in African customary law were informal and that there was no outward ritual necessary to create liability. In accordance with Africa's oral tradition, agreements were always entered into verbally, but unlike Roman law words did not have to be moulded in a specific form. Importantly though, a verbal agreement was not sufficient to create liability. This is illustrated by the Tswana maxim that "yesterday's word does not slaughter an ox",²⁵ and the Fanti saying that "nobody buys the footprints of a bullock".²⁶ It is not unexpected that this particular feature of African customary law of contract gave rise to the perception that that law knew only real contracts (Roman-law *contractus re*) and that a contract could be constituted only by an agreement *and* the transfer of a thing.

It is indeed true that the transfer of property was crucial in legal transactions.²⁷ However, historical sources confirm that in contract the physical activity that transformed the parties' verbal communication into a concrete experience did not necessarily have to relate to the agreement. Concretisation of the words (the intention of the parties) could take the form of performance or part performance in terms of the agreement, or the transfer of property unrelated to the performance in terms of the agreement, such as the making of a gift. Thus Grevenbroek, a seventeenth-century traveller, reported that the "Hottentots" who traded cattle with the merchants of the Cape of Good Hope did not consider themselves contractually bound unless an exchange of gifts had taken place.²⁸ Likewise, among the Fanti, the handing over of *trama* (earnest) was essential to "bind the contract" and a merchant did not regard the contract as binding unless the *trama* had been transferred.²⁹

stipulation; but, because it is inequitable that you should be condemned on this account, it is settled that you must be protected by an *exceptio doli mali*. Cf De Zulueta 151; Nicholas 22 164; Thomas *The Institutes of Justinian* (1975) 209.

25 "Lentswe la maabane ga le thlabe kgomo."

26 Sarbah 93.

27 See Gluckman 1989 *Tijdschrift voor Rechtsgeschiedenis* 151 176; *contra* Vorster "Independent service" in *Indigenous Contract in Bophuthatswana* (ed Myburgh)(1990) 52-53.

28 *Primo magnam tabaci portionem ... exporrigunt ... secus se non obligari tenerre contractum ...* . (At first the traders display a big portion of tobacco ... otherwise the natives do not think themselves bound to the contract); and further: *Tumque nostratibus e longinquo obviam eunt mercatoribus (etom schaep dicunt), opimum conferentes vervecem aliqua dictae plantae donatio fieri debet, quam talis vervecis munere compensant.* ([O]n these occasions they [the Khoikhoi] come a long distance to meet our traders, bringing with them a prime wether (they call it *etom schaep*) – a portion of the tobacco must be given as a present, for which their return is the gift of the wether.): Grevenbroek 136 137.

29 Sarbah 86ff.

Towards the end of the seventeenth century, Willem Bosman,³⁰ a trader in the service of the Dutch West India Company, wrote about the Dutch ivory trade on the Coast of Guinea:

As great Lovers of Brandy as they are, they will not yet, when they first come on Board and are ask'd to Drink, touch a Drop before they have received a Present. And if we should happen to stay too long before we give them any thing, they will boldly ask us if we imagine that they will Drink for nothing ... and he that intends to Trade here, must humour them herein, or he shall not get one Tooth on Board. Thus the Merchant which would deal here, ought to be very well Armed with *Job's* Weapon, without which nothing is to be done.

Further verification that the transfer of property was not necessarily related to performance in terms of the agreement, may be found in two letters, written in the late nineteenth century in Setswana to a Tswana News Paper, *Mahoco a Becwana*, published during the years 1883-1896 by the London Missionary Society. In view of the scarcity of early written sources in any African vernacular, by indigenous Africans, these letters are indeed rare. What contributes to their value is that they do not contain second-hand interpretations of cultural information by non-Africans, but the narratives of Africans themselves.³¹ From 1883, for eight years, letters were published regarding the function of the transfer of bridewealth (*bogadi*). In one of these letters, a certain Baruni Makutle wrote: "Anything that is done formally is done with a cow. That is why when we confirm a marriage, we take cattle" and "[i]t is said that *bogadi* should be paid to formalize the marriage".³² In addition, Montshiwa Tawana, Paramount Chief of the Tshidi Barolong tribe from 1884 to 1896, wrote that the transfer of bridewealth "establishes and confirms marriage" and "we use it as proof [of the marriage]".³³

