

IN THE SHADOW OF FRANCE. LEGAL  
ACCULTURATION AND LEGAL TRANSPLANTS  
IN THE SOUTHERN NETHERLANDS/BELGIUM

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I. GENERAL OVERVIEW

Belgium currently has a legal system which is still, to a large extent, French due to the annexation by France in 1795 and the subsequent introduction of French revolutionary law and the codes of Napoleon. Thus, in many ways, 1795 marks a watershed, a sudden legal transplant displacing the old law. However, this should not be exaggerated, as already before 1795, French law had been seeping through, so it did not start a new trend, but confirmed, albeit rather abruptly, an existing one.

1. *Pre 1795 law in the Southern Netherlands*

Belgium only became independent in 1830, but it was not a completely new entity. When Charlemagne's great empire broke up, France and Germany arose from the ashes and among these a patchwork of principalities could be found, the most important of them being in the South, Flanders, Brabant, Hainaut, Namur, Liège and Luxemburg and in the North, Holland, Utrecht, and Guelders. From the end of the fourteenth century, French princes, the Dukes of Burgundy, started the unification of these so-called Low Countries, a process which was completed by their Habsburg successors in the sixteenth century (two ecclesiastical principalities, Liège and Stavelot-Malmédy managed to retain their independence), only a few decades before a revolt against the Spanish Habsburgs led to a separation. The North, the United Provinces,

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achieved independence and became also known under the name The Netherlands in the vernacular of the Low Countries, whereas the South remained Spanish and took the Latin name for the Low Countries, Belgium. An experiment of independence with Spanish and Austrian blessing proved to be short-lived and the Southern Low Countries were to remain Habsburg until the French annexation in 1795, though they passed from the Spanish to the Austrian branch in the early eighteenth century.

Although this political background is needed to understand the legal history of Ancien Régime Belgium, its impact in the field of law was limited. Neither the Burgundians, nor their Habsburg successors managed to impose legal unity.<sup>1</sup> During the High Middle Ages law essentially was a local and regional phenomenon and it remained so, as unification had to wait for the French Revolution. Yet, over the centuries, local customary law had changed due to its flexibility. Originally, local customary law may have been just that; local and customary in origin. Later on, however, it came to mean ‘accepted as custom by the local population’, or at least its leading lawyers. Thus, an openness for foreign elements paved the way for legal transplants,<sup>2</sup> because lawyers cared more about getting results than about the purity of their customary law.

1. *The High Middle Ages: the monopoly of local, customary law*

During the High Middle Ages local customary law reigned supreme and the renaissance of Roman law in the Mediterranean did not affect this state of affairs for a long time. The best indications of this are the so-called renunciations of Roman law, by which a party gave up the rights Roman law awarded. The earliest appear in the mid thirteenth century and only in charters by clerics, whereas for their appearance in lay charters we have to wait until the end of that century. Moreover, Roman law is only mentioned because it is to be rejected.<sup>3</sup> Nevertheless, the renunciations are a first step towards legal acculturation, as people became aware that there was another important body of law which could no longer be ignored. The agents of this change were churchmen, but accounts of the reception of learned law tend to underplay the fact that it was composed of two elements, Roman and Romano-canonical law, and

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<sup>1</sup> Heirbaut, D., “The Belgian legal tradition: does it exist?”, in: Bocken, H. en De Bondt, W. (ed.), *Introduction to Belgian law*, Brussels, Kluwer, 2001 (2000), pp. 1-3.

<sup>2</sup> Cf. Krynen, J., “Voluntas domini regis in suo regno facit ius. Le roi de France et la coutume”, *El dret comú i Catalunya*, VII, 1998, pp. 59-89.

<sup>3</sup> Gilissen, J., “L’apparition des renonciations aux exceptions de droit romain dans le droit flamand au XIII<sup>e</sup> siècle”, in: *Mélanges Fernand De Visscher*, III, Brussels, Office international de librairie, 1950, pp. 514-550.

that the latter already took hold in the thirteenth century with the officialities, bishop's courts with a university trained judge,<sup>4</sup> and even some influences on legal practice, like the reappearance of the testament.<sup>5</sup>

With this exception, the supremacy of indigenous law was uncontested. Yet, legal transplants and legal assimilation took place, though on a smaller scale. The Southern Low Countries had hundreds of customary legal systems and, nevertheless, some clusters of customs can be found. Unfortunately, they may vary depending upon the legal rule one studies and no final explanation can yet be given for how they came to be.<sup>6</sup> A few mechanisms can be indicated. For example, a prince could grant a privilege to a city and award it the law of another more developed place. For example, in Brabant the duke gave his newly founded city of 's Hertogenbosch (the Dutch name, the duke's forest, indicating its infancy at the time) the law of Leuven and from there it would spread all over the Northern Low Countries.<sup>7</sup> In cases like these, it was common for the court of the 'daughter-city' to ask the advice of its mother, its head, but other lesser courts did this too. At first, this was a loose affair, courts being free to chose their head, but by the early thirteenth century this had become more organised and the lower courts had turned into subordinate courts, which had to follow their head's opinion.<sup>8</sup> A third mechanism of unification were the legal experts of the customary law courts, its presidents, bailiffs, spokesmen (the spokesman was the person who by answering the president's questions formulated the decision of the court) and so on, who were most of the time active in more than one court.<sup>9</sup> All these mechanisms appeared in a haphazard way, driven by

<sup>4</sup> Van Melkebeck, M. *De officialiteit van Doornik: oorsprong en vroege ontwikkeling (1192-1300)*, Brussels, Academy, 1985.

<sup>5</sup> Godding, P. "La pratique testamentaire en Flandre au 13<sup>e</sup> siècle", *Legal history review/Tijdschrift voor rechtsgeschiedenis*, LVIII, 1990, pp. 281-300. See also from the same author, "Le testament princier dans les Pays-Bas méridionaux (12<sup>e</sup>-15<sup>e</sup> siècles): acte privé et instrument politique", *Legal history review/Tijdschrift voor rechtsgeschiedenis*, LXI, 1993, pp. 217-235; "Dans quelle mesure pouvait-on disposer de ses biens par testament dans les anciens Pays-Bas méridionaux", *Legal history review/Tijdschrift voor rechtsgeschiedenis*, 1982, pp. 279-296; "L'acte à cause de mort dans les Pays-Bas méridionaux (XI<sup>e</sup>-XVIII<sup>e</sup> s.)", in: *Actes à cause de mort*, II, *Recueils de la société Jean Bodin*, LX, 1993, pp. 161-176.

<sup>6</sup> Godding, P., "Peut-on déceler un droit commun dans l'histoire du droit privé belge?", *Sartonia*, XVI, 2003, pp. 125-156; Godding, P., "Peut-on parler d'un droit privé «belge» avant 1830?", *Académie royale de Belgique. Bulletin de la Classe des lettres et des sciences morales et politiques*, 5th series, LXX, 1984, pp. 262-281.

<sup>7</sup> See e.g. Hoogwerf, C. L., *Het Haarlemse stadsrecht (1245)*, Amsterdam, Cabeljauwipers, 2001, pp. 3-5.

<sup>8</sup> Van Caenegem, R., *Geschiedenis van het strafprocesrecht in Vlaanderen van de XI<sup>e</sup> eeuw tot de XIV<sup>e</sup> eeuw*, Brussels, Academy, 1956, pp. 301-314.

<sup>9</sup> Heirbaut, D., "Who were the makers of customary law in medieval Europe? Some answers based on sources about the spokesmen of Flemish feudal courts, *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXXV, 2007, pp. 257-274.

circumstances, not by any great design. Consequently, it could also, though exceptionally, happen that a customary legal system fragmented. Thus, in the county of Flanders the once unitary feudal law fell apart at the end of the thirteenth century.<sup>10</sup>

2. *The late middle ages: indigenous law meets Rome by way of France and is not impressed*

From the last decades of the thirteenth century specialists of customary law started to write down their law, but, at first, these texts show no traces of Roman law. One can, of course, remark that the idea of writing down law is in itself stimulated by the influence of learned law and its lawyers,<sup>11</sup> but that would be giving too much credit to these earliest ‘documents’. In their original form they consisted of notes taken in court on slips of parchment and kept together in a bag.<sup>12</sup> As such, they reflect the spread of writing, not of learned law. They are too clumsy to be more than that. However, out of these humble origins arose in the fourteenth century more elaborate texts and those were indeed inspired by the example of Roman law.<sup>13</sup> It is also in this century that books of learned law become more numerous in libraries.<sup>14</sup>

The factors which contributed to the rise of Roman law were diverse. Its first carriers were the already mentioned officialities and their judges, but the real breakthrough was due to other university trained lawyers, the legists. From the fourteenth century onwards, hundreds of them appear in the Southern Netherlands and they infiltrate from the top down. They first appeared in the newly established central courts, the councils of justice.<sup>15</sup> Lower courts were not staffed by university trained

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<sup>10</sup> Heirbaut, D., *Over heren, vazallen en graven. Het persoonlijk leenrecht in Vlaanderen, ca. 1000-1305*, Brussels, General archives of the kingdom, 1997, pp. 41 and 42; Heirbaut, D., *Over lenen en families. Het zakelijk leenrecht in Vlaanderen, ca. 1000-1305. Een studie over de vroegste geschiedenis van het leenrecht in het graafschap Vlaanderen*, Brussels, Academy, 2000, pp. 84-87.

<sup>11</sup> Cf. Gilissen, J., “Romeins recht en inheems gewoonterecht in de Zuidelijke Nederlanden (XIIIe-XVIe eeuw)”, *Tydskrif vir hedendaagse Romeins-Hollandse reg.*, I, 1937, p. 111.

<sup>12</sup> Heirbaut, D., “The oldest part of the Lois des pers dou castel de Lille (1283-1308/1314) and the infancy of case law and law reporting on the continent”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXXV, 2007, pp. 139-152. See also D. Heirbaut, “The precursors of the earliest law reports on the continent as sources about the spokesmen, the forgotten makers of customary law” (forthcoming).

<sup>13</sup> Gilissen, “Romeins recht”, *op. cit.*, p. 111.

<sup>14</sup> Van Caenegem, R., “Ouvrages de droit romain dans les catalogues des anciens Pays-Bas méridionaux (XIIIe-XVIe siècles)”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, XXVIII, 1960, 309.

