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People Take Pictures Of Each Other To Prove That They Really Existed

The book *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*[1] appears to have been published with the objective of bringing the Dutch or Elegant School to the attention of German legal historians. Both editors and contributors strive to achieve a better appreciation of the Dutch jurists of the 17th and 18th Centuries by firmly placing the Dutch School in its (to their minds) rightfully deserved place within the European *ius commune*. From the title, from the selection of topics, and from the majority of essays, it becomes clear that this volume is the labour of protagonists of the *ius commune* paradigm. This leaves one fundamental question: did Roman-Dutch law really exist?

Although the title of the book creates the impression that it did, the adherence to the *ius commune* dogma argues against this point of view. It is a commonplace that one of the most important characteristics of Roman law was its scientific treatment of the law by the Roman jurists, who, in this way developed law as a science. This Roman science of law was one of the principal reasons for the various afterlifes of Roman law and the further development of law in Europe was closely linked to the development of legal scholarship at European universities. In consequence, legal science, because of the subject-matter, acquired a supranational character. However, the notion that "Der Mensch fängt erst mit dem Juristen an" leads to the assimilation of law and legal science. This is not borne out by the reality of the situation and leads to tunnel vision. It is equally incorrect to view legal science and the law in action as two separate entities, since a dialectic between these two is inevitable, as can be witnessed in the numerous references to learned law in the decisions of the (higher) Dutch courts and the opinions of the

[1] Hg. von ROBERT FEENSTRA und REINHARD ZIMMERMANN. (Schriften zur Europäischen Rechts- und Verfassungsgeschichte 7). Berlin: Duncker & Humblot 1992. 627 S., DM 198,–

(better) advocates during the 17th and 18th Centuries on the one part, and the lectures of Dionysius van der Keesel on the *Inleidinge* of Grotius on the other. It is not in contention that the *ius commune* had several important representatives among Dutch jurists of the 17th and 18th Centuries and that there was a certain paradigm which is labelled the Dutch or Elegant School, but this does not lead to the automatic conclusion that there was, indeed, Roman-Dutch law as such. This brings us to the original position: is the title of this book a contradiction in terms?

The term Roman-Dutch law was coined by Simon van Leeuwen, a prolific author who had a predilection for quantity rather than quality. Born in Leiden in 1626, he studied law at the University of Leiden and published in 1652, three years after the completion of his studies and while he was practicing as an advocate in the Hague, his *Paratitula Juris Novissimi dat is Een kort begrip van het Rooms-Hollandts-Reght*. In the preface he complained that at university he was taught nothing of relevance to modern law and that he had to learn this in practice, which caused him to publish this short manual on modern law. In 1664 he published a more elaborate volume, *Het Rooms-Hollands-Regt*, of which the last and twelfth edition appeared in 1780–83 with annotations by Decker. The fact that Hugo de Groot's *Inleidinge tot de Hollandsche Rechts-geleerdheid* had been published in 1631, with the aim of providing a manual on contemporary law, and the fact that this publication was successful, could not have passed unnoticed by van Leeuwen. In addition, the influence of the *Inleidinge* is clear in his work. The term Roman-Dutch law, however, was, and remained for a long time, his own.

However, a name does not make a legal system and, since adherence to the *ius commune* belief appears to eliminate the necessity to incorporate wider social issues into legal historical research, a short historical survey seems appropriate in this context.

The Dutch Republic

After the initial success of the Dutch revolt against Spain the States-General in 1581 formally renounced their allegiance to King Philip II of Spain. However, the Dutch rebels had long considered themselves *de facto* independent and the establishment of a university at Leiden on 8 February 1575, to train administrators and clergymen, shows that they considered *de iure* independence as well. The States (representative

