In the history of European, and accordingly South-African private law, the emperor Justinian is to be considered as the first and perhaps the greatest harmoniser of the law. He purified the *rudis atque indigesta moles*, the mass of raw and indigested texts, put these texts in some sort of order and harmonised them. This he did in a remarkable way.

Of the variety of legal sources still mentioned by Gaius, two were left: *ius* and *leges*, or lawyers’ law and imperial law. *Leges* were every kind of pronouncement coming from the emperor whether it was an instruction to officials, a judgment, a written answer to a legal question, the granting of a privilege or a general enactment. They were all called *constitutiones*. Justinian made a selection of the constitutions, made them all generally applicable and deprived the non selected constitutions of their validity. The selected constitutions were arranged in chronological order within titles, because they derived their validity from the emperor who originally issued them. Consequently the *Codex Justinianus* was not issued as one big constitution but consisted of hundreds of imperial pronouncements, each with its proper inscription (author and recipient) and subscription (place and date). The valid law could be found with the help of the *lex posterior* rule.

In a completely different way the emperor harmonised the *ius*, namely the writings of the famous lawyers. In AD 426 the emperor Theodosius already tried to cut a path in the jungle of authoritative texts by issuing the so called *Law of Citations*. The judge was reduced to an accountant who had to gather the opinions of Gaius, Papinian, Paul, Ulpian and Modestinus on a certain legal issue. After counting heads he had to follow the majority. If the opinions were evenly divided, Papinian had the casting vote; only if Papinian had not said anything about the matter in hand the judge could use his common sense and decide for himself.

Justinian selected fragments from the mass of writings – 150 000 lines out of three million – and divided them into fifty books out of two thousand. The non-

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1 In Webster’s Dictionary the verb “to harmonise” has the significance of agree in action, adaptation or effect; to agree in sense or purpose; for example as the arguments harmonise; the facts stated by the different witnesses harmonise. Harmonisation of legislation is also a collation of parallel legal texts which agree in sense or purpose.
selected writings lost their *legis vigor*. The problem of finding the valid rule was solved in a highly original way. The emperor simply declared the *Digest* to be one big constitution. No *lex posterior* rule; every text was invested with the same force of law. The *Law of Citation* was abolished and Papinian lost his eminent position. It was the emperor who spoke, not the lawyers; the *ius* was no longer a source of law. The names of the lawyers were mentioned out of reverence for antiquity but had no legal significance. In the words of the emperor:

Indeed, since we have ordained that these laws should have the force of imperial enactments and be as if promulgated by ourselves, why should any greater or less importance be attributed to any of them when one rank, one authority, is given to all?\(^2\)

And consequently he ordains:

[L]et no one of you dare either to compare these laws with the former ones or, if there is any discrepancy between them, make any inquiry, since whatsoever is set down here, we resolve that this and this alone be observed.\(^3\)

And again:

[W]hatever has been written there [sc in the *Digest*] should appear as our own work and composed by our own will. No one may dare to compare any ancient text with that which our authority has introduced.\(^4\)

Not only any comparison of the texts was forbidden but also their interpretation. The emperor was the only one who was allowed to change and to interpret his own imperial text. He had the authority to bring to an end old *altercationes*, namely disputes between the lawyers by *deciding* them. *Decidere* literally means to cut and so the emperor cut numerous legal knots. In the same way he was the only one to interpret the law: he was *solus legum conditor et interpres*.\(^5\)

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\(^2\) *Const Tanta* 20a: “*cum enim constitutionum vicem et has leges optinere censuimus quasi ex nobis promulgatas, quid amplius aut minus in quibusdam esse intellegatur, cum una dignitas, una potestas omnibus est indulta?*”

\(^3\) *Const Tanta* 19: “*nemoque uestrum audeat uel comparare eas prioribus uel, si quid dissonans in utroque est, requirere, quia omne quod hic positum est hoc unicum et solum observari censemus.*”