<sup>15</sup> Van Caenegem, R. *Le droit romain en Belgique* (Ius romanum medii aevi, V/5/b), Milan, 1966, pp. 9-13; Gilissen, J., “Les légistes en Flandre aux XIIIe et XIVe siècles”, *Bulletin de*

lawyers, but the major cities hired them to advise these courts.<sup>16</sup> Notaries public contributed less to the diffusion of Roman law. The first were Italians appearing at the end of the thirteenth century, but there was not a real need for them, given that parties preferred to go to a court of customary law (composed of vassals or aldermen) to have it record their agreements.<sup>17</sup>

As this shows, even in the late middle ages, the impact of Roman law remained limited. Actual legal transplants of substantive law, like the doctrine of *laesio enormis*, are rare.<sup>18</sup> Moreover, these Roman law rules served to plug the gaps in customary law and to strengthen its existing principles.<sup>19</sup> For that however, learned law had to compete with other mechanisms. A court could ask its head's advice or it could have a point of law established by an 'inquest by *turba*' (an inquiry amongst the local senior specialists of law).<sup>20</sup> Roman law, however, influenced, certainly in the highest courts, the procedure<sup>21</sup> and, more in general, the mental framework of the university trained lawyers at the top. For the rank and file, not that much changed. For example, there was no romanization of legal terminology until the end of the fifteenth century.<sup>22</sup> In short, legal transplants were exceptional and even legal acculturation remained limited.

In fact, the focus on the influence of Roman law obscures the role of France. True, the most influential learned author was Bartolus, an Italian,<sup>23</sup> but the real guide seems to have been France. In a larger context the Southern Low Countries were together with Northern

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*la commission royale pour la publication des anciennes lois et ordonnances de la Belgique*, XV, 1939, pp. 117-231. See also below.

<sup>16</sup> Van Caenegem, *Droit romain*, *op. cit.*, pp. 13-16.

<sup>17</sup> For the first notaries in Flanders, see Murray, J. "The profession of notary public in medieval Flanders", *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXI, 1993, pp. 3-31; Murray J. and Schmidt, P., "Notaries public in Flanders", *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXI, 1993, pp. 53-64.

<sup>18</sup> Godding, P., "La réception sélective du droit romano-canonique par la pratique coutumière: le cas des Pays-Bas méridionaux", *El dret comú i Catalunya*, III, 1993, pp. 102 and 103.

<sup>19</sup> Godding, "Réception sélective", *op. cit.*, p. 103.

<sup>20</sup> Douxchamps-Lefevre, C. and Godding, P., *Enquêtes par turbe du Conseil de Namur (1496-1630)*, Brussels, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1972; Monballyu, J., *Turben afgenomen door de Kortrijkse Schepenbank (1485-1581)*, Brussels, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1989.

<sup>21</sup> See for the Council of Brabant, Godding, P., *Le conseil de Brabant sous le règne de Philippe le Bon (1430-1467)*, Brussels, Academy, 1999, pp. 315-464, 469.

<sup>22</sup> Van Caenegem, *Droit romain*, *op. cit.*, pp. 45.

<sup>23</sup> Feenstra, R., "Bartolo dans les Pays-Bas (anciens et modernes)", in: *Bartolo de Sassoferrato. Studi e documenti per il VI centenario*, Milan, 1962, I, pp. 173-281.

France, the so-called lands of customary law, the *pays de droit coutumier* and many new elements were copied from French law, like, for example, the inquest by *turba*.<sup>24</sup> Even for Roman law, the Southern Low Countries followed the lead of France, with the county of Flanders serving as a gateway for French ideas. Unlike the other principalities which belonged to the Empire, Flanders was a French fief (only a small part, Imperial Flanders was held from the emperor).<sup>25</sup> Thus, as soon as his overlord, the French king, started to use Roman law, the count of Flanders had to also, if only to fight fire with fire. Consequently, the first legists and notaries to appear in the Low Countries worked for the Count Guy of Flanders who hired them specifically to counter the French king. For the notaries public this is well-known, as they authenticated the appeals of Guy against his excommunication at the order of Philip IV of France and these documents are referred to in any history of the medieval county of Flanders.<sup>26</sup> The case of the legists is more complicated, because the pioneering study by Gilissen<sup>27</sup> wrongly interpreted the sources. According to Gilissen, Count Guy had from 1279 on legists serving on his council and these were all foreigners. However, none of them ever worked in Flanders itself. Most of them were active in Paris where they defended the count's interests before the *Parlement de Paris*.<sup>28</sup> Only one generation later, under Guy's son Robert, we find legists on the count's council in Flanders.<sup>29</sup> Flanders reacted to France when it turned to Roman law and once Flanders did so, the other principalities eventually followed. Many examples can be given, but the best is, once again, the law of procedure before the highest court. Flanders imitated the *Parlement de Paris* and influenced in its turn the other principalities. However, it is remarkable, once again, that changes in substantive law remained exceptional, even though appeal was possible in Paris against Flemish judgements.<sup>30</sup>

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<sup>24</sup> Cf. Gilissen, J., "Le problème des lacunes du droit dans l'évolution du droit médiéval et moderne", in: C. Perelman (ed.), *Le problème des lacunes en droit*, Brussels, 1968, p. 217.

<sup>25</sup> Heirbaut, D., "Le cadre juridique. Institutions et droit en Flandre vers 1302, in: R. Van Caenegem (ed.), *1302. Le désastre de Courtrai*, Antwerp, Mercatorfonds, 2002, pp. 126-139.

<sup>26</sup> The documents are published in: De Limburg-Stürum, T., *Codex diplomaticus Flandriae. Inde ab anno 1296 ad usque 1325*, Bruges, Emulation, 1879-1889, I, nr. 43, pp. 149-151; nr. 50-53, 163-186; Murray, J., *Notarial instruments in Flanders between 1280 and 1452*, Brussels, Academy, 1995, nr. 2-3, pp. 132-136.

<sup>27</sup> Gilissen, "Légistes", *op. cit.*, pp. 117-231.

<sup>28</sup> Heirbaut, "Cadre juridique", *op. cit.*, pp. 137-139.

<sup>29</sup> There is need of a new study of the first legists in Flanders. Unfortunately, even M. Vandermaesen (*De besluitvorming van het graafschap Vlaanderen tijdens de 14de eeuw. Bijdrage tot een politieke sociologie van de raad en van de raadsheren achter de figuur van Lodewijk II van Nevers 1322-1346*), Bruges, Emulation, 1999, pp. 265-266) only repeats the data from Gilissen.

<sup>30</sup> See Van Caenegem R. and Dauchy, S., *Les arrêts et jugés du parlement de Paris sur appels flamands conservés dans les registres du parlement*, Brussels, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1966-2002, 3 vol.

As well as French royal institutions, the University of Orleans was another intermediary for bringing Roman law to the Netherlands, as it was the most popular university for students from the Southern Low Countries in the fourteenth and fifteenth centuries. The lure of Orleans continued even after the founding of a university in Leuven (in the duchy of Brabant) in 1425,<sup>31</sup> as many students from the Low Countries saw studies in Leuven as a prelude to a diploma from the more prestigious University of Orleans.<sup>32</sup>

### 3. *The early modern era: selective reception of Roman law and the French example*

In the second half of the fifteenth century and even more so in the first half of the sixteenth Roman law made an enormous advance,<sup>33</sup> but once again the main impetus was French. For example, the first author to use Roman law extensively was William van der Tanerijen in 1474-1476.<sup>34</sup> However, his work, although it claims to describe the practice of the Council of Brabant, was too romanized to be useful to practitioners and, therefore, it never became popular at the time. Moreover, van der Tanerijen took his inspiration from a French book, the late fourteenth century *Somme rural* of Jean Boutillier.<sup>35</sup> Even though Boutillier wrote on customary law, he used the terminology of Roman law a lot and referred to it. As he dealt with the law of nearby Northern France, his book was also extremely popular in the Southern Netherlands. It was printed many times in the original French and in the Dutch translation, both languages more accessible to ordinary practitioners than Latin. Through Boutillier, the practitioners in the Southern Netherlands came into contact with the legal grammar of the learned law and they started to adjust their own terminology.<sup>36</sup> In that aspect, his work was continued by a local author, Philippe Wielant, in the first years of the sixteenth century. Wielant

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<sup>31</sup> About the law faculty of Leuven university, see Brants, V., *La faculté de droit de Louvain à travers cinq siècles (étude historique)*, Brussels, Larcier, 1906 (reprinted: Brussels, General archives of the kingdom, 2002); Van Dievoet, G., *Lovanium docet. Geschiedenis van de Leuvense rechtsfaculteit (1425-1914)*, Leuven, Faculty of law. Section of Roman law and legal history, 1988.

<sup>32</sup> Cf. De Ridder-Simoens, H., *De Brabantse leden van de Germaanse natie van de rechtsuniversiteit van Orléans (1444-1555)*, Ghent, 1969, 3 vol. (unpublished doctoral thesis, University of Ghent).

<sup>33</sup> Gilissen, "Romeins recht", *op. cit.*, pp. 122-125; Cf. E. Strubbe, "De receptie in de Vlaamse rechtbanken van midden veertiende tot einde vijftiende eeuw", *Legal history review/tijdschrift voor rechtsgeschiedenis*, XXIX, 1961, pp. 445-462.

<sup>34</sup> Van der Tanerijen, William, *Boec van der lopender practijken der raedtcameren van Brabant*, ed. E. Strubbe, Brussels, C.A.D., 1952, 2 vol.

<sup>35</sup> Van Dievoet, G., *Jehan Boutillier en de Somme rural*, Leuven, Universitaire uitgaven, 1951.

<sup>36</sup> Gilissen, "Romeins recht", pp. 120-122.

brought the strengths of Roman law to the study of customary law.<sup>37</sup> The resulting blend achieved great popularity at home and also European acclaim thanks to a Latin translation by Joos de Damhouder (who presented it as his own original work).<sup>38</sup> The work of these authors and their successors was a mixed blessing for the influence of Roman law. On the one hand it ensured the progress of Roman law, on the other it also made further romanization less necessary.