Today the practice of handing over gifts in marital negotiations still exists and betrothal or the agreement to transfer marital guardianship over a woman to the family of the prospective husband is concretised when the boy's family offers a gift to the girl's family to ratify the verbal

30 Bosman Letter XX 404 and see further 405; at 409 he indicated that mainly wax, honey and elephant tusks were traded. Bosman was the second-highest official in service of the Dutch West India Company in Elmina, the main Dutch trading port on the West Coast of Africa for more than fourteen years. In his work *A New and Accurate Description of the Coast of Guinea, Divided into the Gold, the Slave, and the Ivory Coasts*, he describes, among others, the trading practices of the indigenous populations of what is today Ghana, Togo, Benin and Western-Nigeria. The practice of handing over gifts not related to performance in terms of the agreement was confirmed also by Johan Snoek, whose narrative was published as Letter XXII (487), dated 1702-01-02, an appendix to Bosman's letters. He wrote: "[a]fter giving them their *dasje* or Present, I dealt with them for the Ivory at the dearest Rate".

31 A selection of the letters written in Setswana to the editor of the news paper by literate Africans was translated into English and edited by Mgadla & Volz. It was published in 2006 in Cape Town as *Words of Batswana. Letters to Mahoko a Becwana 1883-1896* Vol 37 of the Second Series of the Van Riebeeck Society.

32 *Idem* 145-146.

33 *Idem* 161.

agreement.³⁴ Negotiations for the transfer of marriage goods are protracted and when the families have reached an agreement, an animal is slaughtered to confirm the verbal agreement. This animal does not form part of the marriage goods which have to be handed over.³⁵

Empirical researchers have documented also other instances where property is transferred independent of the performance due in terms of the agreement. Among the Tswana, for example, it is customary for a person to invite people to assist him in doing a specific task. This verbal agreement is validated by the slaughtering of an animal which is divided among those who agreed to do the work. The gift of the meat does not form part of the contract and is not regarded as payment for the services to be rendered.³⁶

It is not surprising that Schapera,³⁷ who had an exceptional knowledge and profound understanding of African customary law and culture, reported for the Tswana of Botswana that executory contracts created legal liability. As to be expected, this statement was not received positively among scholars, like Epstein and Gluckman³⁸ who dismissed his view as an incorrect interpretation of Tswana law.

Based on historical sources, also, Sarbah³⁹ reported that executory contracts were valid. He reported that for a valid sale of land, it was required that *trama* be paid and that “[v]aluable consideration, that is gold, money, or chattel, [be] paid, given, *or promised*” (my emphasis).

3 Concretisation of Words

From the above it is apparent that words or verbal communication *per se* did not create contractual liability in either Roman or African law, but that the words had to be concretised. However, the way in which this occurred differed.

34 In infant betrothals, the family of the baby boy gives a goat and a cow to the family of the baby girl. Church “Betrothal and marriage: Contractual aspects” in *Indigenous Contract in Bophuthatswana* (ed Myburgh) (1990) 84-86 interprets this custom as part performance *and* as a method of confirming liability to transfer the girl in marriage when she reaches a marriagable age.

35 The custom of transferring marriage goods differed among the different ethnic groups. Full performance was not always a requirement for a valid marriage: See Maclean 47-52 for a detailed description of such negotiations among the indigenous people of British Kaffraria; Vorster *et al Urbanites’ Perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) 76.

