INTRODUCTION TO BELGIAN LAW

SECOND EDITION

EDITED BY

MARC KRUITHOF

&

WALTER DE BONDT

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Summary of Contents

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CHAPTER 1

The Belgian Legal Tradition: Does It Exist?

Dirk Heirbaut[*]

Belgium came into existence as an independent state in 1830, when the southern part of the then United Kingdom of the Netherlands seceded. Though not of as recent origin as some other European states, Belgium is still relatively young. It is therefore justified not only to ask what legal tradition Belgium has, but also, most of all, whether the country has any such tradition at all. The answer should vary according to the period concerned: before or after 1830.

§1.01 A BELGIAN LEGAL TRADITION BEFORE BELGIAN INDEPENDENCE IN 1830?

[A] Belgian Political History Before 1830

It is hard to find any antecedents of Belgium before the end of the sixteenth century. The divisions of the Carolingian empire in the treaties of Verdun (843) and Meersen (870) split up the territories that now form Belgium and the Netherlands between France and Germany, the river Scheldt serving as frontier. The French part became an autonomous principality at the end of the ninth century under the counts of Flanders. The German kings managed to keep their Duchy of Lotharingia under better control until the eleventh century. Thereafter it also fell under the sway of local rulers. Thus in the twelfth century the Low Countries were a patchwork of autonomous principalities, like Flanders, Hainault, Brabant, Luxembourg, Liège, Holland, Utrecht and Guelders.

* I wish to thank Prof. em. dr. R. Van Caenegem, Prof. em. dr. D. Lambrecht, Patricia Carson, Gerard Sinnaeve, Luk Burgelman, S. Huygebaert and M. Van Der Haegen who have read drafts of this text. I greatly benefited from their comments and suggestions. Any remaining errors are entirely my own.

Although these principalities were united by economic and, sometimes, dynastic ties, they did not coalesce into a larger unit in the twelfth and thirteenth centuries.

However, from 1386, the dukes of Burgundy gradually brought most of these principalities under their control. To distinguish them from the Burgundian homelands, these new possessions received the name *pays de par deça* (Burgundy and the Franche-Comté being the *pays de par delà*). The Habsburgs, who succeeded the dukes of Burgundy as rulers, finished the process of unification in the sixteenth century. At that time, the *pays de par deça* were in learned circles known as Belgium. This Belgium of sixteenth century humanists, however, was not today's Belgium. It roughly covered the territory of the modern states of Belgium, the Netherlands and Luxembourg and even a part of northern France. Thus, the term Belgium in the sixteenth century has to be translated as the Low Countries. The same is true for its popular equivalent: Netherlands, which does, again, not mean today's Netherlands, but Low Countries (which is in fact the literal meaning of the term Netherlands).

The political unity of the Low Countries did not survive the sixteenth century. Due to religious and other reasons, the Low Countries revolted against their Habsburg overlord, Philip II, king of Spain. The North, the so-called Northern Netherlands, became independent and came to be known as the United Provinces. The Habsburgs managed to keep the South, the so-called Southern Netherlands. Thereafter, the old name of Belgium was still used for both the North and the South. In the eighteenth century, however, it was almost exclusively used for the South, which, by then, had been passed from the Spanish to the Austrian Habsburgs. Yet, even the Southern Netherlands were not completely equivalent to today's Belgium. The principalities of Liège and Stavelot-Malmédy stayed autonomous under their own rulers (a bishop and an abbot). On the other hand, the whole of Luxembourg and the northernmost part of France belonged to the Southern Netherlands (the latter until it was conquered by Louis XIV). The French revolution led to an annexation of the Southern and later also of the Northern Netherlands by France.

In the aftermath of the Napoleonic wars, North and South were reunited in 1815 in the United Kingdom of the Netherlands. As in the sixteenth century, the terms Netherlands and Belgium were, again, used indiscriminately for the whole Low Countries. By now, the French forms of the word Belgium, like *Belgique*, had ousted the original Latin word. Thus, the inhabitants of the new state could both be called *Nederlanders* (in Dutch) and *Belges* in French.[1] North and South had grown estranged in the time spent apart between the end of the sixteenth century and 1815, so that their reunion did not last long. For various reasons, the South broke away in 1830.[2] As its ruling elite was French-speaking, the new state called itself in French *Belgique* (Belgium). The Dutch-speaking North continued to call itself in Dutch *Nederland* (Netherlands).

1. J. Stengers, *Le vocabulaire national dans le royaume des Pays-Bas*, *in* Acta: Colloquium over de Geschiedenis van de Belgisch-Nederlandse Betrekkingen tussen 1815 en 1945. Colloque Historique sur les Rélations Belgo-Néerlandaises entre 1815 et 1945, 9–28 (Ghent: Erasmus 1982).
2. On the United Kingdom of the Netherlands, *see* G. Deneckere & R. Aerts, Het (on)Verenigd Koninkrijk der Nederlanden. Een politiek experiment in de Lage Landen (Rekkem: Ons Erfdeel 2015).

[B] The Legal History of the Southern Netherlands Before 1830

One can distinguish the following periods:

(1) The Middle Ages (till the end of the fifteenth century);
(2) The Early Modern period (end of the fifteenth century to 1795);
(3) The French period (1795–1815); and
(4) The Dutch period (1815–1830).

[1] The Middle Ages (Until the End of the Fifteenth Century)

It is hard to see how a 'Belgian' legal tradition could have existed in the autonomous principalities. There was no political unity between them and, thus, also no unified law. Even within each of these principalities, there was no common legal system. Medieval law in the Southern Netherlands was largely customary and each place had its own customs and, thus, its own laws. One exception to this was the Prince-Bishopric of Liège, where legal unification was largely achieved in the thirteenth century.[3] Apart from local differences, customs could vary because of the status of persons or goods. The result was therefore not one legal system, but a variety of legal systems.[4]

Yet, the chaos was not total. Some legal rules were of more than local importance, but even then, most of them were not common to the whole Southern Netherlands. That some legal rules were more widespread, was not due to the influence of legislation. Legislation did exist, but it was mostly an urban phenomenon.[5] From the twelfth century onwards, city aldermen could legislate and they used this right extensively. This municipal legislation was not without importance as cities were widespread. The county of Flanders, for example, was as urbanised as was northern Italy. In contrast to their cities, the various counts and dukes mostly abstained from law making. This changed under the dukes of Burgundy. Their legislation even began to rival the city ordinances. Yet, its effect was still limited. The Burgundians did not promulgate general laws. They made individual laws for each of their principalities.[6]

Jurisprudence did not remedy the lack of a general legislation. From the thirteenth century, the learned law – i.e., Roman and canon law that were studied at

3. On Liège, *see* S. Dubois, B. Demoulin & J.-L. Kupper, Les institutions publiques de la principauté de Liège (980–1794) (Brussels: State Archives 2012).
4. D. Van Den Auweele, *De evolutie van het recht in het Zuiden. 12de-14de eeuw*, *in* 3 Algemene Geschiedenis der Nederlanden 145, 149–150 (Haarlem: Fibula – Van Dishoeck 1982).
5. P. Godding, *Les ordonnances des autorités urbaines au moyen âge. Leur apport à la technique législative,* in Peasants and Townsmen in Medieval Europe. Studia in Honorem Adriaan Verhulst 185–201 (J. Duvosquel & E. Thoen eds., Ghent: Snoeck-Ducaju 1995).
6. For Hainault, *see* J. Cauchies, La législation princière pour le comté de Hainaut. Ducs de Bourgogne et premier Habsbourg. (1427–1506). Contribution à l'étude des rapports entre gouvernants et gouvernés dans les Pays-Bas à l'aube des temps modernes (Brussels: Publications des facultés universitaires Saint-Louis, XXIV, 1982).