This was even more true of another French idea, the homologation of customary law, i.e. its official compilation and subsequent promulgation by decree.<sup>39</sup> The Dukes of Burgundy, who were after all French princes, followed the example of the French kings in the Netherlands, but it was mainly their sixteenth and early seventeenth Habsburg successors who were responsible for the homologations.<sup>40</sup> The process of homologation involved the central authorities and, thus, university trained lawyers. Consequently, it is not amazing that they used the occasion to insert Roman law in the official redaction of a customary law.<sup>41</sup> In fact, romanization was stronger when centralisation was at work, as in those cases where local customs were replaced by a single provincial law.<sup>42</sup> Roman law also gained ground because it had a supplementary role, plugging the gaps of customary law.<sup>43</sup> In this, the model was the homologated custom of Burgundy.<sup>44</sup> However, during the sixteenth

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<sup>37</sup> About Wielant, see J. Monballyu, *Filips Wielant. Verzameld werk, I, Corte instructie in materie criminele*, Brussels, Academy, 1995, pp. 7-20.

<sup>38</sup> About de Damhouder, see Monballyu, J. and Dauwe, J., “Joos de Damhouder en zijn “Practycke in civile saecken”, pp. 1-14, in: De Damhouder, J., *Practycke in civile saecken*, Ghent, Tijdschrift voor privaatrecht, 1999 (reprint of The Hague, 1626).

<sup>39</sup> Two recent (and excellent) Ph. D. theses have studied the recording and homologation of customary law and its importance for legal practice in the early modern era, more in particular of the Antwerp customs, Van Hofstraeten, B., *Juridisch humanisme en costumiere acculturatie. Inhouds- en vormbepalende factoren van de Antwerpse Consuetudines compilatae (1608) en het Gelderse Land- en Stadsrecht (1620)*, Maastricht, Universitaire pers, 2008; De Ruyscher, D., *Handel en recht in de Antwerpse rechtbank (16de-17de eeuw)*, Heule, UGA, 2009. For a general survey, the publications by Gilissen have not yet been replaced, but one can hope that the two young scholars mentioned will have a chance to update Gilissen's work.

<sup>40</sup> Gilissen, J., “Les phases de la codification et de l'homologation des coutumes dans les XVII provinces des Pays-Bas”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, XVIII, 1950, pp. 36-67 and 239-2909.

<sup>41</sup> Gilissen, J. “Romeins recht”, *op. cit.*, pp. 123-125, and 135-137.

<sup>42</sup> *Ibidem*, 137-138. See also Gilissen, J., “Efforts d'unification du droit coutumier belge aux XVIe et XVIIe siècles”, in: *Mélanges Georges Smets*, Brussels, Librairie encyclopédique, 1952, pp. 295-317.

<sup>43</sup> Gilissen, J., “A propos de la réception du droit romain dans les provinces méridionales des Pays de par-deçà aux XVIe et XVIIe siècles”, *Revue du Nord*, XL, 1958, pp. 259-271.

<sup>44</sup> Gilissen, J., “Réception”, *op. cit.*, pp. 267 and 268.

century Roman law suffered an “authoritative degradation”,<sup>45</sup> as it became ‘subsubsidiary’ instead of subsidiary. When there was a gap in the local law, jurists had to consult provincial custom, and only if the latter too did not resolve the issue, they could turn to Roman law.<sup>46</sup> This proves that homologation only could bring Pyrrhic victories to Roman law. It expanded its influence, but it also strengthened and enshrined customary law<sup>47</sup> so much that further impact became less likely.

Moreover, the Roman law of authors like Wielant, or of the homologated customs was not really the common law of Europe, but rather its local manifestation. Roman law was only used, if it conformed to local law, or at least did not contradict its principles. Given that Roman law meant those elements of Roman law which the local lawyers were willing to stomach, its meaning varied with the local circumstances.<sup>48</sup> In general, there was a great willingness to assimilate, to apply the legal grammar of Roman law to local law, but not to transplant its institutions. Even if the latter took place, it happened, like in the late middle ages, very selectively. For example, from Roman law the lawyers from the Southern Netherlands did not take the principle that a person can freely dispose of his goods in a testament, but only the limitations of that principle, like the legitimate portion.<sup>49</sup> Roman law was, in general, only welcome if it could strengthen indigenous law, not if it came to weaken it.

This attitude towards Roman law was, strangely enough, also possible because the professors at Leuven University cared little for customary law.<sup>50</sup> From the sixteenth century onwards the Habsburgs awarded a monopoly to Leuven law studies.<sup>51</sup> At the provincial councils of justice even advocates needed to have a Leuven law degree, unless

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<sup>45</sup> This very apt terminology is to be found in Van Hofstraeten, *Acculturation*, *op. cit.*, p. 166, a book which is full of new and very useful terms for any student of the history of legal acculturation and legal transplants.

<sup>46</sup> Gilissen, J., “Réception”, *op. cit.*, pp. 264, 265, 268; Gilissen, “Lacunes”, *op. cit.*, pp. 220-223.

<sup>47</sup> Cf. Godding, P., “Nouveaux itinéraires en droit dans l’espace belge du 12<sup>e</sup> au 18<sup>e</sup> siècle”, in: *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Brussels, Bruylant, 1993, p. 242.

<sup>48</sup> This is very well demonstrated in De Ruysscher, *Handel*, see e.g. pp. 73, 157, 399.

<sup>49</sup> About this selective reception, see Godding, “Réception”, *op. cit.*, pp. 91-103.

<sup>50</sup> Apart from a few of them at the end of the sixteenth and the beginning of the seventeenth century (Godding, P., “La formation des étudiants en droit à Louvain (fin 16<sup>e</sup>-début 17<sup>e</sup> siècle): fait-elle place au droit coutumier et édictal de nos régions”, in: *Liber amicorum Jan Buntinx in de oude Nederlanden tijdens de middeleeuwen en de nieuwe tijd*, Leuven, Universitaire pers, 1981, p. 435.

<sup>51</sup> Cf. Buntinx, J., “Post-graduate onderwijs in de rechten te Gent”, *Archief- en bibliotheekwezen van België*, XLII, 1971, pp. 26-33. There was also a law faculty in Douai.

there were exceptional circumstances.<sup>52</sup> This state of affairs, unfortunately, did not stimulate the Leuven professors to be very active or creative and it is even suggested that the great attachment of practitioners to local law may have been a reaction to the ‘unrealistic training’ they received at the university.<sup>53</sup> This judgement may be too harsh, as the Leuven professors assimilated the advantages of humanism without giving up their interest in solving practical problems.<sup>54</sup> Thus, they mentally prepared future lawyers to assimilate, to treat their own law with the toolbox of Roman law, which also included writing it down in the homologations.<sup>55</sup> Nevertheless, even in the tribunal of the city of Antwerp, on which sat more university trained lawyers than on other local courts,<sup>56</sup> the influence of Leuven remained limited.<sup>57</sup> Another channel for this infiltration of the methodology, rather than the substance of Roman law, was the provincial councils of justice and the highest court of the land, the Great Council of Malines.<sup>58</sup> Given the stagnation of customary law after homologation and the lethargy of the legislator, their importance cannot be overrated.

Much has been made of the differences between the successive schools of Roman law,<sup>59</sup> yet, one should bear in mind that in the Southern Netherlands lawyers were first and foremost pragmatic and traditional.<sup>60</sup> The school to which an author belonged was less important than the availability and usefulness of his work.<sup>61</sup> Even in the sixteenth

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<sup>52</sup> Martyn, G., “De advocatuur in het oude graafschap Vlaanderen”, *Geschiedenis van de advocatuur in de Lage Landen*, in: G. Martyn *et al.* (ed.), Hilversum, Verloren, 2009, pp. 26 and 27.

<sup>53</sup> Van den Broeck, J., *De rechtsleer in de Zuidelijke Nederlanden tijdens de 18de eeuw*, Brussels, Academy, 2001, p. 35.

<sup>54</sup> Van Dievoet, G., *Lovanium docet*, *op. cit.*, p.8.

<sup>55</sup> L. Berkvens, “Imperatoriam maiestatem non solum armis decoratam sed legibus oportet esse armatam... Notes on the influence of Justinian’s Institutes on the codification of customary law in the Southern Netherlands”, in: L. De Ligt (ed.), *Viva vox iuris romani. Essays in honour of Johannes Emil Spruit*, Amsterdam, 2002, pp. 1-7.

<sup>56</sup> De Ruyscher, *Handel*, *op. cit.*, p. 112.

<sup>57</sup> *Ibidem*, p. 399.

<sup>58</sup> Wijffels, A., *Qui milies allegatur. Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460-1580)*, Leyden, Brill, 1985, 2 vol.

<sup>59</sup> Wijffels, A., “Legal records and reports in the Great Council of Malines (15th to 18th centuries)”, *Judicial records, law reports and the growth of case law*, in: J. Baker (ed.), Berlin, 1989, pp. 181-206.

<sup>60</sup> Heirbaut, “Belgian legal tradition”, *op. cit.*, pp. 19 and 20.

<sup>61</sup> Martyn, G., “Het gebruik van rechtsbronnen in het Vlaamse nieuwtijdse contentieux: eerste bevindingen van een verkennend onderzoek in de privaatrechtelijke procesdossiers van de Raad van Vlaanderen”, *De rechtspraak in beeld van Justinianus tot de Duitse bezetting*, in: B. Jacobs (ed.), Tilburg, University press, 1997, pp. 47-55; Martyn, G., “Op zoek naar *usus modernus*. Een steekproef naar het gebruik van de rechtsbronnen in de zeventiende-eeuwse Grote Raad van Mechelen, naar aanleiding van een proces over de uitvoering van het

century this meant that Bartolus and other late medieval authors dominated,<sup>62</sup> because they served practice better, and better alternatives were not available, as it took some time for new authors to be circulated. French works later challenged the supremacy of Bartolus, but, once again, utility determined success.<sup>63</sup> Thus, a greater scholar like Charles Du Moulin may be overshadowed by a lesser, though more useful author.<sup>64</sup> In the eighteenth century legal authors may have had a preference for Dutch literature,<sup>65</sup> but in the courtroom French authors remained important and their influence grew even stronger during the second half of the eighteenth century.<sup>66</sup> Local authors were for a long time less popular,<sup>67</sup> as there were fewer of them<sup>68</sup> and their work had less chances of being printed.<sup>69</sup> During the seventeenth century collections of (annotated) decisions of the highest courts<sup>70</sup> gained in importance, with local case-law competing with French editions.<sup>71</sup> Needless to say, local needs determined what material would be used. The aldermen of the great commercial port of Antwerp, for example, had many cases related to commerce and for them, even in the seventeenth century, Italy was a better guide than France.<sup>72</sup>

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testament van Jeanne de Richardot (1655)”, *Van oud en nieuw recht*, in: D. Heirbaut en D. Lambrecht (ed.), Antwerp, Kluwer, 1998, pp. 241-253.