\(^4\) *Const Tanta* 10: “*quidquid ibi scriptum est, hoc nostrum appareat et ex nostra voluntate compositum: nemine audente comparare ea quae antiquitas habebat et quae nostra auctoritas introduct.*”

\(^5\) C 1 14 12 – *Tanta* 20.
In this way he composed his *Digest* and issued it as one huge constitution on 16 December 533. It was the newest imperial law and according to the *lex posterior* it set aside the older constitutions. Therefore mechanical interpolations were necessary.\(^6\)

One consequence of the issuing of the *Digest* as one constitution has been of the greatest importance. The emperor flatly denies the existence of any contradiction in his *Digest*:

> As for any contradiction occurring in this book, none such will claim a place for itself and none will be found by anyone who reflects with a subtle mind upon the modes of diversity. On the contrary, something will be discovered even if obscurely expressed, which removes the objection of disharmony, gives the matter a different aspect and passes outside the limits of discord.\(^7\)

Did the emperor not know that the *Digest* was full of contradictions? Of course he did. But he simply gave orders to use one’s subtle mind. By doing so a lawyer will discover that a contradiction is not a contradiction but a seeming contradiction or paradox. And indeed we know of a Greek writer who wrote a book entitled *About Seeming Contradictions*, περί ἔναντιοφανειών. The anonymous writer of this book, which has been lost, is thus called Enantiophanes.

According to the emperor the subtle legal mind was meant to create harmony between the conflicting texts. The question, however, is of course: “Whose subtle mind?” In Bologna, Irnerius knew the answer. The legal scholars had to use their harmonising faculties. In this sense it was understood by the glossators and their successors. They did not have the authority to decide, but they could use their mental powers to obey the command of the emperor – for they took the remark of the emperor for a command – and remove the causes of disharmony by interpretation. One example:

In *Constitutio Omnen* § 7 Justinian forbids legal teaching outside the imperial cities and the metropolis Beirut, *extra urbes regias et Berytensium metropolim*. Heavy penalties threatened teachers of law in other cities. The Bolognese glossators felt awkward about this ban on legal teaching outside Rome and


\(^7\) Const Tanta 15: “Contrarium autem aliquid in hoc codice postum nullum sibi locum vindicabit nec inventur, si quis supfil aniimo diversitatis rationes excutiet: sed est aliquid novum inventum vel occulte postum, quod dissonantiae querellam dissolvit et aliam naturam inducit discordiae fines effugientem.”
Constantinople for these two cities were the traditional *regiae urbes*. What about teaching in Bologna? *Suptili animo* they solved the problem by referring to a text of the emperor Theodosius who apparently gave Bologna the status of *regia urbs* on the advocacy of bishop Ambrosius.\(^8\) The text is a falsification. Savigny says:\(^9\) “Eine ungeschicktere Erdichtung lässt sich kaum denken.” But it shows how seriously the medieval lawyers took the imperial command to harmonise the texts of the *Corpus Iuris* and to adapt them to the realities of daily life. Through the legal writings of the glossators and commentators a consistent interpretation developed itself, a *certa interpretatio*, which should not be changed or at least as seldom as possible. This rule was prescribed by Paul in *D 1 3 23*:

> What always has had a single definite interpretation should not be changed.\(^10\)

During the Middle Ages the rule of Paul was generally observed but the subtle mind of the legal writers did not only *harmonise* conflicting texts. It also caused new contradictions in what was already established law, especially in the period of the Renaissance and the Reformation. So, for instance, the scholars of the so-called *mos gallicus*. They tried to prove on philological grounds that the established interpretation of a text was false, that the glossators had not taken into account the Greek texts because *Graeca non leguntur*, that the text of the Vulgata was corrupt et cetera. In this way they created new altercations and disharmonies. In a similar way the Roman-Dutch writers with their *suptiles animi* sometimes adopted harmonising and sometimes dissenting opinions. In his preface of the *Tractatus de Legibus Abrogatis et Inusitatis* Groenewegen van der Made (1613-1652) gave three criteria of the valid *ius commune*. It was Roman law so far as it was not explicitly abolished by a written law or implicitly by custom. Apart from these a third criterion had developed the *ratio* or reason. It was not a new criterion: it had already been used by canon law from the beginning of canon law.\(^11\) The *ratio* was used to stamp out customs which were repugnant to reason and equity.\(^12\)