assembly) of Holland and Zeeland had signed a defence pact in 1575 and the Treaty of Utrecht of 23 January 1579 created a union of Holland, Zeeland, Utrecht, Friesland, Gelderland and the Ommelanden, which bound the signatories to act as a single province in matters of peace and war. The treaty defined certain areas of policy in which the United Provinces were to act in concert, but in all other matters the right of each province to govern itself was safeguarded. The Treaty of Plessis-lès-Tours secured a replacement of the sovereign in the form of the Duke of Anjou and on 26 July 1581 a Placard was published abjuring the King of Spain. However, Holland and Zeeland refused to recognize the sovereignty of Anjou. This zeal for provincial autonomy remained one of the principal characteristics of the United Provinces and, after the departure of Anjou in 1583, the assassination of William of Orange in 1584, and the flirtation with England, the States of the seven provinces represented in the States-General of 1588 retained the authority in the state and exercised the sovereign power of the people in their provinces. This was endorsed by a resolution of the States-General on 25 July 1590, declaring that the assembly was the sovereign institution of the country and had no overlord, except the deputies of the provincial estates themselves. The new political order in the Netherlands was run by a tightly knit oligarchy which had seats in the Provincial States and/or city councils. The major towns were small city states ruled by magistrates chosen form the ranks of a closed oligarchy. This ruling caste, the regents, were safe from interference because the sovereign States were responsible to the towns they represented. Thus the regents of the voting towns which had the right to send representatives to the Provincial States, controlled the affairs of the province, since the deputation was not allowed to depart from its instruction. The same regents also controlled the States-General, which consisted of deputies from each of the seven provincial assemblies, since the representatives of each province had to refer back to the States which had sent them before any decision was taken in the States-General. Because of the unequal economic and political strength of the seven provinces, it was mainly the opinion of Holland that was dominant, because Holland paid in theory, 58 per cent and, in practice, far more of the federal budget. The power thus resided with the city councils of the eighteen voting towns of Holland. When a place on the city council fell vacant, the rest of the council chose another patrician to fill his place. A tacit agreement was reached between the States-General and the Provincial States dividing the powers among them. The States-General

dealt with public finance, military affairs and foreign policy, but would not legislate or intervene in the domestic affairs of the individual provinces. The seven provinces had rebelled against the Spanish attempts to create a strong central executive and had deposed their sovereign Prince because he had failed to respect their laws and privileges. Provincial particularism was such that it is clear that the regents of each province did not want an effective central government. Such a de-centralized system was not at all conducive to legal unity. As a result, the Dutch Republic retained many of the characteristics of a medieval state. It was a confederation of autonomous provinces, in which the towns retained their old liberties and privileges, as well as a large degree of independence. The defence of local privilege against the central government had played an important part in the early rebellions against Spain (1566 and 1572), since the privileges and liberties of each town and province pre-dated the state. Central government had made its appearance only in 1548 in the Low Countries when, on 26 June 1548, Charles V persuaded the Diet of the Holy Roman Empire at Augsburg to permit him to turn all his Netherlands provinces, which formed part of the Empire, into a separate administrative unit. In November 1549 Charles V persuaded the States of each province to ratify the Pragmatic Sanction, which ensured that after his death all provinces would continue to obey the same ruler and central institutions. These States mostly dated back to the Thirteenth Century and protected local privileges against encroachment. In the 1420s the Burgundian Dukes had begun to convene joint meetings of the delegates from the States of all the provinces under their rule, the States-General, and after 1549 the right to attend the States-General was open to all provinces united by the Augsburg Transaction. In short, a kind of United Netherlands was thus, for the first time, created by 1550. However, as a result of their economic strength and large population the Provinces of the Low Countries had strong local institutions and traditions, different fiscal and legal systems, and even different languages. Even within a province the law differed according to the customs of the place, and at that stage there were about 700 different codes in the whole of the Netherlands. These local laws, liberties or privileges were considered to be of vital importance against the abusive or arbitrary exercise of power of the government and from the Fourteenth Century onwards the towns of Flanders, Brabant, Holland and Zeeland had repeatedly rebelled against their Prince and managed to extort charters of liberties and rights from the

sovereign. The provinces of the North-East Netherlands were only annexed later, Friesland in 1523–4, Utrecht and Overijssel in 1528, Groningen, the Ommelanden and Drente in 1536 and Gelderland in 1543. In the Treaty of Venlo, 12 September 1543, Gelderland acquired guarantees that local laws and liberties would be preserved.