36 Vorster 52-53.

37 Schapera “Contract in Tswana law” in *Ideas and Procedures in African Customary Law* (ed Gluckman)(1969) 327-328.

38 Cf Gluckman 180, 182-185.

39 Sarbah 86.

3 1 Roman Law

The emphasis on orality in Roman law did not reduce the significance of formalism. In fact, as indicated, there was a fixed connection between words and form. The most distinguishable feature of early Roman law was what Schulz referred to as “actional formalism”, meaning that all legal acts had a specific form.⁴⁰ Thus, in the *stipulatio* not the words but the form or external ritual created the legal bond and liability did not flow from the parties’ agreement but rather from the exchange of the prescribed formal phrases.⁴¹

The “outward ritual”⁴² of the *stipulatio* entailed that the communication had to be in the form of oral⁴³ questions and answers⁴⁴ *inter praesentes*;⁴⁵ that there had to be exact correspondence between question and answer;⁴⁶ and that *unitas actus* was required, that is, the answer had to follow immediately after the question.⁴⁷

It was ritualistic formalism, then, not writing, that served as the concretisation of the spoken word in the *stipulatio*.⁴⁸ During the pre-classical period of Roman law, written documentation was not regarded as a legal formality.⁴⁹ The most obvious reasons for this phenomenon were that the physical presence of the parties was regarded as a

40 Schulz 25-26.

41 According to Harrill 279, the oldest surviving non-legal description of the *stipulatio* may be found in Varro *Rust* 2 2 5-6.

42 For a general discussion of this ritual, see Zimmermann 72-75; Kaser Vol 1 539ff; Meyer 116-117; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1966) 434-435.

43 Gai 3 105: That a dumb man can neither stipulate or promise is obvious. The same is accepted also in the case of a deaf man, because it is necessary both that the stipulator should hear the words of the promissor and that the promissor should hear those of the stipulator.

44 Gai 3 92: “A verbal contract is formed by question and answer, thus: ‘Dost thou solemnly promise that a thing shall be conveyed to me?’ ‘I do solemnly promise.’ ‘Wilt thou convey?’ ‘I will convey.’ ‘Dost thou pledge thy credit?’ ‘I pledge my credit.’ ‘Dost thou bid me trust thee as guarantor?’ ‘I bid thee trust me as guarantor.’ ‘Wilt thou perform?’ ‘I will perform.’” The requirement of specific words – originally limited to Latin, *spondere*, and for Roman citizens – was relaxed in classical times when any words could be used: Buckland *Textbook* 434-435 *contra* Nicholas “The form of the stipulation in Roman law” 1953 *LQR* 63 65ff. There is however recent documentary evidence that slaves and foreigners could make use of the *sponsio*: Urbanik “Sponsio servi” 1998 *Journal of Juristic Papyrology* 185 185-201, quoted in Harrill 278 n 2.

45 Gai 3 136: “[A] verbal obligation cannot be formed between parties at a distance”; see also Gai 3 138. Cf Meyer 255.

46 Gai 3 102.

47 Venuleius *D* 45 1 137pr. *continuus actus*; Modestinus *D* 44 7 52 2; Ulpianus *D* 46 4 8 3; Gaius *D* 44 7 52 2; De Zulueta 153; Nicholas 1953 *LQR* 63 64-65; Buckland *A Manual of Roman Private Law* (1939) 264; cf Meyer 116-117.

48 See Zimmermann 80-82 for a discussion of the conversion of the verbal contract into a written one.

49 Kaser *Das römische Zivilprozessrecht* 2 ed (1996) 10-11; Metzger “Roman judges, case law, and principles of procedure” 2004 *Law and History Review* 264ff; Meyer 2 36-39.

guarantee against misunderstanding and as enhancing clarity;⁵⁰ the widespread and general illiteracy, the prevailing methods of writing, and time constraints.⁵¹ The predominant opinion among scholars is that although it was usual to reduce the oral agreement to writing in classical law, this was not a requirement for a valid contract but was purely for evidentiary purposes.⁵²

There is no agreement on precisely when the written *stipulatio* replaced the oral one. Some scholars are of the opinion that the time could be fixed in the post-classical era, with Emperor Leo's rescript of 472 which removed the requirement of the formal words;⁵³ others hold that the rescript abolished only the use of *specific* formal words and not the oral contract itself.⁵⁴

