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Some Remarks on Dutch Private Law and the *Ius Commune*

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1. Introduction

Tradition, like possession, is nine-tenths of the law. Law must be based on tradition; otherwise it is not law. Law that is changing every day is arbitrary. Certainty and predictability are important aspects of law. I could go on and on giving you truths like this, but I trust you will not need this kind of persuasion.

The invitation to contribute to the XVIIth International Congress of Comparative Law on the topic of ‘National Legal Traditions and Historical Backgrounds’ was for me a very welcome one. For it would provide me with the opportunity to state that there is no independent Dutch Legal Tradition as far as private law is concerned, but there is a common Dutch tradition, which in turn is part of larger European common legal tradition.

Before enlarging upon this theme I have to confess myself to a few limitations which I have taken the liberty to bring to the subject. I will be writing only about private law, because that is the only field of law I pretend to know anything about. But I will be doing so the more gladly, because private law is the only field of law with a common tradition on the continent of Europe – or just Europe as the British would say – that goes back beyond a couple of centuries.

This last remark already gives a clue to my thesis of the last but one paragraph. A common tradition there was and is for Dutch private law, but one could hardly call it national. Perhaps one could call it a common national tradition. What do I mean with all this juggling with adjectives and abstract mumbo jumbo? A short survey of Dutch legal history will perhaps be helpful.¹

2. The Common Tradition

The modern Dutch state goes back to 1813. Perhaps I should say 1798, because with modern I mean a unified Dutch state. In 1798 the Batavian Republic became a unified state. It was followed by the Kingdom Holland of 1806 under Louis Napoleon – yes,

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¹ I have tried to confine myself to refer to literature in English as much as possible.

the brother of. And finally in 1813 the still existing Kingdom of the Netherlands was founded after the French influence on Dutch constitutional affairs was ended.

Before 1798 there was no unified Dutch state. There was the Dutch Republic as it is usually called, which existed until 1795, when the Batavian Republic was founded. Unification took three years, and a kind of revolution, to come to the Batavian Republic. Under the Dutch Republic there were seven or eight sovereign powers, the Dutch Provinces, with each its own legal system, if one dares to use this term before the nineteenth century. The Utrecht Union of 1579 founded the Dutch Republic. Seven Provinces signed the Union at that time. The eighth, Drenthe, was late and always made to feel that.²

The Union was a treaty between the seven Provinces which made their defence and foreign affairs a common task. The States General were to be entrusted with these tasks and the daily affairs were run by the Council of State. All other government business remained within the competence of the States Provincial. Each one of them was sovereign and so the law was a Provincial matter. So there was no unified Dutch nation before 1798, no single Dutch law, and no single national Dutch legal tradition. But there was a common element in the law of the Dutch Provinces, an element common not only in the Dutch Republic but in the rest of Europe – in the British sense – as well. It was, of course, the *ius commune*, the Roman-canon law which was used as a subsidiary source of law.³

Everywhere on the continent of Europe there was a mix of primary local law and subsidiary law. This meant that the *ius commune* applied only to the extent that there was no local law. So there was no general *ius commune* in the sense that it applied everywhere to the same extent. But there was this common element in every legal system.

Roman-Dutch law for instance was the mixture of the local law of Holland and the Roman law as applied in Holland.⁴ The use of ‘Dutch’ here is a bit confusing, because it does not mean the Dutch Republic as a whole, but only Holland. Roman-Dutch law has become, however, so common a term, that I will continue to use it. Roman-Frisian law, to name another example, was the mixture of the local law of Friesland and the Roman law as applied in Friesland.⁵ Etcetera, etcetera. Local laws were of course diverse in the various Dutch Provinces, but their common tradition came from the *ius commune*.

Legal unification came to the Netherlands in 1809. The Kingdom Holland as it was then called got its own private law code, entitled the Code Napoleon arranged for the Kingdom Holland. As its title suggests this was a version of the French Code Napoleon, with some adaptations importing Dutch law. This brought Dutch law into the French tradition of the *ius commune*, because this tradition was the main source of the Code Napoleon. In 1811 the Code Napoleon in its original form was introduced into what had become a Dutch part of the French Empire. After the departure of the French in 1813 the Code civil as it was now once again called remained in force as long as it was not replaced by a Dutch code.