\(^8\) “Ad: regiis urbisbus: scilicet Roma veteni, quam Romulus et Remus reges fecerunt. Et Constantinopolis quam imperator Constantinus fecit ergo idem et in Bononia quia et earum fecit Imperator Theodosius a fuisse beati Ambrosii, cum per prodigationem eam destruxerat, ut dicitur in legenda beati Ambrosii.”


\(^10\) *D 1 3 23* (Paulus libro quarto ad Plautum): “Minime sunt mutanda, quae interpretationem certam semper habuerunt.”

\(^11\) It is good to realise that Roman-Dutch law really was a combination of pure Roman canonical law and indigenous law of the Province of Holland. I think the indigenous African law or laws which are to be or have already been incorporated into South African law can easily be compared with this indigenous Dutch law. Dutch law was customary law deviating from the
In a letter of Pope Gregory VII from the eleventh century to Bishop Wimundus the Pope writes:

If you by chance oppose to a custom, take care of what the Lord says: I am the Truth. He did not say: I am the custom but the Truth. And truly (to use a sentence of Saint Ciprian) every custom, however old, however widely spread must be wholly postponed to the Truth and a custom which is contrary to the truth must be abolished.\(^\text{13}\)

Groenewegen and the other Roman-Dutch writers gave the \textit{ratio} more significance than ever. They were not so much inspired by Roman-Catholic canon law as by the French protestant logician Petrus Ramus (1515-1572) and the German scholar Johannes Althusius (1557-1638).\(^\text{14}\) Instead of always being a harmonising factor the \textit{ratio} could sometimes cause a deviation from the \textit{certa interpretatio}.\(^\text{15}\) The following is a well known example:

According to Grotius delivery of possession (\textit{traditio}) was superfluous for the transfer of ownership. Reason prescribed that the \textit{voluntas} of the transferor and the acceptance of the transferee were sufficient. Nevertheless one should follow the \textit{certa interpretatio} of the \textit{ius commune}, says Grotius, for in this case the tradition of the civil law, \textit{de burgerwet}, is more important than the \textit{ratio} of the natural law, \textit{het aangeboren recht}.

As we all know France adopted the \textit{aangeboren recht} of Grotius while in the Netherlands the \textit{Civil Code} of 1838, abolishing the French \textit{Code Civil}, went back to the true principles of Roman law.\(^\text{16}\)

Another example of the conflict between \textit{ratio} and \textit{certa interpretatio} is Voet’s opinion about assignment. According to his \textit{suptilis animus} the transfer of a claim takes place at the moment of the informal assignment because assignment takes the place of delivery, \textit{quia cessio in actionibus traditionis loco est}. However the \textit{certa interpretatio} of a constitution of the emperor Gordianus

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13 D \textit{1 dist 8 c 5}: “\textit{Si consuetudinem fortassis opponas, aduertendum est, quod dominus dicit: ‘Ego sum ueritas’. Non dixit: ‘ego sum consuetudo, sed ueritas’}. §. 1. Et certe (ut B. Cipriani utamur sententia) quelibet consuetudo, quantumuis uetusta, quantumuis uulgata, ueinti est omnino postponenda, et usus, qui ueinti est contrarius, abolendus est.” Cf \textit{D 1 dist 8 c 3-9} and the conclusion of Gratian: Therefore it appears most clearly that a custom is to be postponed to natural law: \textit{“Liquido iigitur apparat, quod consuetudo naturali iuri postponitur.”}\(^\text{13}\)

14 Cf Van der Walt “Legal history, legal culture and transformation in a constitutional democracy” 2006 (12-1) \textit{Fundamina} 23-24.