Interestingly, Meyer shows that writing on *tabulae* was part of the *stipulatio* from very early on. Although Roman jurists never explicitly mentioned writing as a prerequisite for, or part of, the *stipulatio*, according to her one should nevertheless bear in mind that "their analytical world left much out".⁵⁵ This is illustrated by the fact that Gaius, for example, never mentioned that there must be a *continuus* or *unitas actus* for a valid stipulation. Meyer further maintains that Gaius never claimed his assessment to be a complete description of the *stipulatio* and that it was rather a description of its "core nature";⁵⁶ that his description lends itself to speculation; and that it certainly does not prove conclusively that the *stipulatio* was oral rather than written. Based on Roman texts, scholars have debated the possibility also of various other actions being part of the *stipulatio*, such as the pouring of libations, offering the right hand as a symbol of the *fides*, a combination of these two actions, and holding and breaking a reed.

50 Schulz 25-26.

51 Metzger 2004 *Law and History Review* 264 262ff.

52 Zimmermann 79; Kaser Vol 1 540ff, Vol 2 373; MacCormack "The Oral and Written Stipulation in the Institutes" in *Studies in Justinians Institutes in Memory of JAC Thomas* (eds Stein & Lewis)(1983) 96ff; Du Plessis "The Roman concept of *lex contractus*" 2006 *Roman Legal Tradition* 79-80. Nicholas 1953 *LQR* 63 77ff, 233ff. De Zulueta 155 observes that Cicero, as layman, was wrong to assume that *stipulationes* were among the *res quae ex scripto aguntur*: written *stipulationes* were valid only if orally confirmed and oral *stipulationes* were valid irrespective of whether they had been documented; see further 156 -157.

53 Amos 202; Harrill 275 276; Buckland *Manual* 263; Zimmermann 71 esp n 20.

54 Nicholas 196; Nicholas 1953 *LQR* 63 65ff; see also Thomas 209; Kleyn 1995 *THRHR* 16 18-19.

55 See Meyer 117; see further 116-117 and the sources quoted in nn 102-106; 253-261. Based on Roman texts, scholars have debated the possibility also of various other actions being part of the *stipulatio* such as the pouring of libations, offering the right hand as a symbol of the *fides*, a combination of these two actions and holding and breaking of a reed.

56 *Contra* Nicholas 1953 *LQR* 63 65ff, who argues that Gaius provided an exhaustive list of formal words.

Diódsi, too, is of the opinion that that the predominance of orality had not endured that long and that already during classical times the speaking of formal words was no longer necessary where there was a written document in place.⁵⁷ He claims that the Roman jurists “were not interested in whether the parties had recited the *stipulatio* contained in the document”⁵⁸ and concludes that the polemic is merely a topic of modern scholarly debate.

3 2 African Law

Although there were no formalities as regards the actual communication of the intentions of the parties and although no form or ceremony was required for a contract to be regarded as valid, contracts in African law were nonetheless not completely without form. There were certain ritualistic behavioural and linguistic requirements that had to be observed, some of which correspond with the outward ritual of Roman law. Thus, both parties had to be present and actual words had to be spoken.⁵⁹

Unlike the position regarding the *stipulatio* described above, *consensus*, or the subjective meeting of the parties’ minds, played an important role in customary law of contract and agreement was reached by an extended process of deliberation between the contracting parties and between the parties and members of their respective families.⁶⁰ The physical activity that accompanied the verbal agreement was the manifestation that agreement had subjectively been reached.

In Tswana law, this process is described as “*go tshitsinya*”, which literally means “to introduce”.⁶¹ Contracting parties had to be present when *consensus* was reached. Further, the object of the contract had to be physically pointed out *and* described. Because the whole process of reaching consensus and concluding a contract was concretised, it was much easier to determine the real will of the parties. In fact, in an interview, a panel of experts for the Tswana was puzzled when the idea was put to them that one contracting party could make a mistake about

57 Diódsi 52, see generally 51 *ff.* He avers that the only requirement was that the parties be present.

58 *Ibid.*

59 As in Roman law, the nod of a head was not an indication of a party’s intention.

60 With regard to the Fanti, see, eg, Sarbah 86; see also Bosman 404 Letter XX; On 1702-09-01, in Letter XXI (at 433), which appears as an appendix to Bosman’s narrative, Dawid van Nyendael wrote that “they are very tedious in Dealing ... [it takes] generally eight to ten Days before we can agree with them for: But this is managed with so many Ceremonious Civilities, that it is impossible to be angry with them.” Traditionally parties to a contract consisted of groups. However, individual property (eg clothes, ornaments, animals) has become increasingly recognised and individuals are nowadays allowed to conclude contracts with regard to such property: see Prinsloo & Vorster “Parties” in *Indigenous Contract in Boputhatswana* (ed Myburgh)(1990) 2122.