<sup>62</sup> Wijffels, A. “Mos italicus in der Anwaltspraxis des Grossen Rates zu Mecheln und des Hofes von Holland (ca. 1460-1580)”, *Höchste Gerichtsbarkeit im Spätmittelalter und der frühen Neuzeit*, in: H. De Schepper (ed.), Amsterdam, Faculteit der rechtsgeleerdheid, 1984, pp. 105-121.

<sup>63</sup> Martyn, “Usus modernus”, *op. cit.*, p. 252.

<sup>64</sup> Cf. Van Hofstraeten, *Acculturatie*, *op. cit.*, pp. 178-182 and 371-378.

<sup>65</sup> Van den Broeck, *Rechtsleer*, *op. cit.*, p. 201.

<sup>66</sup> Bosch, J., “Remarques sur quelques influences, exercées en matière de droit, par les provinces méridionales sur les provinces septentrionales des Pays-Bas jusqu’en 1795”, *Legal history review/Tijdschrift voor rechtsgeschiedenis*, XIX, 1951, p. 154.

<sup>67</sup> Martyn, “Usus modernus”, *op. cit.*, p. 252; De Ruyscher, *Handel*, *op. cit.*, p. 399.

<sup>68</sup> Martyn, *Ibidem*, p. 253.

<sup>69</sup> Van den Broeck, *Rechtsleer*, *op. cit.*, pp. 11 and 12. Many of these manuscripts still have to be published. For a recent example of such an edition, see De Ghewiet, G., *Jurisprudence du parlement de Flandre*, S. Dauchy and V. Demars-Sion (ed.), Brussels, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 2008.

<sup>70</sup> About this type of source, see Demars-Sion, V., and Dauchy, S., “A propos d’un ‘recueil d’arrêts inédit: la *Jurisprudence du parlement de Flandre* de Georges de Ghewiet”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXXVII, 2009, pp. 157-189.

<sup>71</sup> De Ruyscher, *Handel*, *op. cit.*, p. 399; Godding, P., “L’origine et l’autorité des recueils de jurisprudence dans les Pays-Bas Méridionaux (XIIIe-XVIIIe siècles)”, in: *Rapports belges au VIIIe congrès international de droit comparé*, Brussels, C.I.D.C., 1970, 33.

<sup>72</sup> De Ruyscher, *Handel*; D. De Ruyscher, “Law merchant in the mould. The transfer and transformation of commercial practices into Antwerp customary law (16th-17th centuries)”, *Rechtstransfer in der Geschichte. Legal transfer in history*, in: V. Duss e.a. (ed.), Munich, Meidenbauer, 2006, 437-441; F. Stevens, “L’influence juridique italienne à Anvers au siècle d’Or (XVIe s.)”, *Revue historique de droit français et étranger*, LXXI, 1993, pp. 345 and 346.

France, the model for homologation and the selective reception of Roman law, was also the great source of inspiration for legislation. However, and most of all in the field of private law, statute law did not take on any real importance before the last decades of the eighteenth century<sup>73</sup> and it was not very original. The great monument of legislation was the 1611 Perpetual Edict, but with its 47 articles it is a meagre imitation of the great French ordinances.<sup>74</sup>

A counterpart to the French influence is the quasi absence of Spain<sup>75</sup> and Austria,<sup>76</sup> the countries in which the princes of the Southern Netherlands lived from the mid sixteenth century. Their law was neglected, whereas France was the shining example. It was, of course, a neighbour; whereas Spain and Austria were far away, but crucially was that they had no willingness to impose their law upon the Southern Netherlands, which left its lawyers more or less free to follow their own inclinations. Customary law was so entrenched in the homologations that any other policy was likely to be unsuccessful anyway. In the eighteenth centuries the Austrians even stimulated the tendency to look to France, a less preordained event than is sometimes thought. The traditional story is that the French Dukes of Burgundy promoted French and that this continued under their successors. The historical reality was not so simple, as French also lost ground in the seventeenth century because Latin was the language for the man of letters, culture and law.<sup>77</sup> Wielant wrote in Dutch (and French),<sup>78</sup> seventeenth century authors in Latin. Although French remained strong as the language of the central administration, the Austrians had no compelling reason for continuing to use it when they became the masters of the Southern Netherlands in 1713. However, whereas French was the language of a minority of the population, it was a language the elites of the Southern Netherlands and Austria shared. Vienna corresponded in French despite resistance in Dutch- (and German) - speaking territories.<sup>79</sup>

The choice for French may have been a good idea at the time, but in the end it proved to be fatal. Local tribunals in Dutch or German-

<sup>73</sup> Gilissen, J., "Essai statistique de législation en Belgique de 1507 à 1794", *Revue du Nord*, XL, 1958, pp. 431-435.

<sup>74</sup> For an analysis, see Martyn, G. *Het Eeuwig Edict van 12 juli 1611, zijn genese en zijn rol in de verschriftelijking van het privaatrecht*, Brussels, General archives of the kingdom, 2000; for a modern reprint, see *Het Eeuwig Edict van 12 juli 1611*, G. Martyn (ed.), Antwerp, Berghmans, 1997.

<sup>75</sup> Cf. Martyn, *Eeuwig edict, op. cit.*, p. 98.

<sup>76</sup> Van den Broeck, *Rechtsleer*, 31.

<sup>77</sup> Willemyns, R., *Het verhaal van het Vlaams. De geschiedenis van het Nederlands in de Zuidelijke Nederlanden*, Antwerp, Standaard, 2003, p. 141.

<sup>78</sup> His *Antiquités de Flandre*, of which S. Dauchy is preparing an edition.

<sup>79</sup> Willemyns, *Vlaams, op. cit.*, pp. 142 and 143.

speaking territories stuck to the regional law, but at the higher levels French was on the rise.<sup>80</sup> From 1750 all written documents at the Great Council of Malines, the highest court in the land, were in French.<sup>81</sup> Legal authors also switched to French<sup>82</sup> and ignored literature in German. Consequently, the great German authors of the Enlightenment and their law, the *Vernunftrecht*, found few sympathizers in the Southern Netherlands. On the other hand, the new ideas had completely won over the Austrian emperor, Joseph II.<sup>83</sup> In line with the *Vernunftrecht* which favoured a top down overhaul of the old law, he wanted to radically change the laws and institutions of the Southern Netherlands, but his complete break with the past could not have come in a place less suited for it. In 1789, the year of the French Revolution, the Southern Netherlands also had a Revolution, to preserve the Ancien Régime, not to destroy it. It was short lived, as already in 1790 the Austrians restored order at the price of their reforms.<sup>84</sup> The experience proved that for an abrupt legal transplant to be successful, it had to be imposed more ruthlessly and take into account that French had become the language of law.

## 2. Post 1795 law in Belgium

### A. The French Revolution and Napoleon: the wholesale and enduring transplant of French law

The French had both the right language and the force of arms to change the law of the Southern Netherlands overnight and they did so in 1795. France annexed the Southern Netherlands and at one swoop the French, in the so-called *Code Merlin*, abolished the many customs of the Southern Netherlands and imposed French law.<sup>85</sup> Under Napoleon the Southern Netherlands were just a part of France and all the great Napoleonic codifications and reforms (judicial organisation (1800)), Civil Code (1804), Code of Civil Procedure (1806), Commercial Code (1807), Code of Criminal Procedure (1808), Penal Code (1810)) automatically came into force there. As such, this is not amazing, given that during the

<sup>80</sup> *Ibidem*, 154-157.

<sup>81</sup> Van den Broeck, *Rechtsleer*, *op. cit.*, 23.

<sup>82</sup> *Ibidem*, 21-23.

<sup>83</sup> *Ibidem*, 23-28, 34.

<sup>84</sup> See about the reforms of Joseph II, Van Hille, P., *De gerechtelijke hervorming van keizer Jozef II*, Tielt, 1972; Warlomont, R., “Les idées modernes de Joseph II sur l’organisation judiciaire dans les Pays-Bas autrichiens”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, XXVII, 1959, pp. 269-289; Dhondt, L., *Verlichte monarchie, Ancien Régime en revolutie: een institutionele en historische procesanalyse van politiek, instellingen en ideologie in de Habsburgse, de Nederlandse en de Vlaamse politieke ruimte (1700/1755-1790)*, Brussels, 2002, vol. 5

<sup>85</sup> Stevens, F. “L’introduction de la législation révolutionnaire en Belgique”, in: *La Révolution et l’ordre juridique privé. Rationalité ou scandale*, Paris, PUF, 1988, II, pp. 485-493.

nineteenth century French law was transplanted all over the world. Belgium, however, is special in that it still is, to a large extent, enchained by French law, whereas almost all other countries have now broken free from it. In fact, Belgium may be even more faithful to its French heritage than France itself. Its judicial organisation is still closer to the Napoleonic model.<sup>86</sup> In 2004, at the commemoration of two hundred years Civil Code, Belgium had preserved more of the original articles than France.<sup>87</sup> It still has the original Napoleonic Code of Criminal Procedure, which is no longer in force in France itself. In short, Belgium may well be Napoleon's most faithful subject.<sup>88</sup>

An observer in 1830, when Belgium became independent, can be forgiven for thinking that the current situation was in his time the most unlikely turn of future events. Several strong arguments pleaded against a long life for the transplant of French law in Belgium: it had been imposed by a military occupation, the country had been united with the Netherlands for the last fifteen years and a new national fervour had caught the people's imagination. It even became enshrined in the constitution which called for new codifications as soon as possible.<sup>89</sup> Yet, the French judicial organisation, the French Civil Code and the Code of Criminal Procedure still stand. In other fields there are new Codes, but they do not really embody the will to break away from France. The 1867 Penal Code followed a French example<sup>90</sup> and the 1967 Judicial Code

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<sup>86</sup> Heirbaut, D. "The Revolution betrayed: the evolution of the judicial system in France, Belgium and the Netherlands since the French Revolution", in: A. Uzelac and C.H. Van Rhee (ed.), *Public and private justice. Dispute resolution in modern societies*, Antwerpen, Intersentia, 2007, 55-85

<sup>87</sup> For the data, see D. Heirbaut, "Statistiques et graphiques des modifications depuis 1807", *Edition cumulative du Code civil. Le texte actuel et l'édition originale avec toutes les modifications en Belgique de 1804 jusqu'à 2004. Edition commémorative à l'occasion du bicentenaire du Code civil en Belgique et du 40ème anniversaire de la revue "Tijdschrift voor Privaatrecht"*, in D. Heirbaut and G. Baeteman (ed.), Ghent, Tijdschrift voor privaatrecht, 2004, II, pp. 2245-2263.