16 Grotius \textit{De iure Belli ac Pacis} 2 \textit{8 25}.
\end{flushright}
would have it that the transfer took place when notice of the assignment was given to the debtor. Before this *denuntiatio* the claim “cleaves to the bones of the first creditor, *primi creditoris ossibus inhaeret*, and can no more be separated from his person than the soul from the body”. Thus Van de Sande, who boasted Roman-Frisian law to be more Roman and thus more truthful than Roman-Dutch law, said: “I really cannot imagine that anyone could stray further from the realm of truth.” Here again the *certa interpretatio* won, but the example shows us that the *suptilis animus* could produce discord instead of concord if it no longer obeyed the command of Justinian as given in the *Digest*.

So far, so good.

Who are the absentees in this story of legislators and interpreters? Who are conspicuously absent until now, when we speak of harmonisation in Roman and Roman-Dutch law? The answer is: the judges and the courts. Why? Because the practice of the courts is no source of law since judgments should be given according to law and not according to precedent: *non exemplis, sed legibus iudicandum*. Judges had to apply the law and in doing this they followed the interpretations given to them by the legal writers. These sometimes referred to legal practice but always as an example, not as a legal rule. Because the verdicts of the courts were not motivated, they were of little importance for the *certa interpretatio*. In the books of verdicts, *sententieboeken*, motivations or legal reasoning are very seldom to be found. The *Observationes Tumultuariae* of Cornelis van Bijnkershoek were meant for private use. They were never officially published.

Did judge-made law not count at all? Yes, it did, or to put it more clearly, it could. It could have significance: not as an independent source of law but as customary law if at least there existed a consistent practice. The emperor Severus stated in a rescript that “in cases of ambiguity arising from the laws, force of law ought to be attributed to custom or to the authority of an unbroken line of similar judicial decisions”.

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18 Interesting in this respect are the archives of the Supreme Court of Friesland, which give rather extensive information: cf ibid.
19 D 1 3 38: Callistratus libro I quaestionum. "Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus profisciscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere."
Voet states as follows.\textsuperscript{20}

Things, which have thus always received a definite interpretation should by no means be changed. Although the decisions of judges even the highest do not possess the force of law, and judgments should be given according to law and not according to precedent, nevertheless a chain of invariably consistent decisions has in the interpretation of the law the force of law.

At the end Voet refers to Groenewegen's commentary on C 1 14 12 where Groenewegen holds the same opinion.

The binding force of the consistent practice of the courts is not founded upon the sovereignty of the judge but upon it being customary law. Superficially it resembles English common law. As we know the common law of England originated from the custom of the Kings Court. It is considered to be customary law: the \textit{stare decisis} rule, namely the rule that a judge is bound by even one precedent, is of recent date. Yet there is an important difference. In Roman law, in Roman-Dutch law and in modern continental law it is the law and not the judge that speaks. The law speaks and it speaks with one mouth. This is the reason why we have no dissenting opinions on the continent. We never know how many of the judges did not support the verdict of the court, we do not even know if and when the court was unanimous. This silence is called the Secret of the Court, \textit{het geheim van de raadkamer}. Its dogmatic reason is the fact that there is one body of law which speaks with one mouth.