the universities – began to penetrate.[7] Because of the central position of the church in medieval society, canon law influenced the matters for which the ecclesiastic courts were competent, like marriage. Roman law had less impact. Even princes only began to use it from the fourteenth century onwards. Scientific study of customary law was almost non-existent. Even when customary law was written down, this was by practitioners, who mostly limited themselves to local customs. It is telling that the most influential work on customary law was the *Somme Rural* of Jehan Boutillier, a Frenchman.[8]

In the absence of professors and legislators, other factors contributed to some legal unity in the Southern Netherlands during the Middle Ages. The most important was the mechanism of the *recours au chef de sens*, the practice of asking the advice of another court, the chief court.[9] This allowed the spread of legal rules from the head-court to other courts. From the fourteenth century, central princely courts also began to influence the decisions of lower courts through appeals and other procedures.[10]

Because of these and other mechanisms, groups of customs can be distinguished. A well-studied division distinguishes Flemish and Picard-Walloon customs. Both groups of customs tend to protect the interests of the family, while still caring for the surviving spouse. In a conflict between the family and the surviving spouse, Flemish customs are more inclined to choose the side of the family; Picard-Walloon customs rather prefer the widow or widower.[11] However, it should be stressed that this distinction is only valid for inheritance law and matrimonial property law, and even then it is only valid for broad tendencies rather than for individual legal rules. In short, during the Middle Ages no Belgian law existed.

[2] The Early Modern Period

Political unification being achieved in the sixteenth century, legal unification could follow. Yet, it was late to come and achieved only limited results. The Habsburg princes did not legislate as king or emperor, but as Duke of Brabant, Duke of Luxembourg,

7. On the reception of Roman law in Belgium, *see* D. Heirbaut & J.-F. Gerkens, *In the Shadow of France. Legal Acculturation and Legal Transplants in the Southern Netherlands/Belgium*, *in* The Belgian Reports at the Congress of Washington of the International Academy of Comparative Law 3–34 (E. Dirix & Y.H. Leleu eds., Brussels: Bruylant 2011).
8. D. Van Den Auweele, *De evolutie van het recht in het Zuiden 12e-14e eeuw*, *in* 3 Algemene Geschiedenis der Nederlanden 145, 152 (Haarlem: Fibula – Van Dishoeck 1982).
9. R. Van Caenegem, Geschiedenis van het strafprocesrecht in Vlaanderen van de XIe tot de XIVe eeuw 300–314 (Brussels: Koninklijke Vlaamse academie voor wetenschappen, letteren en schone kunsten van België 1956).
10. P. Godding & J. De Smidt, *Evolutie van het recht in samenhang met de instellingen*, *in* 4 Algemene Geschiedenis der Nederlanden 172, 172–173 (Haarlem: Fibula – Van Dishoeck 1980).
11. P. Godding, Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle 318–321 (Brussels: Académie royale de Belgique 1987); R. Jacob, Les époux, le seigneur et la cité. Coutume et pratiques matrimoniales des bourgeois et paysans de France du Nord au moyen âge (Brussels: Publications des facultés universitaires Saint-Louis, 1990); E. Meijers, Het Ligurische erfrecht in de Nederlanden II-III (Haarlem: Tjeenk Willink 1932–1936); J. Yver, *Les deux groupes de coutumes du Nord,* 35 Revue du Nord 197–220 (1953), 36 Revue du Nord 5–36 (1954).

Count of Flanders, etc. Consequently, each of the former principalities still had its own set of laws. General legislation was exceptional in the sixteenth century, though by the eighteenth it had become common. Even then, the number of princely ordinances was small. On average fifty new ordinances were issued each year.[12] The best known is the *Edictum Perpetuum* of 1611, promulgated by the Archdukes Albert and Isabella. This short text was the first, and last, major attempt by the legislator at unifying some rules of private law in the Southern Netherlands.[13] Also well-known are the Criminal Ordinances of 1570. Their intention was to unify criminal procedure, but in practice they were largely disregarded.[14]

Jurisprudence did not contribute much to legal unification. The first great author was Philip Wielant around 1500.[15] He made a synthesis of the law of the county of Flanders as it existed in his time. His major works were devoted to criminal law and criminal procedure (*Practijcke criminele*) and to civil procedure (*Practijcke civile*). Wielant's work has one drawback: it was only concerned with Flemish law, not with the law of other principalities. Moreover, it was written in Dutch, as it was aimed at the practitioners of law, who could not always understand Latin very well. Therefore, Latin translations could be published by Joos de Damhouder, who forbore from mentioning Wielant's name. In its Latin form and under Damhouder's name, Wielant's work became widely known in the Southern Netherlands and abroad.[16]

After the split between the Northern and Southern Netherlands and stimulated by the *Edictum Perpetuum* and French examples, some authors began to study law in the Southern Netherlands as a whole. Their work was mostly descriptive. Authors like Gudelinus, Zypaeus or Anselmo were looking for common elements, but they did not themselves create a unified legal system. After the middle of the seventeenth century, most legal works are mediocre.[17]

A third unifying factor, beside jurisprudence and legislation, were the provincial and supra-provincial courts. The supra-provincial court was the Great Council of Malines. Its jurisdiction was disputed, as the provincial councils claimed to be sovereign, i.e., that no appeal against their decisions was possible. Some of them managed to obtain recognition of this sovereignty, so that at the end of the eighteenth

12. J. Gilissen, *Essai statistique de la législation en Belgique de 1506 à 1794*, 40 Revue du Nord 9–13 (1958).
13. G. Martyn, Het Eeuwig Edict van 12 juli 1611, zijn genese en zijn rol in de verschriftelijking van het privaatrecht (Studia 81, Algemeen Rijksarchief en Rijksarchief in de provincïen 2000).
14. J. Monballyu, *Strafprocesrecht in Vlaanderen voor en na de criminele ordonnantien van 1570*, 36 Handelingen van de Koninklijke Commissie voor de uitgave van oude wetten en verordeningen van België 117–133 (1996).
15. J. Monballyu, Filips Wielant. Verzameld werk. I. Corte instructie in materie criminele 7–18 (Brussels: Koninklijke academie voor wetenschappen, letteren en schone kunsten van België 1995).
16. J. Dauwe & J. Monballyu, *Joos de Damhouder (1507–1581) en zijn Practycke ende handbouck in criminele zaken*, epilogue to the anastatic reprint of J. De Damhouder, Practycke ende handbouck in criminele zaeken 1555 (Roeselare: Den Wijngaert 1981); J. Monballyu & J. Dauwe, *Joos de Damhouder en zijn 'Practycke in civile saecken'*, epilogue to the anastatic reprint of J. De Damhouder, Practycke in civile saecken, 1626 (Ghent: s.n. 1999).
17. J. Gilissen & M. Magits, De bronnen van het recht in de Belgische gewesten sedert de dertiende eeuw 115–116 (Antwerp: Kluwer rechtswetenschappen 1989).

century the Great Council of Malines was only competent for Flanders, Namur and Malines.[18] In these circumstances, it should come as no surprise that it could not contribute much to the creation of a unified law for the Southern Netherlands. The provincial councils had marginally more success, but were confined to their own individual provinces.[19]

Even if central legislation, jurisprudence and supra-provincial courts had been more prominent, their chances of realising legal unity would have been small. In 1531, Emperor Charles V ordered the homologation of local customs. They were to be written down, and, after revision by the central authorities, promulgated by the prince. One of this homologation's aims was to bring about legal unification. At first sight, it was fairly successful. About 600 customs were abrogated and fewer than 100 were homologated. In Namur and Luxembourg, for example, the local customs were replaced by one regional custom. However, in the most important provinces, Flanders and Brabant, local customs still prevailed. Moreover, though homologation had abolished many local customs, it had strengthened the position of those that were left by putting them in writing and giving them official recognition. Thus, the homologation's effect was maintaining the diversity of customary law rather than abolishing it. Homologation had one other negative effect. As long as a custom is not written down, it can and will easily change, as there is no fixed point of reference. Homologation changed that. One could now refer to the text of the homologated custom. This meant that the development of customary law largely stopped after homologation. Consequently, most evolution of customary law took place in the Middle Ages rather than in the sixteenth to eighteenth centuries.[20] On the positive side, homologation put up a bulwark against the growing influence of Roman law.[21] A special case was the homologation of Antwerp law during the sixteenth and early seventeenth centuries. Antwerp was unique in that its customs were written down four times. Moreover, this Antwerp law influenced the law of commerce in Amsterdam and London, which displaced it as Europe's main port in the seventeenth and eighteenth centuries.[22] Antwerp was also

