

EDITORIAL

Because the distance in time to the Roman past is long and the ties that bound South Africa to the Netherlands have long since fallen away, the term "Roman-Dutch Law" may have an antiquarian sound. The non-initiated might therefore be tempted to think that South African Roman-Dutch Law - most comprehensive in important areas of private law - is a relic from the past that will have difficulty surviving in the New South Africa.

Nothing is further from the truth. The proven merit of Roman-Dutch Law is such that South Africa's neighbours Botswana, Lesotho, Swaziland, Zimbabwe and Namibia, have retained it after independence. A few years ago an international conference hosted by Lesotho on the question of retaining Roman-Dutch Law in South Africa, concluded that its retention was far preferable to discarding it for another system. One of the participants, Prof. Weeramantry of Sri Lanka, described Roman-Dutch Law as "an eminently malleable system capable of adaptation to the needs of a variety of people living under its umbrella".¹

In a key-note lecture at the 18th Biennial Conference of the South African Classical Association² Prof. H.J. Erasmus of the Law Faculty of the University of Stellenbosch also defended the merits of Roman-Dutch Law as practised in South Africa.

Roman-Dutch Law is really a misnomer. Roman Law was for centuries, from the 13th century onwards, the common law of Western Europe and Roman-Dutch Law therefore "sweeps into its system all the legal learning accumulated by the great Italian, French and German jurists".³

Prof. Erasmus therefore warned against an "antiquarian" attitude of interpreting the common law of South Africa strictly as the old law of the Province of Holland. One of the major benefits of the Roman-Dutch tradition in South Africa is its lack of restrictive codification which enables it to draw upon English law and all other Western law, which to a major extent evolved from the same Roman source. South African law is therefore a system "untrammelled by authority" and "unrestricted in the sources upon which it draws".⁴

As Prof. Erasmus stated: "... not Roman-Dutch Law *stricto sensu* but rather the European *ius commune* should be regarded as the common law of South Africa. This (will) enable our courts to exploit fully and without inhibition the richness of the sources of the legal system which is our heritage".⁵

A.V. van Stekelenburg

1 C.G. Weeramantry, *The constitutional reconstruction of South Africa: Some essential safeguards*, 1987, 3 *Lesotho Law Journal* 1 at 35.

2 Published in the *South African Law Journal* vol. 106, part 4, Nov. 1989, 666ff.

3 Sir J.J. Wessels, *S.A.L.J.* 265 (1920) at 267.

4 R.W. Lee, Roman-Dutch Law in South Africa 41 *S.A.L.J.* 297 (1924) at 303.

5 H.J. Erasmus, *o.c.* at 676.