Another consequence of the supremacy of the law is the validity of a verdict of the Court. In theory it binds the litigants and it never has general force of law. The judge has no power to issue general rules. In the Netherlands a law dating from 1829 (the \textit{law of General Rules, Algemene Bepalingen}) explicitly forbids the judge to give a rule which acts as a statute by which every citizen is bound.\textsuperscript{21} This interdiction was made as a reaction against the power of the French Courts of the \textit{ancien régime}, the \textit{Parlements}, which could issue so-called \textit{arrêts de règlement}. They were legal enactments in disguise and were binding on everyone living within the jurisdiction of the \textit{Parlement}. In English law a verdict can serve as a precedent and as such it is binding in another similar case between other parties. It therefore has more influence than a judicial decision on the Continent. Yet this difference, however fundamental, is

\textsuperscript{20} Gane \textit{The Selective Voet} Vol I (1955) 50.
\textsuperscript{21} Art 12 \textit{Algemene Bepalingen} (AB): “Geen regter mag bij wege van algemeene verordening, dispositie of reglement, uitspraak doen in zaken welke aan zijne beslissing onderworpen zijn.”
in practice less important than it seems. It is no exaggeration to maintain that in the Netherlands the motivated verdicts of the *Hoge Raad* with their fixed formulations are considered as quasi-legal rules. Paradoxically the duty of the continental judge to motivate his decision – a duty introduced in the French Revolution – has caused the judge to enact as a quasi-legislator, something the revolutionaries tried to prevent with might and man. This paradox is clearly illustrated by a chapter in the book commemorating the centenary of the Dutch *Civil Code* in 1938. The author, Telders, frankly called the standard decisions of the *Hoge Raad* “*arrêts de règlement*”. But the *Hoge Raad* is not bound by its previous decisions and is free to adopt a new interpretation of the law. In this way the law in the Netherlands can change dramatically while not one syllable of the legal text upon which the law is based is changed. The following is a famous example:22

The most important article on unlawful acts (tort) in the old Code (1401 BW) reads as follows (in translation): ‘Every unlawful act which causes damage to another obliges the person by whose fault that damage has been occasioned to repair it.’ Readers acquainted with French law will have no difficulty in seeing that this text was identical to the well-known Article 1382 Cc, but for one interesting difference, *viz.* the insertion of the word ‘unlawful’ instead of ‘whatever’ (*quelconque*). This led Dutch legal authors to distinguish systematically between the elements ‘unlawfulness’ and ‘fault’ (*Verschulden* in German) which are considered to be included in the term *faute* in the French text.

The interpretation of the term ‘unlawful’, however, has also conjured up a major problem: is ‘unlawful’ only what is contrary to a statutory provision or does it also include an infringement of other persons’ subjective rights?

Moreover, can ‘unwritten law’ render an act unlawful? In 1883 the *Hoge Raad* included the encroachment upon subjective rights within the notion of unlawfulness.23

In 1910 a little drama took place in the quiet city of Zutphen. Miss De Vries rented a room in the warehouse of Mr. Nijhof. Leather was stored in the warehouse. The waterworks froze in the winter of 1910 and Mr.

22  Lindenbaum Cohen HR 31-1-1919, NJ 1919 at 161.
Nijhof asked Miss De Vries in panic to turn off the water supply for the main supply was in her room. She flatly refused for it was in the night and she needed her rest. Damage was done by her conduct, but was her conduct unlawful? No, said the Hoge Raad,\textsuperscript{24} she had no statutory duty to turn off the water supply and her behaviour was no encroachment upon the subjective rights of Mr. Nijhof.

It was not until 1919 that the Hoge Raad took the next step. In that year the Supreme Court delivered what is generally considered to be the most important judgment in its history, deciding that by the term ‘unlawful act is to be understood an act or omission which violates another person’s right, or conflicts with the defendant’s statutory duty, or is contrary either to good morals or to the care which is due in society with regard to another’s person or property’.\textsuperscript{25}

So, if the Zutphen drama had taken place ten years later, Miss de Vries would have had to pay all the damages. A dramatic reverse of the outcome without any change of the legal text.

As a result the continental judge is freer in his judgment than his English counterpart.