18. A. Wijffels, *Grote Raad voor de Nederlanden te Mechelen*, *in* De centrale overheidsinstellingen van de Habsburgse Nederlanden 1482–1795, 454–455 (E. Aerts et al. eds., Brussels: Algemeen rijksarchief 1994); C.H. Van Rhee, *The Low Countries Until 1800*, *in* European Supreme Courts. A Portrait Throughout History 204–217 (A. Wijffels & C.H. Van Rhee eds., London: Third Millennium 2013).
19. Cf. J. Monballyu, *De gerechtelijke bevoegdheid van de Raad van Vlaanderen in vergelijking met de andere 'Wetten' (1515–1621)*, in Hoven en banken in Noord en Zuid 1–26 (B. Jacobs & P. Nève eds., Assen: Van Gorcum 1994).
20. P. Godding, 'Nouveaux itinéraires en droit' dans l'espace belge du 12e au 18e siècle, in: Nouveaux itinéraires en droit. Hommage à François Rigaux 242–244 (Brussels: Bruylant 1993); R. Van Caenegem, An Historical Introduction to Private Law 36–38 (Cambridge: Cambridge University Press 1992).
21. Cf. G. Macours, *De visie van de Belgische 19de-eeuwse rechtspraak op de subsidiaire rol van het oude Romeinse recht. Een verkennend onderzoek*, *in* 'Houd voet bij stuk'. Xenia iuris historiae G. Van Dievoet oblata 256–286 (F. Stevens & D. Van Den Auweele eds., Louvain: KULeuven, Law Faculty, Section of Roman law and legal history 1990).
22. On Antwerp law, *see* B. Van Hofstraeten, 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); D. De Ruysscher,

essential for the work of Leonardus Lessius, who, around 1600, used his acquaintance with Antwerp business practices to write on finance and commerce.[23]

During the Early Modern Period political unity did not lead to legal unity. In the second half of the eighteenth century the influence of the enlightenment and natural-law theories made itself felt. This was mostly due to an external development. Most lawyers in the Southern Netherlands distrusted the writings of the natural lawyers.[24] Notable exceptions were some proponents of reforms in the administration or in criminal law, for instance Goswin de Fierlant and Vilain XIV.[25] In these circumstances, changes had to be initiated from above. However, the Austrian Habsburgs[26] hesitated for a long time to overhaul the existing structures of the Southern Netherlands. In 1780, Joseph II came to power, and he started an ambitious programme of reform. Before him, the princes of the Southern Netherlands promulgated on average fifty new ordinances a year. Now that number more than doubled. Crucial were Joseph's plans for sweeping reforms of the administrative and judicial organisation and two codes for civil and criminal procedure respectively. The population of the Southern Netherlands did not like these abrupt changes, and in October 1789 a revolt put an end to Joseph's power and his reforms. Austrian authority was later restored, but any plans of reform had to be given up.[27]

[3] The French Period[28]

The restoration of Austrian power did not last long. In 1795 revolutionary France annexed the Southern Netherlands. Henceforward, all French revolutionary legislation was also in force in the annexed departments. Even some older legislation, i.e., French

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NAER HET ROMEINS RECHT ALSMEDE DEN STIEL MERCANTIEL. HANDEL EN RECHT IN DE ANTWERPSE RECHTBANK (16DE-17DE EEUW) (Heule: UGA 2009).

23. T. VAN HOUDT & W. DECOCK, LEONARDUS LESSIUS: TRADITIE EN VERNIEUWING (Antwerp: Belpaire 2005).
24. G. Van Dievoet, *De ontwikkeling van de rechtswetenschappen*, *in* 7 ALGEMENE GESCHIEDENIS DER NEDERLANDEN 311, 318 (Haarlem: Fibula – Van Dishoeck 1980).
25. J. Monballyu, *De Raad van Vlaanderen en de hervormingen van het strafrecht (1756–1787)*, 64 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 47–75 (1996); F. Stevens, *Jean Vilain XIIII (1712–1777)*, *in* GESTALTEN UIT HET VERLEDEN. 32 VOORGANGERS IN DE STRAFRECHTSWETENSCHAP, DE STRAFRECHTSPLEGING EN DE CRIMINOLOGIE 1–9 (C. Fijnaut ed., Brussels: Kluwer Rechtswetenschappen 1993); D. Van Den Auweele & P. Nefors, *Goswin de Fierlant (1735–1804)*, *in* GESTALTEN UIT HET VERLEDEN: 32 VOORGANGERS IN DE STRAFRECHTSWETENSCHAP, DE STRAFRECHTSPLEGING EN DE CRIMINOLOGIE 11–22 (C. Fijnaut ed., Brussels: Kluwer Rechtswetenschappen 1993). *See also* more in general, J. MONBALLYU, HISTORY OF CRIMINAL LAW IN THE SOUTHERN NETHERLANDS AND BELGIUM (1400–2000) (Leyden, Brill 2014).
26. For a monumental work on the Austrian Habsburgs in the Southern Netherlands, *see* L. DHONDT, 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), 5 Vol. (Brussels: State Archives 2002).
27. L. Dhondt, *Politiek en institutioneel onvermogen 1780–1814 in de Zuidelijke Nederlanden*, *in* 9 ALGEMENE GESCHIEDENIS DER NEDERLANDEN 139–159 (Haarlem: Fibula – Van Dishoeck 1980).
28. The French era is the subject of: E. Berger, D. Heirbaut, H. Leuwers & X. Rousseaux, *La justice avant la Belgique: tentatives autrichiennes, influences françaises et expériences néerlandaises (1780–1830)*, *in* DEUX SIÈCLES DE JUSTICE. ENCYCLOPÉDIE HISTORIQUE DE LA JUSTICE BELGE 26–50 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015).

royal ordinances from the sixteenth to eighteenth centuries, like the *Ordonnance civile pour la réformation de la justice*, were introduced in the Southern Netherlands.[29]

As the former Southern Netherlands were a part of France under Napoleon, all his codifications and other reforms also came into force there, among them:

- the *Code civil* (1804);
- the judicial organisation (1800);
- the *Code de procédure civile* (1806);
- the *Code de commerce* (1807);
- the *Code d'Instruction criminelle* (1808); and
- the *Code pénal* (1810).[30]

Revolutionary and Napoleonic legislation finally ended legal diversity in the Southern Netherlands. However, this did not mean that a 'Belgian' legal tradition was born. The new legal system was French. To the extent that the old law disappeared, this was a break with the past, but to the extent that it was French, it was less of a break. As far as the sources of the law are concerned, France at that time could be divided into the regions of customary law (*pays de droit coutumier*), where customary law of Germanic origin dominated, and the regions of written law (*pays de droit écrit*), where Roman law had been supreme. The Southern Netherlands belonged to the *pays de droit coutumier*.[31] More specifically, they were part of the so-called *pays de nantissement* (literally: regions of pledging), regions where the publicity of transfers of rights to real property was assured by the intervention of the competent court.[32] Besides, French laws, French authors and French practices had already been influencing the Southern Netherlands for a long time.[33] During the second half of the eighteenth century that influence had grown even stronger.[34] The complete 'reception' of French law at the beginning of the nineteenth century was a continuation, though a very drastic one, of an already existing trend. To all this should be added that the first generation of lawyers