The Kingdom of the Netherlands came into existence in 1813 and got its first constitution in 1814. King Willem I wanted to replace the Code civil with a national Dutch civil code. He gave instructions to Joan Melchior Kemper to prepare such a

² Cf. on the history of the Dutch Republic e.g. Israel 1995.

³ Cf. e.g. Zimmermann 1990.

⁴ Cf. Feenstra & Zimmermann 1992.

⁵ Cf. Lokin, Jansen & Brandsma 2003.

code which had to be based on the Dutch national tradition instead of the French. Kemper's difficulty, however, was that no single Dutch legal tradition existed, as I explained above. Kemper chose to incorporate mainly the tradition of the Roman-Dutch law, the law of Holland. Kemper was professor at Leiden University. He was trained in the Roman-Dutch law, and, moreover, the Roman-Dutch law had always been the most important and influential law in the Dutch Republic, with the Roman-Frisian law coming in second place, if sports terms are allowed in this context. In 1816 his project was debated in the Dutch Parliament, but a majority of the members opposed. The main reason for the rejection of Kemper's project was to be found in the incorporation of Belgium into the Kingdom as decided at the Congress of Vienna. The Belgian representatives were decidedly against Kemper's project, because it was too Dutch to their taste. Moreover, they had been living under the French code since 1804 and were accustomed to it. But not only were the Belgian representatives opposed. Kemper's project was much too scholarly and extensive to the taste of a lot of representatives. It tasted too much of the musty room of the law professor. The king, however, would not give in and so Kemper tried his luck once again. His second project of 1820 was blocked as well. So much for the attempt to create a national Dutch legal code.

After the failed attempts of Kemper the Dutch Parliament went on to create a civil code by itself. The Belgian representative Nicolai of Liège was one of the main inspirators of this code. His influence led to a code based on the French code with, once again, a few adaptations importing Dutch law. In 1830 the new code should have been brought into force, were it not for the Belgian Revolution which eventually led to the separation of both parts of the kingdom and the establishment of the Belgian Kingdom. The new code was not abandoned, however. It took a couple of years to make a few cosmetic changes to make it more 'northern', but in essence the code of Nicolai became the Dutch Civil Code in 1838.

So since 1809 the French tradition of the *ius commune* had become part of the Dutch law. The situation remained like that in essence until 1992. In 1992 the main part of the Dutch private law, the law of obligations and the law of property and inheritance, was renewed by the introduction of a new Civil Code. For nearly fifty years this code had been in preparation. Professor Meijers had been given the task of recodification in 1947. He and his successors took into account for their project other civil codes as well.

In the course of the nineteenth century the German Historical School and its scholarly teachings of the *ius commune* then still prevailing in Germany became influential also in the Netherlands. Some of the theses of the so-called Pandectists were discussed in the Dutch legal doctrine and so filtered through via the courts and their interpretation of the civil code into Dutch legal practice. Just to mention one very influential doctrine: the legal act. So the German tradition of the *ius commune* mingled with the French tradition and produced a Dutch version, eventually in the shape of the new code.

But what about the old Roman-Dutch law tradition? Did the country of Grotius, Van Bynkershoek, Voet, Vinnius and Huber, just to mention a few illustrious names of the seventeenth and eighteenth century, forget its own legal heritage? Not quite. The discussions in the Dutch legal doctrine almost always took into account this strand of the tradition of the *ius commune* as well. This did not always lead to the adoption of the Roman-Dutch doctrine to the subject under discussion. The code of course had a French background, and so, if the two traditions were too far apart, the French tradition prevailed.

3. Roman-Dutch Law and Third-party Enrichment

For instance in the famous case of *Quint v Te Poel* the question was whether in Dutch law an action existed in the case of unjust enrichment.⁶ The case was quite simple, but the question involved was a difficult one. Quint had built a house on the instructions of Hubertus te Poel. When the house was finished Quint discovered that the ground on which he had built the house was not the property of Hubertus, but of his brother Heinrich te Poel. So when Hubertus refused to pay the bill Quint decided to sue Heinrich. He claimed Heinrich was enriched at his cost without any justification. The old Civil code, however, did not contain a general action for unjust enrichment. Specific instances of unjust enrichment were dealt with, but a general action was lacking.