The legislation enacted by the Duke of Alva to unify the criminal law and criminal procedure in the Netherlands provinces (1570), his codification of customary law and the law regulating marine insurance in a series of ordinances (1569, 1570, 1571) were, therefore, perceived to be 'unconstitutional', and had to be forced through, which strengthened the perception of Spanish tyranny.

Thus the system of the Dutch state was the result of urban and provincial parochialism and augured against nationalism and loyalty to a dynasty. The position of the House of Orange confirms this point of view. The Prince of Orange was Stadtholder of one or more provinces and commander-in-chief of the armed forces; the servant of both the Provincial States and the States-General. The Netherlands never let go of their medieval past and did not create a centralized system of state. Moreover, the geographer Sebastian Munster wrote in his *Cosmography* of 1552 that formerly regions were bounded by mountains and rivers, but that in his day languages and lordship demarcated the limits of one region from the next, and that the limits of a region were the limits of its language. In the provinces of the Netherlands, French and Dutch (and the various dialects derived from them), Fries, Low German and Oosters of East Dutch were the various languages.

Particularism and language, combined with religious divisions caused by the rise of Protestantism, were the divisive factors which prohibited the unity of the Dutch Republic. The rapid extension of Dutch power in the 17th Century must be attributed to aggressive commercial expansion rather than to a strong unitary state.

From about 1590 onwards the trade of Holland burgeoned. Making use of the enormous merchant fleet, commerce became an instrument of war. Foreign colonies were established, factories and trading posts created. The expansion of overseas trade was accompanied by population increase (aided by the influx of Calvinist emigrants from the South), and by growth in trade and in industry at home. The Dutch became a maritime and commercial empire. Their power extended from the Spice Islands of Indonesia to the Caribbean, from the Baltic to the Mediterranean and the Levant, and from Brazil to the Arctic trade-route to Russia.

Vereenigde Oost-Indische Compagnie (VOC)

The fusion of competitive pioneering commercial companies trading to the East Indies into one monopolistic corporation, the United Netherlands Chartered East India Company (VOC) on 30 March 1602, and the formation of the West India Company in 1621, were significant steps in this regard and provide an insight in the workings of the Dutch 'state'. The VOC was sub-divided into six regional boards or chambers, established at Amsterdam, Middelburg, Delft, Rotterdam, Hoorn and Enkhuizen. The States-General awarded to the VOC a charter by means of which the Company was given a monopoly of Dutch trade and navigation to the east of the Cape of Good Hope and to the west of the Straits of Magellan. The governing body of seventeen directors was empowered to conclude treaties of peace and alliance, to wage defensive war and to build fortresses and strongholds in that region. They could enlist civilian, naval, military and judicial personnel who would take an oath of loyalty to the Company and to the States-General. Thus the VOC was virtually a state-within-a-state. However, it was held that the sovereignty remained with the States-General (cf. *Hollandsche Consultatien* V, p. 233 sqq.). Moreover, which law would apply in the territories of the Company was not specified. The organisation of the WIC was modelled on that of the VOC, but the offensive role of this company in the war against the Iberian Atlantic empire was more pronounced. The directors of the six regional chambers retained their position for life. When a director resigned or died, the remaining directors submitted a list of three leading shareholders to the local representatives of the Provincial States, who chose one to fill the vacancy. The governing body was chosen from the regional directors, eight representatives from the Amsterdam chamber, four from Middelburg, one from each of the other chambers, and the seventeenth by rotation. The close connection of the directors with the regents allowed them to consolidate their position as a self-perpetuating oligarchy accountable to nobody. Their strength is exemplified by the statement made by the governing body to inform the States-General in 1644 that the places and strongholds in the East Indies should not be regarded as national conquest, but as the property of private merchants.