29. J. Gilissen & M. Magits, De bronnen van het recht in de Belgische gewesten sedert de dertiende eeuw 153–154 (Antwerp: Kluwer rechtswetenschappen 1989).
30. Of the many commemorative volumes of the bicentennials of Napoleon's codes, only a few can be mentioned here: Le Code Napoléon. Un ancêtre vénéré? Mélanges offerts à Jacques Vanderlinden (R. Beauthier & I. Rorive eds., Brussels: Bruylant 2004); Un héritage Napoléonien. Bicentenaire du Code civil en Belgique (D. Heirbaut & G. Martyn eds., Mechelen: Kluwer 2005); The French Code of civil procedure (1806) after 200 years. The civil procedure tradition in France and abroad 159–192 (D. Heirbaut, C.H. Van Rhee & M. Storme eds., Mechelen: Kluwer 2008); Bicentenaire du Code de commerce en Belgique (G. Martyn & D. Heirbaut eds., Brussels: KVAB 2009).
31. Cf. R. Van Caenegem, An Historical Introduction to Private Law 27 (Cambridge University Press 1992).
32. P. Godding, Le Droit Privé dans les Pays-Bas Méridionaux du 12e au 18e Siècle 233 (Brussels: Académie royale de Belgique 1987).
33. For example the homologation of customary law. *See* R. Van Caenegem, An Historical Introduction to Private Law 36 (Cambridge University Press 1992).
34. J. Bosch, *Remarques sur quelques influences exercées en matière de droit, par les provinces méridionales sur les provinces septentrionales des Pays-Bas jusqu'en 1795*, 19 Tijdschrift voor rechtsgeschiedenis 154 (1951).

after the French and Napoleonic legislation still continued to work in the framework of the old laws.[35]

[4] The Dutch Period

The end of the French occupation in 1814 did not lead to independence, nor did it lead to a restoration of Austrian rule. Instead, the United Kingdom of the Netherlands was created, which reunited the Southern and the Northern Netherlands and Liège under William I of the House of Orange. The new state wanted to have its own codifications. Some differences had to be overcome to create a new national law. In the South, French influence was very great, whereas the North was more inclined to use German ideas and theories. The Southerners wanted law to be practical; on the other hand, the Northerners loved theory. In spite of all that, by 1829 a new law on judicial organisation and four new codes, dealing with civil law, commercial law, civil procedure and criminal procedure were ready. By royal decree, they would come into force on 1 February 1831. However, in 1830 the South seceded. Consequently, the new codes were never introduced there. Exceptions were titles VI and VII of the second book of the new civil code. The French civil code had not dealt with long leases and building leases. Therefore, that part of the new civil code had already been introduced in 1825.[36] Apart from that, the United Kingdom of the Netherlands has not left many traces of its existence in Belgian law.

§1.02 A BELGIAN LEGAL TRADITION AFTER BELGIAN INDEPENDENCE IN 1830?

[A] The Belgian Revolution

The Belgian revolution of 1830 had many causes. The United Kingdom of the Netherlands had been discriminating against the South from its start. The state debt of the new kingdom had to be paid equally by North and South, although the debts were mainly Northern. In the parliament the North had as many delegates as the South,

35. *See* the articles by Beauthier, Stevens and Heirbaut in LE CODE NAPOLÉON. UN ANCÊTRE VÉNÉRÉ? MÉLANGES OFFERTS À JACQUES VANDERLINDEN (R. Beauthier & I. Rorive eds., Brussels: Bruylant 2004).

36. J. Gilissen, *Codification et projets de codification en Belgique au XIXe siècle (1804–1915)*, 14 BELGISCH TIJDSCHRIFT VOOR NIEUWSTE GESCHIEDENIS 219–229 (1983); *Ibid.*, *De Belgische commissie van 1816 tot herziening van het ontwerp burgerlijk wetboek voor het Koninkrijk der Nederlanden*, 35 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 383–443 (1967); H. KOOIKER, 1 LEX SCRIPTA ABROGATA. DE DERDE RENAISSANCE VAN HET ROMEINSE RECHT. EEN ONDERZOEK NAAR DE DOORWERKING VAN HET OUDE RECHT NA DE INVOERING VAN DE CIVIELRECHTELIJKE CODIFICATIES IN HET BEGIN VAN DE NEGENTIENDE EEUW 346–356 (Nimeguen: Ars Aequi 1996); S. Van Brakel, *De geschiedenis van de totstandkoming van het Burgerlijk Wetboek van 1820 tot 1838*, *in* GEDENKBOEK BURGERLIJK WETBOEK 1838–1938, 277–326 (P. Scholten & E. Meijers eds., Zwolle: Tjeenk Willink 1938); J. Van Den Broeck, *Het Burgerlijk Wetboek en de invloed van de Duitse rechtshistorische school in België tijdens de 19de eeuw*, *in* WETBOEK EN GRONDWET IN HISTORISCH PERSPECTIEF. LIBER AMICORUM JOHN GILISSEN 417–425 (Antwerp: Kluwer Rechtswetenschappen 1983); E. VAN DIEVOET, HET BURGERLIJK RECHT IN BELGIË EN NEDERLAND VAN 1800 TOT 1940. DE RECHTSBRONNEN 15–53 (Antwerp, De Sikkel, 1943).

although the population of the South was nearly twice that of the North. The constitution of the United Kingdom of the Netherlands had only been approved in the South in 1815 by some very creative counting (the abstentions and no-votes for religious reasons were counted as yes-votes). Events after 1815 mostly strengthened Southern dislike of the United Kingdom of the Netherlands. The Catholics were enraged because the king interfered too much with education and was not willing to give Catholicism a privileged position in the south. The French-speaking bourgeoisie did not like the linguistic policy of the king, who wanted to promote the Dutch language. They also wanted to have a liberal state, in which there would be no place for the autocracy of the king.

[B] The Constitution

The 1830 revolution led to one major legal document: the Constitution. It came into force on 25 February 1831. This Belgian Constitution has been considered to have been very innovative. Its success can be seen as a testimony of that. It was very influential in the nineteenth century and was imitated in Spain, Greece, Romania and Luxembourg. It also inspired the framers of the Italian, Prussian, Bulgarian and Dutch constitutions. In the twentieth century, it was still a source of inspiration in Poland, Hungary and Czechoslovakia. Yet, the Belgian Constitution was not original at all. Forty per cent of it was borrowed from the constitution of the United Kingdom of the Netherlands, 35% of the French *Charte constitutionnelle* of 1830, 10% of the French constitution of 1791 and 5% was derived from English constitutional practice. This leaves only 10% that has not been borrowed from elsewhere. If one weeds out some articles without much importance, only about ten articles were really new in 1831.[37]

[C] French Influence in the Nineteenth Century

Although the Constitution itself was not so original, Article 139 called for a quick revision of the existing French codifications.[38] If this had happened as soon as the framers had wanted, a Belgian legal tradition might have come into existence. In reality, however, the opposite happened.[39] Paradoxically enough, independence was one of the worst things that ever happened to legal science in Belgium. The French had first abolished the study of law in the Belgian territories and later created some kind of vocational school for law studies. Consequently, after the French occupation there

37. J. Gilissen, *Die belgische Verfassung von 1831. Ihr Ursprung und ihr Einfluss*, *in* BEITRÄGE ZUR DEUTSCHEN UND BELGISCHEN VERFASSUNGSGESCHICHTE IM 19. JAHRHUNDERT 38–69 (Stuttgart: Klett 1967); *Ibid.*, *La constitution belge de 1831: ses sources, son influence*, 10 RES PUBLICA 107–141 (1968).
38. J. Gilissen, *Codification et projets de codification en Belgique au XIXe siècle (1804–1915)*, 14 BELGISCH TIJDSCHRIFT VOOR NIEUWSTE GESCHIEDENIS 229 (1983).
39. *See* for a general survey, D. HEIRBAUT, HADDEN/HEBBEN DE BELGISCHE MINISTERS VAN JUSTITIE EEN CIVIELRECHTELIJK BELEID (Mechelen: Kluwer 2005) and also F. Stevens, *Der Code civil in Belgien seit 1804. Ein fester Halt*, *in* 200 JAHRE CODE CIVIL. DIE NAPOLEONTISCHE KODIFIKATION IN DEUTSCHLAND UND EUROPA 207–224 (Cologne: Böhlau 2005).

were few natives who were learned enough to teach law at a university. The government of the United Kingdom of the Netherlands had to bring in foreigners, mostly Germans. However, the efforts to create an academic study of law came to a halt after the revolution. The Constitution promoted the liberty of education. Anyone, who wanted to, could teach law. To assure at least some level of ability, in 1835 a central commission was instituted in Brussels. Only this commission could, after an examination, award a legal diploma. Original thinking was to be avoided, as that only lessened one's chances of passing the central exam.[40] In these circumstances, it is hard to see how an original Belgian legal tradition could have developed.