Quint referred to Grotius in order to establish such a general action.⁷ He claimed that this action was part of the Roman-Dutch law and had survived the old Civil code. The action would still be available, although the code did not mention it specifically. The Dutch Supreme Court did not deny categorically that such an action did exist. Instead it gave as its opinion that in the abstract there could be instances where an obligation did exist even though it was not to be found specifically in any article of the code. Such obligations could exist where they fitted into the system of the code and were in line with cases which were provided for. In this instance, however, the court had objections to grant an action. The first objection was that granting such an action in this case could allow people to sue for enrichments which they had forced upon another person. Quint could have checked who the property belonged to before he started building. The second objection was that such actions could circumvent the laws of bankruptcy and that such a course of action should be granted by the legislature instead of the judicial branch.⁸

What the court did not say, but what subsequent research showed, was that Roman-Dutch law was not as clearly in support of granting the action in this case as the sole reference to the general remarks of Grotius implied.⁹ The case was a specific one in that it was a case of third-party enrichment. Whereas most enrichment cases are about enrichment flowing directly from one party to another, here the enrichment was of someone other than the one to whom the party providing the enrichment was performing. Cases like this were called 'the most notoriously difficult of all enrichment constellations'. They came from 'the dreaded third-party enrichment jungle'.¹⁰ The question whether an action should be given in cases like this was already in the *ius commune* 'a problem that haunted the doctors'.¹¹

In the Roman-Dutch law opinion differed as to the desirability of acknowledging an action in cases like this. Gerard Noodt for instance concluded that the party performing could sue the party with whom he had contracted. The last one had acted on behalf of the third party and should try to be reimbursed by him.¹² The Frisian author Ulric Huber, on the other hand, was in favour of admitting the action called

⁶ HR (Dutch Supreme Court) 30 January 1959, *NJ (Nederlandse Jurisprudentie = Dutch Case Law)* 1959, 548.

⁷ Grotius (transl. by R.W. Lee, Oxford 1926).

⁸ Cf. Schrage 1995, p. 323 et seq.

⁹ For a detailed discussion of this and other questions involved in this case see Brandsma 1994, p. 251-271, which is, however, as you might have guessed, in Dutch. Cf. Feenstra 1995, p. 197 et seq.

¹⁰ Zimmermann 1990, p. 874 and 892, no. 360.

¹¹ Dawson 1951, p. 67, no. 119.

¹² *Opera omnia*, t. II, Leiden 1724, ad D. 15,3.

actio de in rem verso utilis.¹³ Apart from Grotius he cited contemporary customs, *moribus hodiernis*, which would allow a person to sue a third party who was enriched by a contract the first person had made with someone else.¹⁴

So, one could argue that the Quint-Te Poel decision was in line with the Roman-Dutch tradition, which was suspicious of allowing third-party enrichment actions, whereas the general two-party enrichment action was part of the same law. In accordance with this tradition the new code now has a general enrichment action: art. 6:212 Civil code. Whether third-party enrichment actions are covered by article 6:212 is still a matter of debate.¹⁵ This debate wavers between following the German tradition of disallowing such actions altogether, a tradition which has its roots in nineteenth century Pandectist doctrine, and following the more liberal French tradition, which despite the enrichment-lacuna in the Code civil has embraced the *actio de in rem verso* in a very generous way.¹⁶

4. Roman-Dutch Law and Mitigation of Penalties

Another example of the contribution of the Roman-Dutch tradition to modern Dutch law is to be found in the law concerning penalty-clauses.¹⁷ The English reader will of course immediately object to such a term. Penalty-clauses are not allowed in the common law, clauses containing liquidated damages are.¹⁸ The law on the continent is different. Penalty-clauses are allowed in principle, but the question is whether the amount of the penalty can be reduced by a court if it exceeds the amount of damages which have been suffered in a clearly unreasonable way. There were two strands in the *ius commune* tradition. The one went back to Azo, who gave as his opinion that a penalty once agreed upon could be exacted no matter what the amount, according to Roman law.¹⁹ The other one was taken from canon law. A decretal by Pope Innocent III annulled a penalty and a gloss specified the basis for this decision: the principle of preventing unjust enrichment, which was an application of *aequitas canonica*, canon law equity.²⁰