When the directors of the VOC decided to found a refreshment station for Indiamen at the Cape of Good Hope, Van Riebeeck's implementation of this decision in 1652 planted the seed for Roman-Dutch law. That the Cape developed into a colony was a unique

situation in the possessions of the VOC. The directors had not envisaged any extensive settlement and were anxious to keep it as small as possible to save costs. However, in the 1680s the directors decided to encourage colonization at the Cape and sent out emigrant groups of Huguenot exiles, as well as some Dutch families and marriageable girls from orphanages in the Republic. By 1780 there were between 11 000 and 12 000 free-burghers in the colony, completely blended together. Although the economic development of the colony was handicapped by the numerous restrictions placed by the Company on the commercial and agricultural activities of the colonists, the development of wheat, wine, cattle- and sheep farms pushed the frontier of the colony ever further into the interior. Some of the burghers of Cape Town amassed great wealth and sent their sons to be educated at Dutch or German universities, while the burghers of the rural hinterland who were engaged in agriculture and stock-raising sent their sons to set up on their own, thus pushing the land boundary of the colony northwards and eastwards. To solve the labour problems of the Company, burghers and boers slaves from Mozambique, Madagascar, India and Indonesia were imported, since the Company had forbidden the enslavement of Hottentots and Bushmen, and these added to the population.

The genesis of Roman-Dutch law

However, the instructions to Van Riebeeck did not include the establishment of a governing body or a judicial institution. Thus, Commander Van Riebeeck modelled his government on the ship's council and exercised administrative and judicial functions. Once the pioneering days were over, the senior Company officials formed a Council of Polity under the chairmanship of the Governor, and this body (without the Governor) also functioned as the Council of Justice. From 1657 onwards, burgher representatives sat on the latter council. From 1682 onwards, colleges of *landdrosten* and *heemraden* were appointed to deal with the administration of justice in the country districts. Van Riebeeck was of the opinion that the Cape of Good Hope as a *buitencomptoir* subject to the jurisdiction and administration of the headquarters of the VOC in Batavia, would apply the same law. In 1621 the Company made clear to the Governor-General and Council of India that the law as observed in Holland, namely the Political Ordinance of the First of April 1580, the Declaration of the States of Holland on the Ordinances on Succession of Thirteen March 1594, the Placard on

Succession *ab intestato* of Eighteen December 1599 and, where these ordinances and placards did not make provision, the common civil law as practised in Holland should be observed. In the event that no provision was made, the intention of this legislation of the States of Holland should be followed or otherwise the practice of civil Roman law. In matters not relating to private law, the government of Batavia could use its discretion. The reaction of Coen, the then Governor-General, is indicative of the situation in the overseas territories: he asked to be more particularly informed what exactly was customary in Holland. The reason why the law of Holland was adopted, in preference to the law of the other provinces, is found in the dominant influence of Holland in the VOC. Thus it came about that during the rule of the Company at the Cape Colony the law of Holland was the law of the Cape. In regard to statutes promulgated by the States of Holland after 1652 the position is, however, unclear. At the Cape itself there was much legislative activity, mainly of an administrative nature. The Placaaten issued at Batavia were regarded as law at the Cape and the Statutes of India, compiled in 1642, were regarded as part of the law at the Cape in so far as conditions in the country permitted. Only in the second half of the Eighteenth Century attempts were made to improve the administration of justice at the Cape by recruitment of trained lawyers and a legal library appears to have been established, in which the best known Dutch authors were represented.

In September 1795 the British conquest of the Cape put an end to the rule of the VOC. By proclamation of 11 October 1795 the Council of Justice was re-instated with the instruction "to administer justice, in the name of His said Majesty, in the same manner as has been customary till now, and according to the laws, statutes, and ordinances which have been in force in this colony..." In January 1806 the Cape was once more taken over by the British without any changes to the legal system. The first and second Charters of Justice (1827 and 1832) introduced drastic alterations in the judicial organisation, but directed the courts to exercise their jurisdiction" according to the laws now in force within our said colony, and all such other laws as shall at any time hereafter be made".