However, there was hardly a need for it. For a long time, Belgium could still count on some of the foreigners who had become professors in the 1815–1830 era. Jacques-Joseph Haus, for example, had become professor in Ghent in 1817 and only stopped teaching there in 1880. Most of all, after 1830, the Belgian elite was French-speaking. Although more than half the population was Dutch-speaking, the legal language was French. For lawyers it was easier to keep working with the French codes. That way, they could have a free ride by copying French laws, citing decisions of French courts and using French literature, sometimes in pirated editions of French works printed in Brussels.[41]

The result of this was that during most of the nineteenth century independence of the legal system was further away than ever. The judicial organisation still ran along Napoleonic lines.[42] There were few changes to the French codes.[43] Most attempts at revising them failed. Projects of the two procedural codes only led to new preliminary titles in the existing codes. The Civil Code was even worse off. A first commission to revise it was installed in 1841. The commission's efforts only led to a revision of the title on real securities. However, in 1879 François Laurent was charged with writing a new civil code.[44] Laurent was, beyond any doubt, the greatest legal mind ever working in Belgium. His new code was finished in 1883. It was a well-crafted document that also

40. B. Coppein, *Rechtsonderwijs en rechtsleer*, *in* Deux siècles de justice. Encyclopédie historique de la justice belge 111–112 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015).
41. E. Van Dievoet, Het burgerlijk recht in België en Nederland van 1800 tot 1940. De rechtsbronnen 89–90 (Antwerp, De Sikkel, 1943); F. Verbeke, Belgian law: an annotated bibliographic guide to reference materials, 1803–1993, 115–135 (Brussels: Belgische commissie voor bibliografie en bibliologie 1994).
42. J. Gilissen, L'ordre judiciaire en Belgique au début de l'indépendance (1830–1832), CII Journal des tribunaux 565–596 (1983); J. Nandrin, 1 Hommes, normes et politique: le pouvoir judiciaire en Belgique aux premiers temps de l'indépendence (Ph.D. dissertation Université Catholique de Louvain-La-Neuve 1995).
43. About these, *see* E. Holthöfer, *Belgien*, in Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte III/1, 1070, 1089–1098 (H. Coing eds., Munich: Beck 1982) and III/3, 3277, 3287–3345 (H. Coing eds., Munich: Beck 1986); J. Gilissen, *Codification et projets de codification en Belgique au XIXe siècle (1804–1915)*, 14 Belgisch tijdschrift voor nieuwste geschiedenis 229–269 (1983); E. Spanoghe & R. Feenstra, Honderdvijftig jaar rechtsleven in België en Nederland, 1830–1980. Preadviezen uitgebracht voor een colloquium georganiseerd door de juridische faculteiten van de universiteiten van Gent en Leiden (Leyden: University Press 1981).
44. On Laurent and his project for a new civil code, *see* D. Heirbaut, *Een hopeloze zaak François Laurents ontwerp van burgerlijk wetboek voor België,* 2013 Pro Memorie 261–283.

showed some of the author's social preoccupations. Its quality was marred by his virulent hate of the Catholic church, which permeated his work. Even in Laurent's own 'liberal' party his zealotry was frowned upon. The Catholics, who came to power in 1884, immediately installed a commission that would make something more to their liking.[45] That commission could not achieve much before it stopped its activities in 1929. The Penal Code saw more change. A new Penal Code, mainly written by Jacques-Joseph Haus, came into force in 1867. It did not really deviate from the French pattern. The French had already made modifications to their penal code by 1867, and the new Belgian code only revised the Napoleonic code to a limited extent.[46]

One Napoleonic code, the Commercial Code, was greatly changed in the nineteenth century. Its structure stayed intact, but one chapter after another was replaced by new laws between 1851 and 1891.[47] This did not happen by chance. Industrialisation came earlier to Belgium than to France. Moreover, the country had in relative terms more industry, railroads, etc. than France.[48] Therefore, it was confronted with the legal problems the new technologies posed much earlier and to a greater extent than France.[49] Consequently, in these cases the Belgians could not imitate French solutions, but had, out of necessity, to look to other countries, like England, or develop their own laws.[50] This explains also why the title on real securities in the civil code was revised. The power structure of nineteenth century Belgium explains why legislative change remained limited to rules impacting on commerce and industry. As only the rich had the right to vote, they dominated Parliament. Catholic and liberal members of Parliament were deeply divided on the issue of church-state relationships, but they were just as strongly united in their willingness to give Belgian industrialisation the best legal instruments possible.[51] In sharp contrast, they were unwilling to

45. F. Stevens, *'Où est donc passée la commission de révision?' La révision du Code civil en Belgique à la fin du XIXe et début du XXe siècle*, *in* Les démarches de codification du moyen-âge à nos jours 213–221 (G. Macours & R. Martinage eds., Brussels: KVAB 2006).
46. F. Stevens, *La codification en Belgique. Héritage français et débats néerlandais*, in *Le penal dans tous ses etats* 287–302 (Brussels: Facultés universitaires Saint-Louis 1997). The hotly debated issue of the death penalty in this code is the subject of J. De Brouwer, La peine de mort en Belgique: les conditions d'émergence du système abolitionniste de fait (1830–1914) (PhD dissertation Université Catholique de Louvain-La-Neuve 2009).
47. D. Heirbaut, Een beknopte geschiedenis van het sociaal, het economisch en het fiscaal recht in België 87–89 (Ghent: Academia Press 2013).
48. Cf. H. Coing, 2 Europäisches Privatrecht, 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern 81 (Munich: Beck 1989).
49. Cf. E. Holthöfer, *Belgien*, in Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte III/1, 1138 (H. Coing eds., Munich: Beck 1982); E. Van Dievoet, Het burgerlijk recht in België en Nederland van 1800 tot 1940. De rechtsbronnen 388 (Antwerp, De Sikkel, 1943).
50. *See* for the example of bankrupcy law, D. De Ruysscher, Gedisciplineerde vrijheid: een geschiedenis van het handels- en economisch recht 107–108 (Antwerp: Maklu 2014). For non-French foreign influences in Belgian case law, *see* G. Martyn, *In Search of Foreign Influences Other Than French in Nineteenth Century Belgian Court Decisions*, *in* 2 Ratio Decidendi. Guiding Principles of Judicial Decisions. Foreign Law 155–167 (G. Martyn, S. Dauchy, W. Hamilton Bryson & M. Mirow eds., Berlin: Duncker & Humblot 2010).
51. D. Heirbaut, Hadden/hebben de Belgische ministers van justitie een civielrechtelijk beleid 38–40 (Mechelen: Kluwer 2005).

improve the legal conditions of the working classes. For example, although working place accidents had become more common because of the rapid expansion of Belgium's industry, legislation on it had to wait until the early twentieth century.[52]