This fundamental difference from English law is nowhere better visible than in South Africa after the arrival of the English. In 1828 a Supreme Court was established in the Cape of Good Hope. It was the beginning of the so-called Anglicisation of the law. Two years later in the case \textit{In re Taute} the Cape Court relied on its own previous decision and began to invoke the doctrine of precedent. The influence of English law expanded after the formation of the Union of South Africa on 31 May 1910. Writing about the Aquilian liability in the nineteenth century Annél van Aswegen described the growing influence of English law as follows:

Generally, the courts considered themselves bound to apply Roman-Dutch law. At the same time, however, English legal principles managed to infiltrate South African law in various ways. Thus, the direct importation of a common law rule (such as the immunity of government from being sued for damages) could be justified by reference to British political sovereignty. Much more frequently the courts examined the English position in detail, referred to a similar rule, or (most often)

\textsuperscript{24} Cf HR 10-6-1910 W 9038.
\textsuperscript{25} Hartkamp (n 23) 146.
adduced a supporting principle in Roman-Dutch law, and proceeded to apply English law.

Where no similar rule or principle was found to exist in Roman-Dutch law, the application of English law could be justified by stating that it was not in conflict with the former. In other cases the courts applied English law, sometimes reluctantly, even where it was found to differ from Roman-Dutch law, because they considered themselves bound by previous decisions of a South African court or of the Privy Council. Thus, the adoption of the English doctrine of *stare decisis* made itself felt on the development of substantive law. Finally, in rare instances South African courts simply applied English law without any attempt to determine the legal position in Roman-Dutch law and without any effort to justify this way of proceeding.\(^{26}\)

Is there some sort of *bellum juridicum* between English and Roman-Dutch law? Is there competition or rivalry between the two? Yes and no. Since the introduction of English law the judge, being for the greater part educated in the English procedural tradition, sees his natural task in supplying and if necessary correcting the written law. In this respect he resembles the Roman praetor and his praetorian law which could support, supply and correct Roman civil law, *adiuvandi vel supplendi vel corrigendi iuris civilis gratia*.\(^{27}\) Both Roman praetor and English judge have the power to create new law. In Rome, however, praetorian or honorary law is based on civil law, even where it corrects it. The supplements, additions and corrections of Roman-Dutch law by English law are not connected to the same source of law and therefore do not belong to the Roman-Dutch tradition. They are introduced by foreign law, originating from an independent source. The judge decides whether they will be accepted as South African law. Thus the hierarchy has changed: the judge decides and the legal writer follows. If he accepts a new rule, it becomes part of the national law and in one way or another it has to fit into the system. This “fitting in” is still the task of the legal writers’ subtle minds. They connect the trust with *fideicommissum*, estoppel with the *exceptio doli*, anticipatory repudiation with contractual *bona fides* etcetera. It is harmonisation in *optima forma*.


\(^{27}\) D 1 1 7 1 (Papinianus libro secundo definitionum): “*Ius praetorium est, quod praetores introduserunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. quod et honorarium dicitur ad honorem praetorum sic nominatum.*”
Is the reverse possible? Can English law be corrected by Roman-Dutch law? Is it possible to say: “The consistent practice of the South African courts rests on a wrong interpretation of Roman-Dutch law and has to be changed?” The relation between court decision and doctrine was hotly debated in Germany at the end of the nineteenth century. Roman law was still the *ius commune* of large parts of Germany. Between the Pandectists a fundamental dispute arose about the legal status of a consistent practice (*Gerichtsgebrauch*), based on a wrong interpretation of the law. Bernard Windscheid maintained that such a line of decisions had to be corrected as soon as possible. It could never become valid law because this practice of the court was in fact a wrong custom that could not develop into customary law. Customary law is based on a prolonged usage, *diuturnus usus*, and the opinion that this usage is not erroneous but true and necessary, *opinio necessitatis*. A wrong court practice can therefore never constitute customary law because the *opinio necessitatis* fails. In contrast Heinrich Dernburg saw the *Gerichtsgebrauch*, the practice of the court, as an independent legal source and not as a custom. He based his opinion on the rescript of Severus28 and especially on the word *aut* (*consuetudo aut rerum perpetuo similiter iudicatarum auctoritas*). Being an independent source of law, Dernburg said, an erroneous practice could as such obtain validity but was not to be invoked in analogical cases. Dernburg referred to Celsus who held the same opinion:

> What is introduced on an irrational ground but adhered to first in error and thereafter by custom does not hold good in analogical cases.29

With the help of this rule Dernburg saw a way of correcting the judicial practice. I do not know whether it was ever invoked in South Africa. In a decision of the Appellate Division in 198830 it appears that a consistent practice in the South African courts meant that a possibly false perception of the Roman-Dutch law should not be corrected.31 This brings me to my conclusion.

For centuries harmonisation was practised by legal scholars who helped to shape the *ius commune*. In the early Middle Ages nearly all of them were

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28 In cases of ambiguity arising from the laws, force of law ought to be attributed to custom or to the authority of an unbroken line of similar judicial decisions: *D 1 3 38* (Callistratus libro quaestionum): “Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere.” Cf n 19.

29 *D 1 3 39* (Celsus libro XXIII digestorum): “Quod non ratione introductum, sed errore primum, deinde consuetudine optentum est, in alius similibus non optinet.”

30 *Horowitz v Brock* 1988 (2) SA 160 (A).

31 Zimmermann & Visser (n 26) at 44 n 71.
teachers at the newly-founded universities. Harmonisation was part of the teaching programme, it seems, and the voluminous writings were the result of the lessons these teachers gave. In seventeenth-century Holland many of the writers were legal practitioners, advocates, municipal clerks, magistrates and judges. They gave Roman-Dutch law that flexible and practical character for which it is famous. It was a mixture of common and indigenous law. It was law in action according to Reinhard Zimmermann:

Das römisch-holländische Recht war eben nicht abstraktes Professorenrecht, sondern weithin eine jurisprudentia forensis.32

Nevertheless Roman-Dutch law was shaped by the theoretical and learned works of the lawyers, not by the unmotivated decisions of the courts. As we said, Bijnkershoek and Pauw wrote their Observations as private persons and for private purposes.

Roman-Dutch law was transplanted to the Cape of Good Hope in the years following 1652. Judgments from this period obtained their authority through their incorporation into the works of the legal writers. The arrival of the English and the introduction of English law changed the legal situation dramatically. English law with its reasoning from case to case was a new source of law alongside Roman-Dutch law which officially remained the common law of the Cape Colony. The two streams mingled and mixed and became the mighty river of South African law strengthened by a third source, indigenous African law. Until this day the systems are in a constant flux. The judges in their English tradition introduced the doctrine of precedent and referred to Roman-Dutch law if and when they chose to do so. In doing so they made the use of Roman-Dutch law dependant on the choice of the judge. In this way much of Roman-Dutch law is incorporated into the anglicised system in the form of a precedent. It is an interesting question whether those parts of Roman-Dutch law to which no reference is ever made in the courts belong to the valid law of South Africa. Is it still valid although dormant law, or is it no longer in use? To put it more provocingly: do we need a modern Groenewegen van der Made?

Although judges create and shape the law of South Africa, the task of legal writers is at least as prominent as that of the courts. They are the custodians of the civilian tradition of whom Pomponius says33 iuris civilis scientiam plurimi et

33 D 1 2 2 35 (Pomponius libro singulari enchiridi): “Iuris civilis scientiam plurimi et maximi viri professi sunt.”
maximi viri professi sunt. Through harmonisation of the court decisions and the existing law books they must maintain the high level of South African law in which, in the words of Robert Lee,\textsuperscript{34} the best elements of Roman and English law – and I must add today indigenous African law – are welded together in an harmonious and indissoluble union.

\textsuperscript{34} Lee An Introduction to Roman-Dutch Law (1931) 26.