61 See Whelpton 8183.

the identity of the other party or about the identity of the object of the contract.⁶²

In contrast to the Roman *stipulatio*, where abstract form completely overshadowed the subjective expectations of the parties, contracts in African law were posited in reality. The parties retained their specific identities defined by their membership of specific family groups. The object of the contract never became a “colorless commodity”⁶³ and the intention of the parties remained of paramount importance.

The fact that there were specific conventions as regards behaviour and taboo further confirms that there were ritualistic boundaries in the verbal agreement. An integrated relationship existed between language, magic and religion in African culture.⁶⁴ Language was the oral expression of African cultural life and played an important role in social and legal relations. The various language taboos illustrate the close affinity between language and the superhuman. Cattle, for example, were regarded as an important form of legal tender and a complex cattle terminology existed. Terms employed to refer to cattle differed, depending on whether they were used in a legal, religious or kinship context. Thus, where the family of a young man approached a girl’s family to discuss a possible betrothal, they first offered her family the gift of an animal which, in that context, was referred to as *vula mlomo* or “opening the mouth”.⁶⁵ Animals were distinctively identified in transactions, using established, refined and complex linguistic colour-pattern terminology as well as personal names.⁶⁶

In the early twentieth century, in a case heard by the Eastern Districts Local Division of the High Court, the Judge observed:⁶⁷

The subject-matter of the transaction being cattle, the defendant pointed out to the plaintiff certain five beasts easily identified, especially among Kaffirs, by their colour, horns, formation and other marks, and the plaintiff from that day to this has had no trouble in recognising which cattle were so pointed out to him as the *lobolo* which he accepted; and indeed there is no plea or contention on the defendant's part that [the] plaintiff is claiming cattle other than those so pointed out to him.

We therefore come down to this: Is the form of delivery adopted to be void in law, because physical delivery was not resorted to, or because, while symbolic delivery was intended, the cattle were not separated from the rest of the herd,

62 *Idem* 85.

63 See Wonnell “The abstract character of contract law” 1990 *Connecticut LR* 437 438-441.

64 Myburgh “Language” in *Anthropology for Southern Africa* (ed Myburgh)(1981)140-144.

65 Gluckman 183. Poland, Hammond-Tooke & Voight *The Abundant Herds. A Celebration of the Cattle of the Zulu People* (2003) 34.

66 Poland, Hammond-Tooke & Voight 36-37; they point out that this intricate naming and classification has significant alliterative and lyrical qualities.

67 *Xapa v Ntsoko* 1919 EDL 177 181.

and the defendant did not say at each inspection, "I gave you this one." It sounds rather like the echo of a Roman stipulation if it be necessary.

Also kinship terminology was complex and differed among the ethnic groups. Among the Nguni tribes, for example, parents-in-law and children-in-law had to avoid using words phonetically resembling each other's names. The restrictions on the use of certain words remind of the limitation in Roman law on the use of *spondeo* to Roman citizens.⁶⁸

4 *Fides*

The prevalence and endurance of verbal contracts in early Roman law have been attributed to the importance of the Roman virtue of *fides*. This immediately begs the question whether the absence of purely verbal contracts in African customary law was related to the possible absence of *fides* in African culture.