Fortunately, not all changes had to be initiated by the legislature. The first to encounter the challenges of industrialisation were the judges. Although they were willing to help the victims of industrialisation, their attitude towards it was rather benevolent. Judges were willing to award damages, but they did not forbid dangerous activities. At first, they sometimes based their decisions on the pre-1804 laws. In the second half of the nineteenth century the judiciary became more self-conscious and only referred to its own precedents.[53] The role the judges played in developing new legal rules has long been underestimated. For example, Article 1384, paragraph 1, of the Civil Code was creatively interpreted by the Brussels Court of Appeal, so that a new strict liability for damage caused by defective objects could be based on it. Laurent later made this theory popular and thus, it was believed to be his.[54]

'The country most faithful to Napoleon's codes',[55] or, 'a French province',[56] these expressions neatly sum up Belgium during the nineteenth century. Only a few changes to the French codes were made. Even these changes should not be overestimated and be seen as the embryonic developments of a legal tradition of its own. They were made only when necessary. Besides, some of them were not very Belgian. Laurent was a native of Luxembourg, and many other more or less original legal thinkers, like Haus, were of German origin.[57] It is hard to see how a Belgian legal tradition could have come into existence with only French codes and foreign scholars to nurture it.[58] Paradoxically, throughout the nineteenth century Belgium's highest magistrates paid lip service

52. B. Debaenst, Een proces van bloed, zweet en tranen! Juridisering van arbeidsongevallen in de negentiende eeuw in België (Brussels: KVAB 2011).
53. D. Heirbaut, *Les juges belges face au Code civil*, *in* Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen außerhalb Frankreichs 253–272 (B. Dölemeyer, H. Mohnhaupt & A. Somma eds., Frankfurt: Klostermann 2006). *See also* G. Martyn, *The Judge and the Formal Sources of Law in the Low Countries (19th–20th Centuries): From 'Slave' to 'Master'?*, *in* 1 Ratio Decidendi: Guiding Principles of Judicial Decision. Case Law 201–222 (W. Hamilton Bryson & S. Dauchy eds., Berlin: Duncker & Humblot 2006).
54. Cf. L. Cornelis, De buitencontractuele aansprakelijkheid veroorzaakt door zaken. Rechtsvergelijkend onderzoek: België, Frankrijk, Nederland, Bondsrepubliek Duitsland en Engeland 23–24 (Antwerp: Kluwer Rechtswetenschappen 1982).
55. Cf. R. Piret, *Le Code Napoléon en Belgique*, 6 Revue internationale de droit comparé 754 (1954).
56. E. Holthöfer, Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert 147 (Frankfurt: Klostermann 1993).
57. C. Hennau & J. Verhaegen, *Jacques-Joseph Haus (1796–1881)*, *in* Gestalten uit het verleden: 32 voorgangers in de strafrechtswetenschap, de strafrechtspleging en de criminologie 73–81 (C. Fijnaut eds., Brussels: Kluwer Rechtswetenschappen 1993).
58. Some recent doctoral theses (F. Muller, La cour de cassation belge à l'aune des rapports entre pouvoirs. De sa naissance dans le modèle classique de la séparation des pouvoirs à l'aube d'une extension de la fonction juridictionnelle 1832–1914/1936 (Bruges: die Keure 2011); S. Vandenbogaerde, Vectoren van het recht. Geschiedenis van de Belgische juridische tijdschriften (PhD dissertation Ghent University 2014)), however, may open the debate on Belgian autonomy towards France during the nineteenth century, as they show that some law reviews and the Court of Cassation took a more autonomous stand than has hitherto been assumed. *See also* De Belle Époque van het Belgisch recht (1870–1914) (B. Debaenst ed., Bruges: die Keure, 2016).

to the country's old legal traditions and its great jurists of the past, as if to compensate for a reality which went completely against their discourse.[59]

[D] The Waning of French Influence

Belgian law still has ties with French law,[60] but there is no denying that from the end of the nineteenth century[61] the dependence on France has lessened. The process has been very gradual, and its effects differ. It has many causes, but only the most important of them can be mentioned here.

[1] Changes in Legal Education and Legal Science

In 1876, the organisation of legal education in Belgium was drastically changed. The universities themselves could confer degrees in law. This meant that a law student was no longer examined by a central commission in Brussels, but by the professors who had taught him. This gave more freedom to law professors. Consequently, legal science in Belgium took off in a new direction.[62] Before 1876 the exegetical method dominated in the law faculties. Its adherents stated that statutes were the only source of law and that they had to be interpreted literally. Now, other ways of studying law became possible. As in France, the exegetic method came under fire from the proponents of the scientific method. They wanted legal research to be free from the constraints of the codes. Other sources of law than statutes and even social influences had to be studied.[63] A typical representative of this new method around 1900 was Adolphe Prins, who developed the theory of social defence (maintaining order is the sole goal of justice) and stimulated the reform of criminal law.[64] Another leading author of the 'socialisation of law' around 1900 was Edmond Picard, a prolific legal writer, patron of the arts and politician.[65]

59. Cf. F. Stevens, *Histoire du droit et nationalisme en Belgique aux XIXe siècle*, *in* Histoire de l'histoire du droit 203–215 (J. Poumarède ed., Toulouse: Presse de l'université 2006); A. Hendrick, 'Des mots de circonstance'. Les discours de rentrée de la haute magistrature belge au XIXe siècle (PhD dissertation Université Saint Louis Brussels 2012).
60. Cf. C. Malliet, Elementaire bibliografie Belgisch recht 65 (Ghent: Mys & Breesch 1999).
61. On this pivotal era for Belgian law, *see* De Belle Époque van het Belgisch recht (1870–1914) (B. Debaenst ed., Bruges: die Keure, 2016).
62. F. Stevens, *Het rechtsonderwijs in de Zuidelijke Nederlanden in het begin van de 19de eeuw*, 9 Cahiers du Centre de recherches en histoire du droit et des institutions (CHRiDI) 67–70 (1998).
63. Cf. J. Gilissen & M. Magits, De bronnen van het recht in de Belgische gewesten sedert de dertiende eeuw 254–256 (Antwerp: Kluwer rechtswetenschappen, 1989); J. Van Biervliet, *L'interprétation belge du code civil*, *in* 2 Le code civil. 1804–1904. Livre du centenaire 652 (Paris: Rousseau 1904).
64. S. Christiaensen, *Adolphe Prins (1845–1919)*, *in* Gestalten uit het verleden: 32 voorgangers in de strafrechtswetenschap, de strafrechtspleging en de criminologie 109–123 (C. Fijnaut ed., Brussels: Kluwer Rechtswetenschappen 1993); B. De Ruyver, *De transformatie van het Belgisch strafrecht in de achtergrond van de politieke en sociaal-economische ontwikkelingen in het laatste kwart van de negentiende eeuw*, *in* Handelingen van het XVe Belgisch-Nederlands rechtshistorisch congres 207–210 (Antwerp: Kluwer Rechtswetenschappen 1998).
65. Picard will be an inexhaustible subject of study for many years to come. On him, *see* B. Coppein, Dromen van een nieuwe samenleving: intellectuele biografie van Edmond Picard (Ghent: Larcier 2011); F. Ringhelheim, Un jurisconsulte de race, Edmond Picard (1836–1924) (Brussels: Larcier

The great figures of the scientific school after the Second World War[66] were Henri De Page and René Dekkers, who wrote authoritative studies of Belgian civil law, which are still used today.[67] In spite of the popularity of their works, their scientific method has had little impact. The formalism of the exegetic method still dominates Belgian legal thinking, the main difference with the nineteenth century being that case law has become more important, with the decisions of the Court of Cassation (*Cour de cassation – Hof van Cassatie*) in practice having nearly the same status as acts of Parliament.[68] Apart from Chaïm Perelman, who worked about argumentation theories, the scientific method has not led to much original scientific work. To be fair, the situation seems to have changed in the last decades. Since the seventies, more work is being made of a scientific study of law, but this has, to date, little influenced the mainstream of Belgian lawyers.[69] However small the results of the scientific method may be in this respect, it has achieved one of its goals, an unfettered research of the law, and thus lessened French influence.