Canon law influenced secular law. Especially a treatise by Charles Dumoulin, the famous sixteenth century advocate at the Parlement of Paris, was influential in doing so.²¹ Dumoulin emphasized the damage assessment character of such clauses. Pothier

¹³ *Praelectiones juris romani et hodierni* II (Franeker 1700) ad D. 15,3 (p. 520-521) and *Eunomia Romana* (Franeker 1700) ad D. 15,3,1pr. (p. 571-572).

¹⁴ Whether the text he cited in support of his opinion, D. 12,1,32, could be the foundation of such an action is, however, questionable. See Brandsma 1994, p. 263 et seq. The text most commonly cited as founding the *actio de in rem verso utilis* is C. 4,26,7,3. Mention must also be made of a case of the Supreme Court of Holland and Zeeland of 27 July 1707, which, however, seemed to be a case of agency of necessity. Cf. Van Bijkershoek 1926, no. 303. See for a South African case discussing the question on the basis of Roman-Dutch law *Gouws v Jester Pools (Pty.) Ltd.*, 1968 (3) South African Law Reports 563 (Transvaal Provincial Division).

¹⁵ The most recent contribution to the debate is by Gerdes 2005, also only available in Dutch I am afraid, and without the usual summary in a non Dutch language.

¹⁶ Cf. e.g. Zweigert & Kötz 1998, p. 540 et seq. and p. 545 et seq.

¹⁷ Zimmermann 1990, p. 103 et seq.

¹⁸ The leading case is *Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd.* [1914-1915] All E.R. Rep. 739; [1915] A.C. 79.

¹⁹ 'Ego puto poenam conventionalem quantacumque sit posse agi,' in: *Summa Codicis ad C. 7,47i.f.* (e.g. in *Corpus Glossatorum Juris Civilis* II, Turin 1966, p. 284).

²⁰ X. 5,37,9 (Liber Extra) and Gl. Sua. Cf. also Gl. Persolutis.

²¹ *Tractatus de eo quod interest*, nrs 159-171 (Opera, Paris 1612, t. 2, col. 906ff.). Cf. Fliniaux 1929, p. 233-247.

was influenced by Dumoulin,²² but nevertheless the Code civil chose Azo's Roman law solution.²³ Freedom of contract was the main reason to do so. The old Dutch Code of 1838 was entirely based on the French Civil Code in this respect.²⁴

Roman-Dutch law, however, allowed penalties to be mitigated.²⁵ Voet, for instance, referred to *moribus hodiernis*, contemporary customs, which had given the courts the authority to mitigate penalties, although Roman law allowed unrestricted penalties.²⁶ Van Bijnkershoek sought to base the restrictions on penalties on Justinian's Code 7,47, which restricted damages in general to twice the value of the performance to be made.²⁷ The Supreme Court of Holland, Zeeland and West-Friesland concurred.²⁸ A French connection is to be found in Groenewegen who refers to decisions of the Parlement of Paris.²⁹

The New Dutch Civil Code returned to the tradition of Roman-Dutch law, which was the tradition of the French *ius commune* as well.³⁰ In the parliamentary history of article 6:94 reference is made to Pothier to motivate the authority of the courts to mitigate excessive penalties. The Dutch courts had already begun to anticipate the New Code in the eighties of the twentieth century and started to mitigate excessive penalties.³¹

5. Roman-Guelders Law, Canon Law and Frustration

The canon law component of the *ius commune* tradition was at work in the field of frustration as well. If a change of circumstances which was not contemplated by the parties made the discharge of a contract unreasonably burdensome for one of them Roman law did not provide him with a remedy. A gloss to Gratian's *Decretum*, however, introduced the implied condition 'if the circumstances will remain the same' into the law of oaths.³² This became known as the implied condition *rebus sic stantibus*.³³ The roots of this implied condition are to be found in Seneca and Cicero, who gave as their opinion that someone was sometimes not morally bound to fulfil his promise if a change of circumstances occurred.³⁴ The civil law followed track through Bartolus and broadened its scope through Baldus and Jason de Mayno even beyond the boundaries of the law of contracts.³⁵

Roman-Dutch law, however, does not seem to have applied the *clausula rebus sic stantibus*. The only ones who write about it are Grotius, Van Bijnkershoek and a

²² Traité des Obligations, nr 346 (Œuvres, Paris 1805).