4 1 Roman Law

Literature on the topic affirms that *fides* which in Roman culture implied trust and trustworthiness was an elemental postulate of Roman religious, socio-political and legal life.⁶⁹ For Romans it was the most sacred thing in life.⁷⁰ It formed the foundation of the binding effect of obligations, not only in the *ius gentium*, but also in the *ius civile*. Everybody, irrespective of nationality, was expected to observe the duty to keep his or her word.⁷¹

The centrality of *fides* in Roman life was not an attribute conceived of by modern Romanists. *Fides* is a recurring theme in the works of Cicero,⁷² and it is referred to, among others, by Seneca⁷³ and Cornelius Nepos.⁷⁴ The Greeks, too, commented on the extraordinary fidelity of

68 The restrictions had possible religious origins in the oath before the Roman gods: Gai 3 92; Sandars *The Institutes of Justinian* (1903) 333; Harrill 277; De Zulueta 153; Gai 3 92 points out that the *sponsio* was restricted to Roman citizens but that other forms of stipulation were also available to foreigners and that other languages could even be used, as long as the parties could understand each other.

69 See among others Fromchuck *The Concept of Fides in the Histories of Tacitus*, (PhD thesis 1972 Bryn Mawr College, University of Michigan Ann Arbor) 1 ff; Van Zyl *Justice and Equity in Cicero* (1991) *passim*; Meyer 150 ff; Zimmermann 68-70; Schulz *Principles of Roman Law* (1936) 223 ff (esp 326-328 for the significance of *fides* in law).

70 See Cicero *in Verr* 2 3 3 6: *fidem sanctissimam in vita qui putat*.

71 See, eg, Kaser Vol 1 27, 33, 35, 39, 87 esp his references to the connection between *fides* and sacral law.

72 See, eg, *de Rep* 4 7, *ad Fam* 16 10 2, *de Offic* 1 7 23; in *de part Orat* 22 78 Cicero observes: "That part of virtue displayed ... in matters of trust [is called] faith."

73 *Ben* 3 15(1-2).

74 *Att* 9 5.

the Romans. Polybius⁷⁵ noted that bound by their pledge of *fides*, even Roman officials, who were *ex officio* most exposed to the temptation, were restrained from skimming public funds.⁷⁶

Cicero saw *fides* as “*fit quod dicitur*”⁷⁷ and associated it with justice (*iustitia*) and other related virtues. In fact, according to him *fides* formed the very foundation of justice.⁷⁸ Within the context of the *stipulatio*, his proposition that *fides* derived from a promise made good, is certainly appropriate and underwrites its importance in legal conduct.⁷⁹

Interestingly, in contrast to the opinion of modern Roman-law scholars, Seneca⁸⁰ and Cornelius Nepos⁸¹ saw the formality of the *stipulatio* as evidence of the absence of *fides*. In their view informal agreements should suffice between friends and *fides* should eliminate the necessity for formal contracts.

4 2 African Law

It does not appear far-fetched to assume that the vital importance of the transfer of property in legal transactions and the concomitant absence of purely verbal contracts in African customary law were due to the fact that *fides* did not play a significant role in African culture.

However, trust between people, specifically neighbours, was certainly important in ancient Africa and it was regarded as morally reprehensible to break a promise.⁸² Gluckman, who did extensive empirical research among the Barotse of Zambia, observed that all legal relationships in

75 *Hist* VI 56.14-15: “... whereas among the Romans those who as magistrates and legates are dealing with large sums of money maintain correct conduct just because they have pledged their faith by oath. 15. Whereas elsewhere it is a rare thing to find a man who keeps his hands off public money, and whose record is clean in this respect, among the Romans one rarely comes across a man who has been detected in such conduct” Also Cicero remarked on the role of *fides* in affairs or relationships of trust: *de part Orat* 22 78: *in creditis rebus fides*; cf Van Zyl 97-98.

76 At 21, Meyer comments that “it was at first rare (although eventually better known) for suspicion of corruption to touch the Romans themselves”.

77 *de Rep* 4 7: *Fides enim nomen ipsum mihi videtur habere, cum fit, quod igitur*. (Faith seems to me to get its very name from the fact that what is promised is performed).

78 *de Offic* 1 7 23: *fundamentum autem est iustitiae fides*; Cf also Van Zyl 123.

79 In his *de Offic* 1 7 23 he wrote that undertakings and agreements (*dictorum conventorumque*) should be upheld and the resulting obligations be discharged. This applied in both public and private acts.