[2] Social and Economic Changes

Already in the middle of the nineteenth century, Belgium sometimes had to make its own laws because France's economic development lagged behind. This took on even more importance from the end of that century, as the rate of technological change accelerated and the legal system began to reflect not only the interests of the bourgeoisie, but also of other social groups. In 1887, for example, the first social laws were voted by Parliament, and a huge body of labour law and social security law has been created in the years after.[70] Ever since, Belgians have prided themselves on their

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2012); P. Aron & C. Vanderpelen-Diagre, Edmond Picard (1836–1924); un bourgeois socialiste belge à la fin du dix-neuvième siècle. Essai d'histoire culturelle (Brussels: Musées royaux des beaux-arts 2013); Genius, grandeur & gêne: Het fin de siècle rond het justitiepaleis te Brussel en de controversiële figuur van Edmond Picard (W. Van Eeckhoutte & B. Maes eds., Brussels: Knops 2014).

66. This text cannot deal with the special situation during the World Wars and their aftermath. For that, *see* M. Bost & S. Horvat, *Une première crise majeure. L'impact de la Grande Guerre sur la justice belge*, *in* Deux siecles de justice. Encyclopedie historique de la justice belge 517–537 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015); K. Peters, R. Roden & L. Vanhaecke, *La Seconde Guerre mondiale et la répression d'après-guerre*, *in* Deux siecles de justice. Encyclopedie historique de la justice belge 538–561 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015); K. Aerts, *De repressie en juridische reïntegratie van collaborateurs na de Tweede Wereldoorlog*, *in* Deux siecles de justice. Encyclopedie historique de la justice belge 562–577 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015).
67. R. Dekkers, Handboek burgerlijk recht, 3 Vols. (Brussels: Bruylant 1971); H. De Page, Traité élémentaire de droit civil belge, 10 Vols. (Brussels: Bruylant 1952–1975).
68. Cf. R. Kruithof, Naar een 'gouvernement des juges' in het Belgische verbintenissenrecht en andere opstellen 39–45 (Antwerp: Maklu 1992).
69. Cf. F. Ost & M. Van Hoecke, *La jurisprudence en Belgique*, 33 Revue interdisciplinaire d'études juridiques 107–137 (1994).
70. *Honderd jaar sociaal recht in België*, 88 & 89 Arbeidsblad (1987–1988); B. Chlepner, Cent ans d'histoire sociale en Belgique (Brussels: Editions de l'université de Bruxelles 1972); J. Nandrin, *La genèse du droit du travail en Belgique. Plaidoyer pour la chronologie*, *in* Auctoritates. Xenia R.C. Van Caenegem oblata 256–288 (S. Dauchy, J. Monballyu & A. Wijffels ed., Brussels:

social system, even though, taking into account its early industrialisation, Belgium was a latecomer.

The most interesting evolution in this story happened in family law (in its broadest sense). The Napoleonic Civil Code had given the man as husband and father an authority over his wife and children that mirrored the absolute power Napoleon himself exercised over France. This patriarchal vision of the family was strengthened by the discrimination against the surviving spouse (which was mostly disadvantageous to women) and children born out of wedlock. From the end of the nineteenth century, all this was challenged and the family structure was gradually reorganised along more 'democratic' lines.[71] This process was stimulated by research into legal history.[72] Many customs in the Southern Netherlands had generally promoted a more democratic family structure before the coming of the French[73] and new legislation returned, if not to the details, then at least to the spirit of pre-French era family law. It is strange to realise that the evolution of Belgian family law from the nineteenth century has largely been a return to the past. This is exceptional. Most other legal developments cannot be linked to the old law of the Southern Netherlands. In 2001 the transformation of Napoleonic family law was completed, when Parliament abolished the family council, a typically French institution, which had never taken root in Belgium.[74] In the twenty-first century Belgian law has finally broken away from both the Napoleonic and older concepts of the family, introducing civil solidarity pacts, same sex marriage and legal voluntary euthanasia. A common element of the changes in both the twentieth and the twenty-first century seems to be a more democratic family life with a greater freedom for individuals to make their own choices.[75] Further changes, for example a modification of the rules on forced heirship, are on the horizon.

Koninklijke academie voor wetenschappen, letteren en schone kunsten van België, Wetenschappelijk comité voor rechtsgeschiedenis 1997); G. VANTHEMSCHE, DE BEGINJAREN VAN DE SOCIALE ZEKERHEID IN BELGIË, 1944–1963 (Brussels: VUBPress 1994; D. HEIRBAUT, EEN BEKNOPTE GESCHIEDENIS VAN HET SOCIAAL, HET ECONOMISCH EN HET FISCAAL RECHT IN BELGIË 15–80 (Ghent: Academia Press 2013); D. Heirbaut & B. Debaenst, *Het sociaal en het economisch recht: twee grote werven voor de justitiegeschiedenis*, *in* DEUX SIÈCLES DE JUSTICE. ENCYCLOPEDIE HISTORIQUE DE LA JUSTICE BELGE 502–509 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015).

71. Cf. B. Bouckaert, *De herziening van het Burgerlijk Wetboek: een tweede adem voor de rechtsstaat?*, *in* LIBER MEMORIALIS FRANÇOIS LAURENT 231 (J. Erauw, B. Bouckaert, H. Bocken, H. Gaus & M. Storme eds., Brussels: Story Scientia 1989); W. Delva, *Honderd jaar burgerlijk recht. Het civiel recht – inzonderheid het familierecht – gisteren, vandaag en morgen*, *in* GEDENKBOEK. DE VLAAMSE CONFERENTIE DER BALIE VAN GENT 1873–1973, 341–355 (G. Baert ed., Ghent: Vlaamse conferentie der balie van Gent 1974).
72. Cf. G. Van Dievoet, *Geschiedenis van de Commissie*, 37 HANDELINGEN VAN DE KONINKLIJKE COMMISSIE VOOR DE UITGAVE VAN OUDE WETTEN EN VERORDENINGEN VAN BELGIË 15–57 (1996).
73. For the old persons and family law, *see* P. GODDING, LE DROIT PRIVÉ DANS LES PAYS-BAS MÉRIDIONAUX DU 12E AU 18E SIÈCLE 47–138, 295–413 (Brussels: Académie royale de Belgique 1987); J. MONBALLYU, GESCHIEDENIS VAN HET FAMILIERECHT VAN DE LATE MIDDELEEUWEN TOT HEDEN (Leuven, Acco, 2006).
74. On the changes in postwar Belgian family law, *see* J. Gerlo, *Het familierecht in het zicht van het jaar 2000*, *in* LIBER AMICORUM PROF. DR. G. BAETEMAN 119–140 (Deurne: Story-Scientia 1997); M. Meulders-Klein, *La famille, le législateur et le juge à la croisée des chemins*, 63 REVUE RÉGIONALE DE DROIT 31–56 (1992).
75. D. Heirbaut, *Vijftig jaar privaatrecht in het TPR: er is in die tijd veel veranderd*, 51 TIJDSCHRIFT VOOR PRIVAATRECHT 44–49 (2014).

[3] The Rise of Dutch as a Language for Law

Today's Belgium has three official languages: Dutch, spoken in Flanders in the north and by a small part of the population of Brussels; French, spoken in Wallonia in the south and by the largest part of the population of Brussels; and German, spoken in the so-called eastern districts. The German-speakers form only a small part of the population. About 60% of Belgium speaks Dutch and about 40% French. Although the Flemings form the majority of the population, the language of law after Belgian independence was French. French was the language of the elite, even in Flanders, and thus of the lawyers. For example, if one does not count vulgarising publications, between 1830 and 1890 only a few more than twenty books on law were published in Dutch. Legislation was only published in French, and only in a small minority of the courts was Dutch used.[76]

From 1856 the dominant position of the French language came under attack from the so-called Flemish movement. At first, the Flemings did not demand much: equality of Dutch and French in Flanders. In 1873 a first language law[77] was passed in Parliament. It made the use of the Dutch language compulsory in Flanders in criminal proceedings in which the accused could not understand French. Laws of 1878 and 1883 introduced comparable rules for administrative matters and education. From 1898 all statutes, royal decrees and government regulations had to be published both in French and in Dutch.