Nevertheless, as government, administration and the judicial organization were re-shaped along English lines, English civil and criminal procedure were substantially taken over, and English mercantile law was introduced.

Between 1834 and 1840 about 15000 frontier Boers left the Eastern frontier territory of the Cape Colony and moved into the interior in

order to establish their own states. Natalia, the first republic established by the Voortrekkers, existed for only four years (1838–1842). Nevertheless, its Constitution, the *Regulatien en Instructien* of October 1838, made provision for jurisdiction by magistrates according to "de Hollandsche regtspleging, zoo civiel als crimineel" when local statutes and regulations did not provide otherwise. When the Governor of the Cape Colony officially proclaimed Natal a separate district of the Cape Colony it was stated that "the system, code, or body of law commonly called the Roman-Dutch Law, as the same has been and is accepted and administered by the legal tribunals of the Cape of Good Hope" applied in Natal. In 1852 the British signed the Sand River Convention, and in 1854 the Bloemfontein Convention, recognising the independence of the Voortrekker states, the *Zuid-Afrikaansche Republiek* and the *Oranje Vrijstaat Republiek*. The Free State Constitution, drafted and adopted in 1854, provided in art 57 that the administration of justice was to be grounded in Roman-Dutch law and Ordinance 1 of 1856 specified what this entailed: the law in force in the Cape Colony before the abolition of the Council of Justice (1827–8) as found in the works of Voet, Van Leeuwen, Grotius, de Papegay, Merula, Lybrecht, van der Linden, van der Keessel and authorities cited by these authors. Art 1 of the first Appendix of 1859 to the Constitution of the ZAR (1858) provided that the Code of van der Linden remained (in so far this is not in conflict with the Constitution, other statutes or resolutions of the Volksraad) the code of the state. Where van der Linden would be insufficient, the *Roomsch-Hollandse Recht* of Simon van Leeuwen and the *Inleidinge* of Hugo de Groot would have binding force as supplementary sources.

This short historical excursus is based on facts which are generally accepted by historians (cf. for example *Larousse Encyclopedia of Modern History* 1964, Boxer *The Dutch Seaborne Empire 1600–1800* 1965, Parker *The Dutch Revolt* 1977, J. & A. Romein *De lage landen bij de zee* 1979) and have not been selected in order to validate a thesis. These facts lead to the conjecture that the political organisation of the Dutch Republic made the existence of a system of Roman-Dutch law impossible, but that at the Cape of Good Hope and in the Boer Republics various legal systems did develop, which gradually came to be known as Roman-Dutch law. Lack of legal expertise and sources, the "leges Citationis" of the republics are an expression of both, were dominant factors in this development.

The development of Roman-Dutch law

The preface of *An Introduction to Roman-Dutch law* published in 1915 by Lee, throws more light on this 'system'. This book emanated from a course of lectures delivered at the University of London, which lectures were aimed at introducing students to the general principles of Roman-Dutch law as administered at that time by the courts of South Africa, Ceylon, and British Guiana. As Maasdorp's *Institutes of Cape law* dealt only with the jurisdiction to which it related, a work was needed which would enable students to acquire a knowledge of the general principles of Roman-Dutch law as it existed in Africa, Asia, or America. The references are principally to de Groot, Voet, Van Leeuwen, Van der Keessel and Van der Linden. These authors not only formed the basis of the legal systems of the Boer Republics, but played a similar role in the Cape Colony. This can be deduced from the translations of their works into English; cf Kotze's translation of Simon van Leeuwen *Commentaries on Roman-Dutch law*, van der Linden's *Institutes of Holland*, translated by Sir H. Juta, van der Keesels *Theses selectae*, translated by Lorenz and Maasdorp's translation of de Groot's *Inleiding*, *Introduction to Dutch Jurisprudence* as well as the various translations of *capita selecta* from Voet. Thus, some further attention to these works is apposite:

Published in 1631, Grotius's *Inleidinge tot de Hollandsche Rechtsgeleertheid* was written during his imprisonment from 1619 until 1621. The work was intended as a text book and the systematising of the subject-matter was thus a high priority. The genius of de Groot is seen in the incorporation into this system of local law, received Roman law and natural law. However, in view of the nature of the book, de Groot restricted himself to briefly formulated positive norms abstracted from local law and supplemented with Roman law. The subsequent success proved that the book filled a void. In 1644 Simon à Groenwegen van der Made, a practising advocate in The Hague, published notes on the *Inleidinge* which referred to the sources used by de Groot, and to case law in the courts of Holland. In 1729 the *Alphabet der Hollandsche regten ofte bladwyzer en korten inhoud van de Inleyding tot de Hollandsche Regtsgeleerheit* appeared and in 1767 Schorer, President of the Court of Flanders, published a commentary on the book. In 1776 a group of jurists published *Die Rechtsgeleerde Observatien* another commentary and in 1777 Schorer and van Wyn published *Dertig Rechtsgeleerde Vragen* concerning this work. The *Inleidinge* found its

way even into universities; Johannes Voet (professor at Leiden from 1680–1713) gave lectures on contemporary law on the basis of the *Inleidinge*. Scheltinga lectured on this basis in the mid-18th Century and van der Keessel gave his lectures in the form of a commentary on de Groot at the end of the century. The latter also published his *Theses selectae* as an *addendum* on the *Inleidinge* meant for legal practicioners. It should however, be borne in mind that the *Institutes* of Gaius had a similarly spectacular success, both in legal practice and in legal education, but nobody would proffer that the *Institutes* gave a realistic description of classical Roman law, or that such a well-defined system did exist.

Van der Linden's *Rechtsgeleerd Practicaal en Koopmans Handboek* was published in 1806 and was intended as a first work for students and a legal guide for business men.

Van der Keessel, a professor at Leiden from 1770 onwards, published his *Theses selectae iuris Hollandici et Zelandici, ad supplendam Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam* in 1800, a summary of the lecture course he gave based on the *Inleidinge*.

Finally, Voet's *Commentarius ad Pandectas*, published in 1698 (vol I) and 1704 (vol II), in which the author follows the order of the *Digest* and sets out Roman law, with, where necessary, a short reference to contemporary law. The comprehensiveness of the work, the result of its compilatory nature, guaranteed success, all the more so since the other sources turned out to be rather elementary text books, in which system and principles were brought to the fore at the expense of the chaotic diversity of legal reality.

Dutch humanism

Another aspect of Dutch society which merits attention, since it may contribute to an understanding of the legal literature from the region, is the strong influence of humanism in the Dutch Republic.

Johan de Witt, described by Sir William Temple in his *Observations upon the United Provinces of the Netherlands* (1668) as the perfect Hollander, illustrates this point. The de Witt family had been represented on the town council of Dordrecht since the end of the 15th century. Johan de Witt's grandfather had inherited a timber business and was frequently chosen as alderman and burgomaster, he was a representative of the Province of Holland in the Zeeland Admiralty from 1596 to 1599, and the largest subscriber to the Zeeland chamber of

the VOC in 1602. His three sons studied law and travelled abroad in order to equip themselves for official employment, a practice followed by most regents' families. Johan de Witt's father took over his father's business and his place on the town council. He disposed of the business and represented Dordrecht in the States of Holland an in the States-General. Johan de Witt received an education in the classics at Dordrecht and read law at Leiden. He took his degree at the University of Angers. In the years 1645–47 he and his brother made the grand tour through France and England, after which Johan practised as an advocate in The Hague. In 1650 he became Pensionary (town clerk) of Dordrecht and in 1653 Grand Pensionary of the States of Holland. During his official career he kept up his interest in mathematics and he published a book on life-annuities, which qualifies him as the founder of actuarial science. The de Witts were typical members of the regent class, as the following citation from Temple confirms: "Their youth are generally bred up at schools and at the Universities of Leiden or Utrecht, in the common studies of human learning, but chiefly of their civil law, which is that of their country. Where these families are rich, their youths, after the course of their studies at home, travel for some years into England or France, not much into Italy, seldomer into Spain, nor often into the more Northern countries, unless in company or train of their public ministers. The chief end of their breeding, is to make them fit for the service of their country in the magistracy of their towns, their provinces, and their State."