<sup>88</sup> It took a surprisingly long time for Belgians to become aware of the fact that Napoleon was no longer around. For example, according to the 1803 Napoleonic statute organising the office of the notaries Belgium was still ruled as late as 1980 by the *premier consul* and not by the king of the Belgians. It is also telling that this statute is, following its original date according to the revolutionary calendar, even today only known as the "Ventôse statute" (Ventôsewet, Loi de Ventôse) (for its history in Belgium, see F. Stevens, "La loi de Ventôse en Belgique", in: *Destin d'un loi. Loi du 25 Ventôse an XI. Statut du notariat*, Paris, Institut international d'histoire du notariat, 2003, 187-199).

<sup>89</sup> Art. 139, 11 (abolished in 1971, *Moniteur belge*, 8 July 1971).

<sup>90</sup> It was, however, also based on ideas already developed by Haus in the 1830's (Stevens, F., "La codification pénale en Belgique. Héritage français et débats néerlandais (1781-1867)", *Le pénal dans tous ses états: justice, états et sociétés en Europe (XIIe-XXe siècles)*, in: X. Rousseaux and R. Levy (ed.), Brussels, FUSL, 1997, ppp. 300 and 301).

slavishly stays within the French mould.<sup>91</sup> The Commercial Code does not contradict the general pattern. Its structure remained intact during the nineteenth century, but its articles were replaced during the second half of the nineteenth century. Belgium then industrialised at break-neck speed (when World War I broke out, only the United States, the United Kingdom, Germany and France had an economy bigger than the one of tiny Belgium) and its ruling classes were well aware that it desperately needed new legislation to cope with the problems posed by industrialisation. Given that Belgium was ahead of France in developing its industry, it could not always follow France and it had, this time, to develop its own rules and also look to other countries.<sup>92</sup> However, it is significant that Belgium only turned away from France, when it had no choice. Another example of this was the first major statute to amend the Civil Code in 1851.<sup>93</sup> It dealt with real securities because this part of the Code showed many defects<sup>94</sup> and it was only original because France's economy had less need of an efficient regulation for this than Belgium's.

## 2. *Explanations for the tenacity of the French legal transplant in Belgium*

In studying the enduring success, as it may be called, of French law in Belgium, it is not very useful for this article to make a detailed study of the efforts undertaken to write new codifications. There is already an abundant literature about that subject<sup>95</sup> and it makes clear that projects for a new code either did not want to get rid of the French heritage, or failed.<sup>96</sup> In each case specific circumstances can explain the outcome to some extent, but this article, being a winner's history of French law, should be more concerned with the reasons for French

<sup>91</sup> Heirbaut, D. *Efficiency: the Holy Grail of Belgian justice? Civil procedure in Belgium (1806-2008), Access to justice and the Judiciary. Towards new European standards of affordability, quality and efficiency of civil adjudication*, Antwerp-Oxford, Intersentia, 2009, pp. 89-117.

<sup>92</sup> Heirbaut, D. *Hebben/hadden onze ministers van justitie een "civiel" beleid?*, Mechelen, 2005, pp. 35-41; D. Heirbaut, "Enkele hoofdlijnen uit de geschiedenis van het wetboek van koophandel in België", *Tweehonderd jaar Wetboek van Koophandel in België*, in: G. Martyn and D. Heirbaut (ed.), Brussels, 2009, pp. 91-103.

<sup>93</sup> Loi du 16 décembre 1851 sur la révision du régime hypothécaire (Moniteur belge, 22 december 1851).

<sup>94</sup> Cf. Holthöfer, E., "Frankreich", in: Coing, H. (ed.), *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, Munich, Beck, 1973-1988, III/1, 1003. The Brussels Court of Appeal had already criticised this part of the Code when it was still a project (Stevens, F. "Der Code civil in Belgien seit 1804", *Die napoleonische Kodifikation in Deutschland und Europa*, in: W. Schubert and M. Schmoeckel, Cologne, Böhlau, 2005, p. 210).

<sup>95</sup> See Heirbaut, *Ministers*, and the references there.

<sup>96</sup> See about those, also Heirbaut, D., *Codificatie in België en Nederland: een voorbeeld van hoe het (niet) moet? Een onderzoek naar de factoren van het succes en het falen van de pogingen tot codificatie van het civielrecht in België en Nederland*, Tijdschrift voor privaatrecht, XLIII, 2006 (2007), pp. 1683-1745.

success, than with the explanations for individual failures to break away from France.

A. *The French legal transplant as the brutal successor of a gradual acculturation process*

The 1795 legal transplant was shocking, because it was so abrupt and total. Yet, it also continued past practices. For centuries the laws of the Southern Netherlands had been guided by France. The process had now become more intense than ever before, but one should keep in mind that it had already become stronger during the second half of the eighteenth century. Add to this the growing influence of the French language in general during the eighteenth century, and it is clear that the Southern Netherlands had been ‘softened up’ for a French legal transplant. This explains, *inter alia*, why, during the unification with the Netherlands, the Belgians were less eager to write new codifications for the United Kingdom of the Netherlands than the Dutch.<sup>97</sup>

B. *French law, a well-known neighbour*

If one looks not at the diversity of legal rules at the local level, but at the common elements they shared, the French legal transplant was, in most cases, less a reception of new rules than an assimilation of the old ones. After all, the ancient customs of the Southern Netherlands can be grouped together with those of Northern France, the so-called *pays de droit coutumier*. True, Napoleonic law formulated the existing legal rules in a new way, but it also gave them more clarity and visibility by abolishing their diversity and exceptions. For example, primogeniture was abolished, but this actually strengthened the underlying current of the old law, which had accepted primogeniture only as an exception to the general rule of equality amongst heirs.<sup>98</sup> Another example is matrimonial property law. The 1804 Civil Code stated that the joint property of a married couple consisted of their moveables and their acquisitions, but most couples in the Southern Netherlands already married under this regime before 1795. Thus, in most cases the new rules fell into line with

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<sup>97</sup> A. Wijffels, “Balancing rationality and tradition: the French *Code civil* and the codification of civil law in the Netherlands, 1798-1838”, *Le code Napoléon, un ancêtre vénéré?*, in: R. Beauthier en I. Rorive (red.), Brussels, Bruylant, 2004, pp. 310-316. See also Wijffels, A., “An unedifying monument. J.M. Kemper and some early controversies around the French Civil code”, *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXXV, 2007, pp. 213-229; Heirbaut, D., “Codificatie van het burgerlijk recht in België en Nederland: parallel lives?” (forthcoming).

<sup>98</sup> Heirbaut, D., “A history of the law of succession, in particular in the Southern Netherlands/Belgium”, *Imperative inheritance law in late-modern society. Five perspectives*, in: C. Castelein, R. Foqué and A. Verbeke (ed.), Antwerp, Intersentia, 2009, pp. 65-84.

the general expectations, though there could be some local differences, which was also true in France itself.<sup>99</sup> Hence, in the nineteenth century, Belgium nationalism could very well be reconciled with a French code, because the latter was based on Franco-Belgian customs.<sup>100</sup>

*C. The long French occupation and the perverse effect of the initial resistance to French law*

French law was close to the existing customs and its invasion had been prepared for centuries, but nevertheless there was some opposition.<sup>101</sup> It would be wrong to see that as a manifestation of an anti-French spirit, since resistance was strongest in cases when the new rules went the most against existing traditions.<sup>102</sup> Thus, what fuelled it was not the French origin of new rules, but their revolutionary character. Whether it was Joseph II or the French Revolution, a hated change led to protest and even that did not amount to much. A short-lived peasants' revolt of a few months in 1798<sup>103</sup> and some unrest in the two years thereafter had no legal impact at all, because many people had also gained through the Revolution, e.g. by the abolition of feudalism.

Moreover, resistance was also possible by less visible means. Judges, notaries, lawyers and their clients tried to find ways to keep on using the old law. French law itself opened some venues for this approach. For example, art. 4 of the Civil Code made it a crime for a judge to refuse a judgement because the Code was obscure and inefficient and thus the judges sometimes had to turn to the old law to solve a dispute.<sup>104</sup> Art. 2 of the Code stated that the latter was only to be applied in the future, as future effects of old situations were still being ruled by the old law. Contracts and wills also offered possibilities for staying with the old law.<sup>105</sup> Régine Beauthier in a ground-breaking article has shown that

<sup>99</sup> Godding, P. "De l' «ancien droit belge» au Code civil de 1804: une rupture?", *Le Code civil entre ius commune et droit civil européen*, in: A. Wijffels (ed.), Brussels, Bruylant, 2005, pp. 585-610.

<sup>100</sup> Cf. Stevens, F. "Histoire du droit et nationalisme en Belgique aux XIXe siècle", *Histoire de l'histoire du droit*, in: J. Poumarède (ed.), Toulouse, Presse de l'université, 2006, p. 207.

<sup>101</sup> Van Goethem, H. "La Belgique sous l'annexion à la France, 1795-1813: l'acceptation des nouvelles institutions judiciaires et du droit français", *Auctoritates. Xenia R.C. van Caenegem oblata*, in: S. Dauchy, J. Monballyu and A. Wijffels (ed.), Brussels, Academy, 1997, pp. 289-301.