²³ Cf. De Maleville 1807, ad s. 1152 and 1231.

²⁴ S. 1285 and 1345.

²⁵ De Wet 1979, p. 63 et seq and 206; Wessels 1951, § 3367 et seq.

²⁶ Commentarius ad Pandectas, The Hague 1731, D. 45,1 nr 12i.f.

²⁷ Quaestiones Juris Privati (in: Opera Omnia, Leiden 1767, t. II) 2,14. Van der Keessel 1961ff, 3,1,43.

²⁸ Van Bijnkershoek 1926ff., nrs 2558 and 3230 (and his Quaestiones Juris Privati, l.c.).

²⁹ Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus, Amsterdam 1669, ad C. 7,47 nr 10.

³⁰ Cf. Schelhaas 2004 (with a summary in English); Brandsma 2000 (Dutch only).

³¹ The Belgian courts had started to do so already. The Code civil was altered in this respect in France (Laws of 9 July 1975 and 11 October 1985) as well as in Belgium.

³² Gl. Furens ad C. 22,9,2,c. 14: *Ergo semper subintelligitur haec conditio si res in eodem statu manserit...* (*Decretum Gratiani... cum glossis*, ed. Turin 1620, col. 1258.) The gloss refers to D. 46,3,38pr. for the wording of the clause.

³³ Cf. Feenstra 1974, p. 77 et seq., who doubts whether the glossator, Johannes Teutonicus was the first to formulate the doctrine like this (p. 82). See also Zimmermann 1990, p. 579 et seq.

³⁴ Seneca, *De beneficiis*, 4,35,2-3; 4,39,4; Cicero, *De officiis*, 1,10,31-32; 3,25,94-95.

³⁵ Cf. e.g. Rummel 1991 (a German title, no doubt).

certain Mr Vink. Grotius and Van Bijkershoek do so only in the context of international law.³⁶ Mr Vink is the only one who favours application of the *clausula* to the law of contracts, but he did so in his thesis of 1803, six years before the abolition of Roman-Dutch law, so he cannot have had a lot of influence on the law of his days.³⁷ No court decisions apply the doctrine in Holland.

A thread of the tradition here is to be found in the law of Guelders, which one could call Roman-Guelders law. A legal opinion of Hendrik Schrassert dated 19 December 1692 gives an application of the *clausula* to the case at hand.³⁸ The opinion has not been noted so far. It is a very isolated instance of application of the doctrine. A thread, but still... Schrassert based himself on Elbertus Leoninus, a sixteenth century law professor in Louvain.³⁹ Leoninus eventually became chancellor of Guelders in 1581, so that is your Guelders connection.

The Old Dutch Civil Code did not know an article on frustration. The courts, however, saw a possibility of applying the doctrine through the article which provided that contracts should be discharged *bona fide*. The new code eventually embraced the doctrine in article 6:258 and picked up the thread of tradition woven in Roman-Guelders law.

In the field of public law the tradition was stronger, as I already indicated. This tradition also remained influential as the Dutch Supreme Court seems to be inclined to apply the doctrine more readily if a government body is one of the contracting parties. A change of policy by such a body can be taken as a change of circumstances which triggers the doctrine of frustration, according to the court.⁴⁰

6. Roman-Frisian Law and Compensation for Lawful Government Action

An example of a tradition which has not yet been transformed into positive law, but which is influencing the current debate is to be found in the so-called Roman-Frisian law. It concerns the discussion about the right to be indemnified for government actions which are in itself lawful. In contemporary Dutch law the basis for indemnification is a rather peculiar one. Because this matter has not been dealt with by the legislature, the courts had to find a solution. They did so by applying the general tort action which Dutch law knows, as do the other continental civil law systems. The problem was of course how to make a tort action the basis of indemnification for lawful actions.