This description of the ruling class explains, to a certain extent, the variety of juridical publications in the Republic. Where Johan de Witt occupied himself with mathematics after work, others dedicated their spare moments to antiquity and published on Roman law *ars artis gratia*. The humanist interest in education, in systematising, the rationality which leads to questioning of the previously unassailable authority of texts, are all represented in the legal literature published by the Dutch intelligentsia.

However, an anonymous pamphleteer gives us a glimpse into the rigid class-structure of social life in the Dutch Republic. This pamphleteer defines the upper middle class as being composed of the regents, magistrates, sheriffs, bailiffs, receivers and other senior officials, as well as rich merchants and traders. He was of the opinion that advocates and medical doctors might be considered the social equals of magistrates, but attorneys and notaries were a grade below them and ranked with clerks and sheriff's officers. It were the latter, who

daily occupied themselves with municipal and other statutes, who had knowledge of customary law and the local and regional variances thereof. The every-day law of persons, family and succession, the daily details of commerce, delict and crime, was their domain. Abstract legal scholarship was left to jurists at universities, in their studies or in the highest courts. It was the Roman-Dutch scholarship of these jurists which formed an integral part of the European *ius commune*, but the complex mosaic of the Roman-Dutch law of the various municipalities is found in legislation, collections of decisions and opinions, legal dictionaries and encyclopaedias published for the lawyers. The subsidiary *ius commune* was available to a small elite.

South Africa

To-day, Roman-Dutch law is the common law of the Republic of South Africa. However, as it has been stated, no such system existed and the rudimentary system created during the 19th Century would hardly suffice to meet the conditions of to-day. Already during the previous century in the Cape Colony there was a movement towards English law and institutions and a layer of English rules and concepts was gradually superimposed. However, during the second half of the 20th Century a politically inspired *petere fontes* emerged, which led to a desperately seeking of sources. A variety of theories developed, a discussion of which would lead too far, ranging as it does from the 'only the legal literature of Holland is pertinent" to 'legal literature from all culturally related countries may be consulted'. It will not come as a surprise that the emergence of the *ius commune* dogma had an enthusiastic reception in South Africa and appears to have become the reigning paradigm. However, historical study not undertaken out of historical curiosity, but to serve contemporary law, a desire not foreign to the *ius commune* adherents, may produce findings which are useful to modern law, but will hardly produce an approximation to the truth. This problem is compounded by the fact that in Pandektist-fashion the *ius commune* paradigm limits legal history to the study of legal science. This internalist epistemology to which protagonists of the *ius commune* are forced to adhere, prevents them from moving beyond the consideration of intellectual influences and from bringing the relation of law to sociological factors and to the ideologies involved in this relationship into their work. In discarding the relation between subject-matter and societal conditions, the past is often manipulated to achieve a desired

result. This may be condoned in judges, but hardly in academic writers. Thus, the need experienced by the South African legal fraternity to construct *ex post facto* a legal system – Roman-Dutch law – explains the appearance of volumes alleging to set out 'The Roman-Dutch law'. The involvement of legal historians in these exercises augurs ill for the future of this discipline. The absence of publications on other pre-codification 'legal systems' such as Roman-French law, Roman-German or Roman-Italian law, is significant in this regard.

Finally, over-emphasis of the European *ius commune* with the resultant concentration on the contribution of Roman law to the development of European legal science, its unconditional acceptance of the doctrines of reception and continuity, its selection of sources, its disregard of the economic, political and societal context of the law, its elimination of whole geographical and topical areas, leads to the presentation of a picture which has no links with historical reality. On the other hand, Roman-Dutch law as an essential element of the *ius commune* might already have become a legal historical myth, a belief lacking factual support, which persists because enough people would like it to be true. In spreading this approach a generation of young legal historians is absorbing this apparently indisputable fact and will refer to it in their publications.