<sup>102</sup> Cf. Godding, "Ancien droit", *op. cit.*, pp. 603-605.

<sup>103</sup> François, L., *De Boerenkrijg. Twee eeuwen feiten en fictie*, Leuven, Davidsfonds, 1998.

<sup>104</sup> Heirbaut, D., "Les juges belges face au Code civil", *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen außerhalb Frankreichs*, in: B. Dölemeyer et al. (eds.), Frankfurt, Klostermann, 2006, pp. 260-271.

<sup>105</sup> Stevens, F. "Résistances et acculturations aux codes. Le code de 1804 et les actes de la pratique en Belgique", *Code Napoléon*, 207-215; Beauthier, R. "Le véritable sens de l'article

the result of this resistance was a paradox: instead of being a bar to the success of the French Code, it actually enabled it,<sup>106</sup> as it had a perverse effect. It mitigated the worst effects of the legal transplants, making it more acceptable for the population to get used to it. This was only possible because French law was given enough time to settle. The French remained in power for twenty years and thereafter it took the Dutch fifteen years to write, vote and prepare the application of new codifications.<sup>107</sup> These should have come into force in 1831 and, by then, Belgium had become independent. If the French had not stayed so long, or the Dutch had acted sooner, history might have been different. Thirty-five years of working with French law meant that in 1830 only old lawyers had some faded memories of their old customs and even for them French law had become the ‘natural’ law of the land. In the first decades after independence French law had yet another argument working for it: it was cheap. Until 1852 Belgium did not protect the copy-right of French authors.<sup>108</sup> Brussels publishers quickly saw they could offer a bargain to Belgian lawyers and still come out ahead.<sup>109</sup>

#### D. *Legal education*

A shared history, laziness and greed all drove Belgian lawyers into the arms of French law. University education ensured that they would not try to escape from it. Eighteenth century legal education at Leuven had not been of the highest level<sup>110</sup> and the French only made it worse. First they abolished law studies in Leuven and then they established only a vocational school.<sup>111</sup> The United Kingdom of the Netherlands had a

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2 du Code civil. L’ambition du Code civil de remplacer l’ancien droit à la lumière de la jurisprudence belge de la première moitié du 19<sup>e</sup> siècle”, in: Beauthier and Rorive, *Code Napoléon*, 217-257.

<sup>106</sup> Beauthier, “Article 2”, 257.

<sup>107</sup> About these codes, see Wijffels, A. “Les contrats dans le Code civil de 1830. Contribution à l’histoire de la réception du Code civil des Français en Belgique sous le régime du Royaume des Pays-Bas”, in: P. Wéry (ed.), *Le droit des obligations contractuelles et le bicentenaire du Code civil*, Bruges, Die Keure, 2004, pp. 21-59; A. Wijffels, “A phantom code: the 1830 Code of civil procedure for the kingdom of the Netherlands”, *Towards a European ius commune in legal education and research*, in M. Faure, J. Smits and H. Schneider (eds.), Antwerp, Intersentia, 2002, pp. 283-300; and the literature quoted there.

<sup>108</sup> Dopp, H., *La contre-façon des livres français en Belgique, 1830-1852*, Leuven, Uystpruyst, 1932.

<sup>109</sup> For a survey of these Belgian editions, see Verbeke, F., *Belgian law: an annotated bibliographic guide to reference materials, 1803-1993*, Brussels, Belgische commissie voor bibliografie en bibliologie, 1994, pp. 115-135.

<sup>110</sup> Van den Broeck, *Rechtsleer, op. cit.*, pp. 31-35.

<sup>111</sup> Stevens, F. “Het rechtsonderwijs in België in de 19<sup>e</sup> eeuw”, in: *Handelingen IXe Nederlands-Belgisch rechtshistorisch congres-rondom Feenstra*, Leyden, Faculteit der Rechtsgeleerdheid, 1986, pp. 57-64; Stevens, F. “Het rechtsonderwijs in de Zuidelijke

completely different philosophy. Judging, correctly, that the local lawyers were not that good, it established new universities and imported foreigners, Dutchmen and most of all Germans,<sup>112</sup> to teach.<sup>113</sup> The influence of this new policy is visible in *La Thémis*, a review which was very critical of French law.<sup>114</sup> It was French, but there was a Belgian reprint and it published many contributions by Belgian professors or, rather, professors teaching in Belgium. *La Thémis* and its Belgian authors tried to promote the ideas of the German historical school in Belgium,<sup>115</sup> but they made little headway and independence ended even that. A few foreigners remained, but many others left.<sup>116</sup> The standards were not very high for their replacements, as the constitution guaranteed freedom of education and anyone who wanted could teach law. To ensure that a university diploma in law would be worth something, the government gave the monopoly on awarding law degrees to a central commission in Brussels.<sup>117</sup> The commission did not appreciate original thinkers and let those who slavishly followed French handbooks pass.

In 1876 a reform of higher education made it possible for universities to confer law degrees themselves<sup>118</sup> and new ways of teaching became possible. By then, Belgian lawyers had become so used to French law that it took them some time to become aware of their new freedom. Until the 1950's it was still possible to use French handbooks of private law.<sup>119</sup> Even today, the focus of law teaching is still mostly on statute law or case-law, which in many cases means French law or its interpretation, as the legislative diarrhoea does not leave much time for critical scholarly work. Nevertheless, the situation is much better than in the nineteenth century, when many of the leading lawyers were foreigners. François Laurent, Belgium's greatest lawyer ever, was a native of Luxemburg and

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Nederlanden in het begin van de 19de eeuw", *Cahiers centre de recherches en histoire du droit et des institutions*, IX, 1998, pp. 119-132.

<sup>112</sup> The best-known of them is L. A. Warnkönig (Wild, G. *Leopold August Warnkönig, 1794-1866. Ein Rechtslehrer zwischen Naturrecht und historischer Schule und ein Vermittler deutschen Geistes in Europa*, Karlsruhe, 1961, pp. 12-34 about Warnkönig in Belgium).

<sup>113</sup> Stevens, "Rechtsonderwijs Zuidelijke Nederlanden", *op. cit.*, pp. 133-149.

<sup>114</sup> See about *La Thémis*, Bonnacasse, J., *La Thémis (1819-1831), son fondateur, Athanase Jourdan*, Paris, Sirey, 1914; Remy, P., "La Thémis et le droit naturel", *Revue historique de droit français et étranger*, LXV, 1987, pp. 145-160.

<sup>115</sup> About the influence of the German historical school on the development of Belgian law, see Van den Broeck, J., "Het Burgerlijk Wetboek en de invloed van de Duitse rechtshistorische school in België tijdens de 19de eeuw", *Liber amicorum John Gilissen*, Antwerp, Kluwer, 1983, pp. 417-425.

<sup>116</sup> D. Heirbaut, "Law reviews in Belgium (1763-2004): instruments of legal practice and linguistic conflicts", *Juristische Zeitschriften in Europa*, in: M. Stolleis en Th. Simon (eds.), Frankfurt, Klostermann, 2006, pp. 346-347.

<sup>117</sup> Stevens, "Rechtsonderwijs", *op. cit.*, pp. 62-65.

<sup>118</sup> *Ibidem*, pp. 67-70.

<sup>119</sup> Cf. Malliet, C., *Elementaire bibliografie Belgisch recht*, Ghent, Mys & Breesch, 1999, p. 65.

had to be naturalised.<sup>120</sup> The authors of the 1867 Penal Code were, originally, a Dutchman and a German.<sup>121</sup>

### E. *The inactivity of the Justice department*

A crucial element for the survival of French law is that Belgian ministers of Justice have not been very active.<sup>122</sup> The great reform of commercial law was a collective effort of all Belgian politicians<sup>123</sup> and would also have taken place without ministers of justice. Ministers shelved projects of new codes or did not defend them in parliament.<sup>124</sup> Enthusiasm for new projects was, at best, lukewarm.<sup>125</sup> In doing so, the minister fulfilled expectations: he had to be a caretaker who did not rock the boat.<sup>126</sup> Even if a new text could be written, it had to shy away from great innovations.<sup>127</sup> This has changed somewhat in the last two decades. Parliament approved two new codes and the current minister (2009) even proposes a complete reorganisation of the judicial system.<sup>128</sup> As to the latter, the future is very uncertain, whereas for the former ambitions have been limited. The new codes are so-called mini-codes, they deal with a relatively small part of law (international private law (2004) or companies (1999)) and most of the time they confirm existing practices.<sup>129</sup> A new major Code of economic law is in preparation,<sup>130</sup> but it is written at the behest of the department of economics. The lethargy of the lawmaker

<sup>120</sup> About Laurent, see the articles in *Liber memorialis François Laurent 1810-1887*, Erauw, J., et al. (eds.), Brussels, Story-Scientia, 1987, esp. the biographical article by G. Baert.

<sup>121</sup> Haus, J. J. (Hennau, C., and Verhaegen, J., “Jacques-Joseph Haus (1796-1881)”, *Gestalten uit het verleden. 32 voorgangers in de strafrechtswetenschap, de strafrechtspleging en de criminologie*, in: C. Fijnaut (ed.), Brussels, Kluwer, 1993, pp. 73-81) and J. Nypels, J., (P. Bodson, “Jean Nypels (1803-1886)”, in: Fijnaut, *Gestalten, op. cit.*, pp. 83-88.

<sup>122</sup> D. Heirbaut, *Ministers, op. cit.*; Heirbaut, D., *Cowardice as a virtue: a history of the policies of the Belgian justice ministers since 1830, Liber amicorum Kjell Å Modéer*, Lund, Juristförlaget, 2007, pp. 211-224. Bram Van Dael is preparing a Ph. D. thesis about the policies of the Belgian justice ministers concerning private law.

<sup>123</sup> D. Heirbaut, *Ministers, op. cit.*, pp. 39-41.

<sup>124</sup> D. Heirbaut, “Codificatie”, *op. cit.*, pp. 1700-1703.

<sup>125</sup> See for examples, D. Heirbaut, *Ministers, op. cit.*, pp. 27-28, 42 and 43.

<sup>126</sup> *Ibidem*, 69-73.