The reasoning ran as follows. The lawful action in itself did not provide the person who suffered the damages as a consequence of the government action with the general tort action. But if the authorities declined to indemnify the victim the government action turned into an illegal action. The result was that the victim could claim damages if the authorities did not pay for actions which were in itself lawful. This was a tort which existed only in not paying for lawful actions. A tort which may be committed if one pays. Circular reasoning at its best, I would say.

Dutch legal doctrine still debates this rather odd solution, but Dutch legal practice has coped with the problem in a practical way. The victim gets indemnification.

³⁶ Grotius, *De iure belli ac pacis* 2,16,25,2; Van Bijkershoek, *Quaestiones juris Publici*, lib. II, cap. X.

³⁷ Vink 1803.

³⁸ Schrassert 1740 ff., vol. 4, cons. 21. Cf. e.g. Roberts 1942, p. 281 et seq.

³⁹ Schrassert 1584, cons. 21.

⁴⁰ HR 23 June 1989, *NJ* 1991, 673 and 1996, 3. Cf. on this subject in general Brandsma 1999, p. 9.

The Court of Friesland already solved this riddle in a much more elegant way in 1611.⁴¹ It was a case in which a farm had to be demolished for military purposes. Thanks to the demolition in part Friesland was saved of complete Spanish occupation in 1580, at the beginning of the Dutch Revolt.⁴² But the owner of the farm nevertheless liked to be compensated by the Frisian authorities. He finally got permission to sue the States Provincial in 1611, during the Twelve Years Truce. He based his claim on the Lex Aquilia, which provided the action for unlawful damage to property. The authorities, of course, defended themselves by claiming absolute necessity and public interest.⁴³ Their actions were lawful on these grounds.

The court, however, took the opportunity to reward the plaintiff with compensation on the basis of the so-called Lex Rhodia de iactu, the Rhodian law on the throwing of goods overboard at sea. In the case of what is called general average loss is suffered, because the master of a ship finds himself forced by stormy weather to throw part of the cargo overboard to save the vessel and the rest of the cargo. Under the Lex Rhodia the owner of the cargo which has been sacrificed is awarded the right to spread his loss amongst all those concerned, i.e. the owner of the ship and the owners of the cargo which has been saved. Each one of them, including the owner suffering the loss should contribute to the damage suffered in the interest of all.⁴⁴

In Roman law this law of general average was applied only to damage suffered lawfully at sea. The Gloss, however, commented on D. 14,2,2pr. as follows.

And it should be noted that, if I suffer something for the sake of the common good or in order to prevent another person from suffering loss, I must be able to obtain compensation.⁴⁵

Baldus inferred from this that in case of a fire a neighbour's house could be pulled down to prevent the fire from spreading, but all the neighbours benefitting from this had to contribute in order to compensate the owner suffering the loss.⁴⁶ According to Accursius this could be done through an action based on taking care of the affairs of another person without mandate, *negotiorum gestio*.⁴⁷

This doctrine became the *communis opinio doctorum* and was applied, for instance, by the Reichskammergericht, the Imperial Court of the Holy Roman Empire.⁴⁸ The Court of Friesland chose to follow this *ius commune* tradition.⁴⁹

Roman-Frisian law was bolder in this respect than Roman-Dutch law. Voet rejected the application of the Lex Rhodia to cases on land.⁵⁰ He stated that in the case of the house pulled down the circle of beneficiaries could not be drawn with any kind of certainty – next-door neighbours, the whole street, part of the city, the whole city? – as was possible on board a ship. So the circle of contributors could not be defined. But the case of lawful government action was different as the Court of Friesland decided. The loss was then suffered in the public interest. So the authorities should be

⁴¹ Lokin, Jansen & Brandsma 2003, p. 252 et seq.

⁴² Cf. e.g. Israel 1995, p. 169 et seq.

⁴³ They relied on D. 9,2,45,4, Bartolus and a gloss by Accursius, Gl. Debent, on D. 39,2,31pr.

⁴⁴ D. 14,2,1-2. Cf. Zimmermann 1990, p. 406 et seq.