80 *Ben* 3 15(1-2): 1 *Utinam nulla stipulatio emptorum venditori obligaret nec pacta conventaque impressis signis custodirentur, fides potius illa servaret. 2 Sed necessaria optimis praetulerunt et cogere fidem quam expectare malunt ...*

81 *Att* 9 5: “[H]e came to the rescue and lent her the money without interest and without any contract, considering it the greatest profit to be known as mindful and grateful, and at the same time desiring to show that it was his way to be a friend to mankind and not to their fortunes ...”

82 Cf Mahoney “Contract and neighbourly exchange among the Birwa of Botswana” 1977 *J of African Law* 40 at 59.

their law were based on “generosity and the utmost good faith”.⁸³ He reconciled the apparent conflict that, on the one hand, good faith was central in all spheres of African life and, on the other hand, that a mere agreement did not incur liability, as follows: Liability in contract was indeed only incurred when performance had taken place or property transferred, but once the obligation was created, it was governed by good faith.⁸⁴

The pre-eminence of trust in social and legal relationships was likewise reported for the Birwa of Botswana. Among these people, neighbours within the same settlements formed neighbourhood sets that frequently interacted with each other. These sets of people were not jurally defined units like households, but were informally dependent upon each other’s co-operation for their welfare and safety. Special relationships of trust existed between such neighbours who assisted each other in various activities such as reciprocal labour exchanges, and who contracted with each other, among others, to acquire livestock.⁸⁵

Bosman,⁸⁶ too, reported at the end of the seventeenth century that if the Dutch traders abided by their ancient customs, Benin traders honoured their agreements: “[i]f we comply with them, they are very easy to deal with, and will not be wanting in anything on their Part requisite of a good Agreement.”

It is therefore not the lack of *fides* that explains why purely verbal contracts were unknown in African law, but rather the fact that African law and culture were characteristically non-specialised. This feature manifests itself in the lack of separation, differentiation, classification, and delimitation of, amongst others, knowledge, concepts, ideas, duties and interests; and hence in a concomitant lack of abstraction.⁸⁷ It was the emphasis on the concrete and the fact that legal reasoning was founded in sensory observation, a natural corollary of the general pre-literate condition of ancient Africa that gave rise to the need to concretise abstract principles.

5 Conclusion

There are many intersections in the law of ancient Roman and African contracts and a superficial analysis of orality in the Roman law of contract provides insights that one could usefully employ in understanding the African law of contract.

Roman society found legal certainty in formalism, which is the extreme adherence to form, because well-defined form made legal acts

83 Gluckman 175 and generally 174-176.

84 Albeit not in the modern ethical sense: see *idem* 180, 182-185.

85 Mahoney 40, 49-53; cf Gluckman 170ff.

86 Van Nyendael 433 Letter XXI.

87 Myburgh *Papers on Indigenous Law* (1985) 2ff.

memorable. In the *stipulatio* form was manifested in specific ritualistic words.

In African society, the emphasis on the concrete and the lack of abstraction excluded words as formality. However, specific behavioural conventions, which were not limited to delivery in terms of the contract, conferred form and created legal certainty, gave rise to liability, and were regarded as manifestations of the intention of the parties. Contrary to the traditional view, performance or part performance in terms of the contract was not the only way in which the verbal agreement could be confirmed and in that sense contracts in African law differed from real contracts in Roman law.

Historically the incorrect interpretation of African customary law by the imposition of Roman-law principles has caused much hardship for the indigenous population. The misinterpretation of the *lobolo* contract is but one such example. The transfer of bridewealth was regarded as performance in terms of a bilateral real contract to purchase a wife. As a result, agreements related to bridewealth were regarded as *contra bonos mores*. Had such agreements rather been explained by analogy with the Roman *dictio dotis*,⁸⁸ a unilateral formal verbal contract to transfer marriage goods,⁸⁹ indigenous Africans would have been spared the long and arduous journey to have their marriages recognised in law.

88 In classical law this obligation was enforceable by a *condictio*. It fell into disuse when Theodosius II made enforceable any informal promise of a dowry (C Th 3 13 4).

89 Sandars 333; Thomas 208.