<sup>127</sup> For example, in 1884 the minister clearly stated that a commission had to revise the Civil code: “*sans même altérer les grandes lignes... en harmonie avec les mœurs et le tempérament du pays*” (Report to the King for the Royal Decree 15 November 1884 (*Moniteur belge*, 22 November 1884)).

<sup>128</sup> “Grootste hervorming van justitie in jaren”, *De Standaard*, 27 May 2009. See also on the minister’s personal website: <http://www.stefaandclerck.be/nl/naar-een-nieuwe-architectuur-voor-justitie/691>.

<sup>129</sup> This is most of all true for the Code of companies (cf. Horsmans, G. et De Cordt, Y., “La portée et l’influence de la codification”, *Le nouveau Code des sociétés*, Brussels, Bruylant, pp. 94 and 147-150.

<sup>130</sup> D. Heirbaut, *Een beknopte geschiedenis van het sociaal, het economisch en het fiscaal recht in België*, Ghent, Academia press, 2009, p. 87.

has, at times, given to French institutions a much longer lease of life than was warranted by the needs of daily life. For example, in 1804 the French introduced the family council as a mechanism for controlling the guardian of a minor. Despite this institution's lack of success,<sup>131</sup> it was only abolished in 2001.<sup>132</sup>

*F. A lack of respect for French law*

One of the paradoxes of French law in Belgium is that it still lives, because the veneration of the Belgians does not stop them from making a mess of their French inheritance. The Commercial Code still has the Napoleonic structure, but all the original articles were thrown out in the second half of the nineteenth century, the four articles on commercial courts surviving until 1967. The Civil Code offers the best view of the strange adherence of Belgium to its French law. One half is still original while the other has been mutilated in any possible way imaginable. Even if one is willing to disregard the content, the form of the new changes is bewildering enough. New articles are not numbered in a uniform way. The fancy of the moment determines whether it is 577-2, 331quinquies, 213 a, or even 488bis, j. The legislator sometimes abrogated articles of the code in order to replace them with a new text with its own numbering, so that, for example, in between article 2091 and article 2119, one finds articles numbered 1 to 144. In some cases in which the legislator did not insert the new text in the code, he changed his mind a century later.<sup>133</sup> Thus, reading the Belgian version of the French Civil Code it is easy to see that Belgium has not shown much respect to its most successful immigrant. However, once again, there is a paradox. Belgium's irreverence towards French law and its willingness to constantly adapt it to new situations has ensured that it remains living law until the present day.

*G. The pragmatism of the practitioners: the invisible hand*

All of the above can, with some exaggeration, be reduced to one common cause: the dominance of the law practitioner in Belgium. It is hard to find great legislators in Belgium, its past (though not its present) does not reveal many great law professors. Judges, advocates, proctors,

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<sup>131</sup> See I. Deryckere, "The family assembly and the justice of the peace in 19th century" Flanders, *Droit et société*, 1999, pp. 99-119.

<sup>132</sup> Loi du 29 avril 2001 modifiant diverses dispositions légales en matière de tutelle des mineurs (*Moniteur belge*, 31 May 2001).

<sup>133</sup> D. Heirbaut, "Introduction à l'édition cumulative du Code civil en Belgique: sources et méthodologie", in: Heirbaut and Baeteman, *Edition cumulative*, pp. lxxxiii-cxix; D. Heirbaut, "Editing and translating the Code civil in Belgium", *Legal history review/tijdschrift voor rechtsgeschiedenis*, LXXII, 2004, pp. 215-229.

notaries and the like are the leading personalities of Belgian law. They were the ones who had become impregnated by French law and culture before 1795, who had become accustomed to French law in 1830, who preferred cheaper French books in the decades thereafter, who did not like unpractical academics and active ministers of justice. Their attitude is most of all pragmatic, which means that legal literature has to serve practical needs. Successful law reviews in Belgium reflect this. Experiments have been undertaken, but if the law review is not an instrument of legal practice, its impact will be limited. For example, the *Tijdschrift voor privaatrecht*, the greatest promoter of legal scholarship in Belgium outside the universities, owes its popularity less to its high academic standards than to its very useful surveys of leading cases.<sup>134</sup>

The dominance of the law practitioner means that in evaluating the French legal transplant one should not focus on statutory law only. Its application in practice should also be taken into account, as it may very well happen that Belgium and France are divided by a common rule. In those cases a text may be French, but its interpretation is Belgian.<sup>135</sup> A detailed study is still needed to determine whether some of these differences go back to pre 1795 law, or are just a consequence of the French court of cassation not being competent for Belgium.

The pragmatism of the law practitioner also explains the conservatism of Belgian law. Its general attitude can be summarised as: “If it ain’t broken, don’t fix it. If it is, change as little as possible”. One of the best examples of this attitude, and its unfortunate consequences, can be found in the law of civil procedure. Every reform wants to make procedures faster and cheaper and still guarantee the parties’ rights. Napoleon tried to do so in 1806 and failed and this has also been the fate of all his successors in Belgium. A nineteenth century project for a new Civil Code by Albéric Allard would have achieved the goal of an efficient procedure, but the proctors lobbied so successfully against it, that parliament only approved its preliminary title. Almost a century later, in 1967, parliament voted a Judicial Code (the proctors remained silent this time, they had been bought off). Ten years later a leading specialist of procedural law already called it a failure. One of the two framers blamed this on the practitioners, but success had been impossible from the start, as the new code still stuck to the principle of party autonomy, or more

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<sup>134</sup> Heirbaut, D., “Law reviews”, pp. 343-367.

<sup>135</sup> For an example, see the report for the 2006 congress of the International Academy of Comparative law, Heirbaut D. and Storme, M. E., “The Belgian legal tradition: from a long quest for legal independence to a longing for independence”, *The Belgian reports at the congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, p. 35. (I would like to express here my gratitude to the editors of this volume.)

exactly, advocates' autonomy. The main author of the Code, himself an advocate extolling the virtues of the bar, had even deliberately neglected the best model for an efficient procedure at that time (Austria's 1898 *Zivilprozessordnung*), because it, rightly, gave more powers to the judge. A 1992 Judiciary Code Amendment Act failed and the effect of the 2007 Judicial Code Modification Act to Combat Judicial Delay is still in doubt, once again in the interests of practitioners, this time the judges seem to be more important than an efficient procedure.<sup>136</sup>

### 3. *The current situation: begging for European intervention*

The French influence is still strong in Belgium, but it is no longer what it used to be. For this several reasons can be given. Already mentioned are the changes in legal education which made it possible to look to other countries than France and which has led to the great importance of comparative law in Belgium. A second factor is the social and economic change, which already played a role in the second half of the nineteenth century, as the history of commercial law shows. Even more important is the linguistic change. In the nineteenth century, it didn't matter that a majority of the population spoke Dutch, because all the lawyers spoke French. A long process of emancipation, starting in 1856, led to a first change in legislation in 1873 and from 1898 the Dutch text of a statute, royal decree or government regulation is as authentic as the French one. Since 1935 judicial proceedings have to respect the language of the region in which the court is located; this means that in Flanders the judges have to use Dutch. Law teaching in Dutch had become possible at Ghent University, later followed by others, in 1923. In the 1930s legal scholarship in Dutch equalled the quality of the French publications and since the 1980s the output in Dutch largely surpasses that in French. The result is that Belgium still shares one federal law, but that there are differences between Dutch and French-speaking Belgian lawyers. One of these is that a Flemish law professor is more likely to consult Dutch literature, whereas his French-speaking colleague will have a preference for French jurisprudence. Needless to say, this is a simplifying generalisation which does not hold true in every single case. For example the co-operation of the Liège law faculty with its colleagues from Maastricht in the Netherlands proves that the actual situation is more complicated than sketched here. Still, it is remarkable that Dutch has become the second model for Belgian law, together with French law. A distant third is German law, but in many cases its influence is only

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<sup>136</sup> Heirbaut, D., "Efficiency", pp. 89-117. Add for the proctors: Velle, K. "In de schaduw van de advocatuur. De Belgische pleitbezorgers (1800-1969)", *Geschiedenis advocatuur*, pp. 267-296. B. Quintelier is preparing a Ph. D. thesis about the advocates in Belgium, which will also shed new light on the history of procedural law and its actors.

indirect, through either France or the Netherlands. Fourth is Anglo-American law, due to globalisation and the presence of international law firms in Brussels. Another effect of globalisation is the influence of immigrants and their ideas about what the law should be.<sup>137</sup>

Given the ongoing processes of globalisation and European unification, the growing rift between lawyers on both sides of Belgium's linguistic border is somewhat ironic. From 1970 subsequent revisions of the constitution have changed Belgium from unitary into a federal state. Regions and communities make legislation for their areas of competence, but a major part of law, including private law, is still federal and Dutch and French-speaking Belgians still need to find compromises, which their growing differences make harder to find. Consequently, Europeanization, seen, at best, as a mixed blessing in many other member states of the Union, is welcomed because it offers a way out of this deadlock. In fact, since the 1960's Europe has become an excuse for inaction. Why bother to make Belgian law, if that is so hard to achieve and Europe will take care of the problem anyway? The wisdom of waiting for the next European transplant remains to be seen, but there is no denying that this approach fits well with the historical constant of Belgian law, the pragmatism of the practitioner, to whom it is more sensible to copy others than to invent something oneself.

## II. SPECIFIC INSTITUTIONS OR LEGAL MECHANISMS

### 1. *Historical perspective*

On the question about institutions or legal mechanisms that have been received by Belgium, one can globally say that there are two periods of reception:

a) Belgium, as a part of the Roman Empire, has of course been ruled by Roman law in Roman times. The Belgian territories were conquered by Caesar's armies during the Gallic Wars (58-50 B.C.). Of course, this did not mean that since then only Roman law had been in force on these territories. On the contrary, Roman law was applied on a personal basis, thus only to Roman citizens. But with time, more and

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<sup>137</sup> This paragraph summarizes somewhat the report made for the session about legal tradition at the 2006 congress of the International Academy of Comparative law, Heirbaut, D. and Storme, M. E., *Belgian legal tradition, op. cit.*, pp. 4-43. That report should, however, be completed by: Dirix, E., *Privaatrecht en multiculturaliteit*, Antwerp-Oxford, Intersentia, 2007 and Martyn, G., "The judge and the formal sources of law in the Low Countries (19th-20th centuries): from "slave" to "master"?", *Ratio decidendi. Guiding principles of judicial decisions, I, Case law*, in W. Hamilton Bryson and S. Dauchy (ed.), Berlin, Duncker & Humblot, 2006, pp. 206-207, 219 and 220.

more “Belgians” became Roman citizens and this is how Roman law spread all over the Belgian territories.<sup>138</sup> This period of Roman Belgium ended with the end of the Western Roman Empire and the migrations of the end of the fifth century A.D. For the Belgian territories, the migrations meant the arrival of the Franks and the departure of many Romanized citizens, who headed south. Law being still applied on a personal basis, Roman law basically left Belgium with the Romanized people of northern Gaul.

b) The second period of reception was the period that started with the Frankish Kingdom. For the Belgian territories, it meant a blend of influences, but mainly the influence of French law. This part of the story has already been dealt with above (A. Pre 1795 law in the Southern Netherlands).