⁴⁵ Gl. Aequissimum. Et not. quod si quid pro communi utilitate, vel alterius damni patior, quod mihi est restitutio facienda.

⁴⁶ Commentaria, Venice 1586, ad D. 14,2,2.

⁴⁷ Gl. Agere potest.

⁴⁸ Gaill 1690, II, Obs. XXII, nos 4 and 5.

⁴⁹ Van den Sande 1635 etc., 5,7,3.

⁵⁰ Voet 1723, ad D. 14,2 no. 18.

liable. They in their turn, of course, paid with the tax payer's money and so everyone concerned contributed, including the owner suffering the loss.

The significance of this decision was long in doubt. Van den Sande was to blame for this, because he reported a case which seemed to be similar, in which the Court did not grant the plea.⁵¹ This was a decision of 1623 and so it seemed the Court had changed its mind. Ulric Huber concluded that both cases were irreconcilable.⁵² As the archives learned, however, Van den Sande's rendering of the facts of both cases was incomplete.⁵³ The reason to reject the claim in the second case was that the orchard which had been demolished, had been placed under the city walls of Leeuwarden in contravention of a prohibition to construct buildings close to the city walls, a prohibition for obvious military reasons. What Van den Sande did not mention in his report of the first case was that the farm had already been in place before the fortress to prevent the Spaniards from advancing had been built. No blame on the owner in that case. So the ground-breaking decision of the Court of Friesland of 1611 was vindicated. The Dutch Supreme Court still has to follow track. According to one author it already did.⁵⁴ Anyhow, this case is a fine example of the fruitful contribution the *ius commune* tradition in one of its emanations can make to contemporary Dutch law.

7. Conclusion

Other Roman-Frisian traditions could be summed up as well.⁵⁵ But the message will be clear by now I think, so it is time to sum up. The tradition which still influences contemporary Dutch law is not national. Before the codifications there was no national law. There is, however, an interprovincial Dutch legal tradition, as I would like to call it. Of the various Provinces of which the Dutch Republic consisted the law of Holland was, of course, prominent. It has been known as Roman-Dutch law for centuries. Of the other Provinces Friesland came in a good second place. The Frisians even prided themselves in applying Roman law much more undiluted than anywhere else in the Christian world. The remaining Provinces had their own brand of Roman-local law as well.

The unifying element in all this was, of course, the Roman law element. This and the canon law element formed a *ius commune* tradition which influenced not only the Dutch traditions, but also the traditions of the other continental European countries. Starting with the glossators – culminating in the Gloss of Accursius -, followed by the commentators like Bartolus and Baldus, almost each and every possible solution to the legal problems which occur again and again had been tried and tested. Moderated by canon law equity these suggestions were put to practice by the courts, no matter whether the Parlement of Paris, the Imperial Court of the Holy Roman Empire, the Supreme Court of Holland, Zeeland and West-Friesland, or the Court of Friesland was involved.

So the tradition to be stressed is, I am happy to say, not predominantly national in character. It is on a wider scale international, but at least at the Dutch level

⁵¹ Decisiones Frisicae, 5,7,4.

⁵² Praelectiones juris civilis, Franeker 1678 etc., ad D. 9,2, no. 1i.f.

⁵³ Lokin, Jansen & Brandsma 2003, p. 265 et seq.

⁵⁴ Van der Burg 1991, p. 241, concludes that that decision is consistent with the Frisian decision.

⁵⁵ Cf. Lokin, Jansen & Brandsma 2003, p. 268.

⁵⁵ Cf. Lokin, Jansen & Brandsma 2003, passim.

interprovincial. Such traditions are of advantage to every legal system⁵⁶ which is not preoccupied with navel-gazing. One can, of course, imitate an ostrich if one wants to, but a level-headed view may be preferable. Why invent the wheel every time all over again?

The reader will, I hope, not object that I have taken the examples I have given from my own research on the matter. For how could I have done otherwise? They are examples and so the overall picture is as yet incomplete. But the purpose of this contribution was not to be complete – the best way to bore is to say everything, as Voltaire said. The purpose was to show how legal traditions are still helpful in making contributions to contemporary Dutch law.

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⁵⁶ Brandsma 2001, p. 35 et seq.

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