The outcome of both receptions was probably very important, even if we still have to distinguish between them:

a) As for the first one, we know only very little about Celtic law in the Belgian territories, so it is almost impossible to tell what the law was like, during pre-Roman times. It is also quite difficult to say what the relative importance of Roman law and Celtic law has been.

b) About the later reception, the outcome of French influence on Belgian law is massive. Basically, Belgian law is French law, even if the recent evolution of Belgium tends to be influenced also by Dutch, German and American law (see above: B.3. The current situation: begging for European intervention).

## 2. *The driving forces of the legal receptions*

Both receptions were the result of a military conquest, but there have been important differences between both movements:

a) During Antiquity —but also later— law was enforced on a personal way. This means that Roman law was applicable only to Roman citizens, not to the inhabitants of Belgium. This means that for the Roman military conquest, the legal reception was not a corollary of the conquest itself. Roman law was a privilege, but in 212 A.D. it was extended to all inhabitants of the Roman Empire who all became Roman

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<sup>138</sup> On this process in general, see e.g.: Kunkel, W. and Schermaier, M., *Römische Rechtsgeschichte*, Cologne, Böhlau, 2001, pp. 98 seq.; H.F. Jolowicz, *Historical introduction to the study of Roman law*, Cambridge, University Press, 1939, pp. 356 seq.

citizens.<sup>139</sup> So this is how Roman law also became —*de facto* and by way of consequence— applicable almost to the whole territory.

b) In contrast to the reception of Roman law, the reception of French law was an immediate result of the French military conquest, when the Southern Netherlands were annexed by France (as reminded above: B.1. The French Revolution and Napoleon: the wholesale and enduring transplant of French law).

### 3. *Roman and French law receptions as wholesales*

As the receptions of Roman and French law were both wholesales, it is useless to try to identify received institutions or received legal mechanisms. The topic becomes more interesting only when we consider the more recent evolution of Belgian law and if we have a look at the more recent Dutch and German influences.<sup>140</sup> These influences seem to have reached Belgian law mostly through doctrinal mechanisms.

### 4. *The case of the rechtsverwerking*<sup>141</sup>

New foreign legal institutions could be received in Belgian law either by way of legislation, or by the courts. It does not seem that the Belgian legislator used them very much in civil law. Actually, most changes of Belgian Civil Code<sup>142</sup> have been done in the first book (Law of Persons), but these changes say more about the evolution of Belgian society, than about Belgian civil law. The hard core of the Code has not really been changed by the legislator.

The recognition of new legal theories has to be looked for in the decisions of the Belgian court of cassation. It is interesting to see how this Supreme Court dealt with the legal institution of *Verwirkung*, in Belgium usually called *rechtsverwerking* after its Dutch name. The *Verwirkung*-rule says that a right will be forfeited if the owner of the right fails to use it for a longer period of time, so that the debtor could have the impression that he would not have to fulfill his obligation anymore. This rule was unknown in Belgian law until 1979, when it became the subject of a

<sup>139</sup> This was the result of the *Constitutio Antoniniana* (see e.g. Kunkel and Schermaier, *Römische Rechtsgeschichte*, *op. cit.*, pp. 98 seq.; Wieacker, F., *Römische Rechtsgeschichte*, Munich, Beck, 1988, pp. 512 seq.; Jolowicz, *Historical Introduction*, *op. cit.*, pp. 356 seq.).

<sup>140</sup> As mentioned above under title B.3. The current situation: begging for European intervention.

<sup>141</sup> Recently and for further publications, see: Van Malderen, G., “La rechtsverwerking”, in *Obligations, Traité théorique et pratique* (suppl. 14, September 2008), Brussels, Kluwer, V.2.6-1, pp. 67-73.

<sup>142</sup> D. Heirbaut, “Statistiques”, *op. cit.*, pp. 2245-2263, especially 2261.

comparative study of the *Vereniging voor vergelijking van het recht in België en Nederland*,<sup>143</sup> the society for comparison of law in Belgium and the Netherlands. Originally, it was a general clause, developed by German jurisprudence and thus, it was already a legal transplant in Dutch law.

5. *Psychological Approach. The reception was conscious or unconscious? Confessed or denied?*

The discussion on introducing the legal transplant *Verwirkung/Rechtsverwerking* also in Belgian law has been quite tough.<sup>144</sup> It was, of course, a very sensitive question, as it would have given much more power to the judges, and this was not the tendency of the French legal tradition (see above B.2.g. The pragmatism of the practitioners: the invisible hand). Indeed, it was left to the judge to decide whether the owner had waited for too long or not. This legal transplant has had some success amongst Flemish, but also amongst French speaking judges. The Belgian court of cassation has first seemed to admit the validity of this legal transplant,<sup>145</sup> but finally decided to reject it,<sup>146</sup> sticking to a strict conformity to the Civil Code.

As a member of the European Union, Belgium has of course transposed several European guidelines in Belgian law. Generally, one can say that Belgium is rather slow in fulfilling its international duties. It is also rather uninspired in doing so. If, for example, one looks at the directive on certain aspects of the sale of consumer goods,<sup>147</sup> Belgium has

<sup>143</sup> P. Van Ommeslaghe, "Rechtsverwerking en afstand van recht", *Tijdschrift voor Privaatrecht*, 1980, p. 735.

<sup>144</sup> See e.g. Henry, P. and Jeunhomme, J. F., "Rechtsverwerking: révolution ou restauration?", *Livre du Centenaire de la J.L.-J.L.M.B.*, Liège, 1988, pp. 203-222; Henry, P., *R.I.P.*, *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 1990, p. 884; Moreau-Margrève, I., "Rechtsverwerking, réflexions pour un requiem", *Annales de la Faculté de Droit de Liège*, 1990, pp. 286-291; Storme, M. E., "Rechtsverwerking na de cassatie-arresten van 17 mei 1990 en 16 november 1990: springlevend", *Rechtskundig Weekblad*, 1990-91, pp. 1073-1080; Cornelis, L., "Rechtsverwerking: een toepassing van de goede trouw?", *Tijdschrift voor Privaatrecht*, 1990, pp. 545-644; Stijns, S., "La rechtsverwerking: fin d'une attente (dé)raisonnable?", *Journal des Tribunaux*, 1990, pp. 685-690; I. Moreau-Margrève, "A propos de la rechtsverwerking: une procession d'Echternach?", *Actualités du Droit*, 1991, pp. 205-209; Storme, M. E., "Repelsteeltje, de windmolen en de zwaanridder. Of: het Hof van Cassatie en de rechtsverwerking", *Recente cassatie*, 1992, nr. 21.

<sup>145</sup> Cass. 12 May 1989, Pasicrisie, I, 959; Van Malderen, *Rechtsverwerking, op. cit.*, pp. 68-70.

<sup>146</sup> Some of the first decisions on this might have been a bit ambiguous, but in the end the court of cassation decided clearly to reject the transplant (Cass. 17 May 1990, Pasicrisie, I, 1061; Cass. 16 November 1990, Pasicrisie 1991, I, 292; Cass. 6 December 1991, Pasicrisie 1992, I, 266; Cass. 20 February 1992, Pasicrisie, I, 549; Cass. 5 June 1992, Pasicrisie, I, 876; Cass. 1 October 1993, Pasicrisie, I, 777. See Moreau-Margrève, I. *et al.*, "Grands arrêts récents en matière d'obligations", *Actualités du Droit*, 1997, pp. 16-18; Van Malderen, G., *La rechtsverwerking, op. cit.*, pp. 70-73).

<sup>147</sup> Directive 1999/44/EC.

basically drafted only the text of the directive itself,<sup>148</sup> whereas in Germany the same directive has been used to make a major revision of the BGB.<sup>149</sup> Compared to France now, it is funny to notice that the transposition of this directive created a difference between French and Belgian law, whereas earlier both still had exactly the same text, the one drafted in 1804.

### III. CONCLUSIONS

Concluding, one could wonder whether Belgian law really exists. Somehow, the attempts to go our own way have been shallow. Since the codification of private law, Belgian law has been French and little has changed. Of course, there is a growing rift between lawyers on both sides of Belgium's linguistic border, but this rift has only made it more difficult to reach the necessary compromises to change Belgian law. As has been stated above, the recent process of Europeanization of private law is seen to offer a way out of the deadlock. The efforts needed to reach compromises between French-speaking and Dutch-speaking lawyers are considered to have become useless, as European law will wash away most of it anyway. However, this remains to be proven. Not all legal systems of Europe are impatient to have their own law replaced by European law and there might still be a good perspective for Belgian law in the future. In some way, however, this rather passive approach fits well with the historical constant of Belgian law, the pragmatism of the practitioner, to whom it is more sensible to copy others than to invent something himself.

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<sup>148</sup> The Belgian legislator literally inserted articles 1649*bis* to 1649*octies*, immediately after the articles of the old Code Napoleon, dealing with latent defects in the law of sale. This means that the old law is still applicable to normal contracts of sale (when the buyer is not a consumer, as defined in article 1649*bis*) and that the new law is meant to protect the buyer only if he is such a consumer.

<sup>149</sup> See e.g. Schermaier, M. (ed.), *Verbraucherkauf in Europa. Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG*, Munich, Sellier, 2003; Knütel, R., "Zur Schuldrechtsreform", *Neue Juristische Wochenschrift*, 2001, pp. 2519-2521.