After the First World War, language legislation entered a new stage. A 1921 act of Parliament introduced the territoriality principle: in principle, the language of the authorities should be the language of the region in which they act. In 1932 this led to the recognition that Flanders and Wallonia are unilingual (Dutch, respectively French) and that Brussels is bilingual. A 1935 law applied this principle also to judicial proceedings. Thus, a linguistic boundary was created in Belgium. However, a regular language census was held regularly and the linguistic boundary could be changed according to its results. However, in 1962–1963 this boundary was fixed by statute and in 1970 even by the Constitution.[78] In the 1960s the most important statutory instruments which date from before 1898 were also officially translated into Dutch (e.g., the Civil Code in 1961, the Constitution in 1967).[79] The 1930s and 1960s are also crucial for legal education. Ghent University, where Dutch had been used next to

76. H. Van Goethem, *De Nederlandse rechtstaal in België in de negentiende eeuw*, *in* 'HOUD VOET BIJ STUK'. XENIA IURIS HISTORIAE G. VAN DIEVOET OBLATA 587–599 (F. Stevens & D. Van Den Auweele eds., Louvain: KULeuven, Law Faculty, Section of Roman law and legal history 1990); H. VAN GOETHEM, DE TAALTOESTANDEN IN HET VLAAMS-BELGISCH GERECHT 1795–1935 (Brussels: Koninklijke academie voor wetenschappen, letteren en schone kunsten van België 1990).
77. On Belgium's language legislation, *see* B. Coppein & M. Muller, *La législation linguistique en Belgique*, *in* DEUX SIECLES DE JUSTICE. ENCYCLOPEDIE HISTORIQUE DE LA JUSTICE BELGE 477–499 (M. De Koster, D. Heirbaut & X. Rousseaux eds., Bruges: die Keure 2015).
78. L. Wils, *Bestuur, in* NIEUWE ENCYCLOPEDIE VAN DE VLAAMSE BEWEGING, I, 480–486 (Tielt: Lannoo 1998); H. VAN GOETHEM, DE TAALTOESTANDEN IN HET VLAAMS-BELGISCH GERECHT, 1795–1935 (Brussels: Koninklijke academie voor wetenschappen, letteren en schone kunsten van België 1990).
79. J. GILISSEN & M. MAGITS, DE BRONNEN VAN HET RECHT IN DE BELGISCHE GEWESTEN SEDERT DE DERTIENDE EEUW 201 (Antwerp: Kluwer rechtswetenschappen, 1989).

French from 1923, began to use only Dutch from 1930. In Louvain, however, French was still used until 1969.[80]

The rise of Dutch as an official language and a language for education inevitably led to the development of a legal literature in Dutch. The great stages run close to the legal developments: a first real start at the end of the nineteenth century, a breakthrough in the 1930s, and well established after 1960. Today law articles in Dutch are in all respects equal to those in French.[81] Needless to say, the appearance of Dutch-speaking lawyers has greatly contributed to the weakening of French influence.

[E] A French-Speaking and a Flemish Belgian Legal Culture?

The decline of French influence has not led to the creation of a distinct Belgian legal culture. In fact, an evolution is visible towards the development of two new legal cultures: one Flemish, i.e., Dutch-speaking, the other French-speaking. Some examples can illustrate the growing rift between Belgian lawyers on both side of the linguistic border:

- The leading reviews are different: for Flemings the *Rechtskundig Weekblad* and *Tijdschrift voor Privaatrecht*; for the French-speakers the *Journal des tribunaux* and *Revue critique de jurisprudence belge*. It has to be stressed that the divide is far from absolute here. For example, some law reviews have become bilingual.[82]
- The decisions of courts may vary according to the linguistic background of the judges. This has been most visible for the Council of State (*Conseil d'Etat – Raad van State*), the highest administrative court. Some of its decisions have come under attack by members of one linguistic group because they had been taken by justices of the other linguistic group.[83]
- Flemish lawyers are more influenced by Dutch, German and Anglo-American legal thinking, whereas in the French-speaking part of the country the presence of French jurisprudence is still strong.[84]

80. R. Verstegen, *L'enseignement du droit en Belgique. Evolution de la législation aux XIXe et XXe siècle*, *in* 'Houd voet bij stuk'. Xenia iuris historiae G. Van Dievoet oblata 154, 191 (F. Stevens & D. Van Den Auweele eds., Louvain: KULeuven, Law Faculty, Section of Roman law and legal history 1990).
81. Cf. G. Van Overwalle, *Het Nederlandstalig juridisch tijdschrift in België*, 1988/4 Vlaams jurist vandaag 16–20. *See also* H. Sabbe & L. Huyse, De juristen in België. Een beroepsgroep in beweging 5 (Leuven: Instituut recht en samenleving 1994); S. Vandenbogaerde, *Vijftig jaar grensoverschrijdende rechtswetenschap: Het Tijdschrift voor Privaatrecht (1964–2014)*, 51 Tijdschrift voor Privaatrecht 60–103 (2014).
82. G. Van Overwalle, *Het Nederlandstalig juridisch tijdschrift in België*, 1988/4 Vlaams jurist vandaag 19–21.
83. G. Baeteman, *De Raad van State op de drempel van de 21ste eeuw*, *in* 50 jaar Raad van State 8 (Bruges: die Keure 1998); F. Remion, Le conseil d'état 225 (Brussels: Bruylant 1990); J. Sohier, *'Forumshopping' bij de Raad van State: realiteit of waanidee?*, 1998/5 Vlaams jurist vandaag 19.
84. Cf. J. Herbots, *Belgium*, *in* 1 International Encyclopedia of Laws, Contract Law 30 (The Hague: Kluwer Law International 1998); F. Ost & M. Van Hoecke, *La jurisprudence en Belgique*, 33 Revue interdisciplinaire d'etudes juridiques 107, 115 (1994).

That Dutch-speaking, i.e., Flemish, and French-speaking lawyers are different becomes clear, when one consults surveys of legal science in Belgium. Both parts of the country are dealt with separately.[85]

Differences will only grow stronger in the future. Belgium was originally conceived as a unitary state, though with a lot of freedom for local authorities. Nowadays, it no longer is a unitary state. Since 1993, the first article of the Constitution states that Belgium is a federal state. Subsequent revisions of the Constitution and constitutional bylaws in 1970, 1980, 1988–1989, 1992–1993, 2001 and 2012–2013 (the reader will notice a ten-year pattern) have created one of the most original types of federalism in the world. Three 'communities' (Dutch-speaking, French-speaking and German-speaking) are competent for educational and cultural matters, and three 'regions' (Flanders, Wallonia and Brussels) are competent for economic matters.[86] Communities and regions have their own legislative and executive branches of government. For the areas of their competences, these new entities are making their own legislation, thus assuring that Dutch-speaking and French-speaking lawyers in these areas no longer share the same laws. Not to be neglected is the fact that education is no longer organised by the federal State, as it falls under the jurisdiction of the communities. Dutch-speaking and French-speaking universities are already now organised along different lines.[87] It is to be expected that, in time, this will contribute to the growing break-up of Belgian law. On the other hand, constitutional amendments have also introduced a new player in the world of Belgian law. In 1980 the Constitution established the Court of Arbitration, which was in spite of its name a constitutional court, albeit with limited powers. Thereafter its jurisdiction expanded, so that from 2007 its name is 'Constitutional Court' (*Cour constitutionnelle – Grondwettelijk Hof*). Its prestige has grown rapidly, and it has even displaced the Court of Cassation as Belgium's leading court.[88]

The people of Belgium have been mostly apathetic toward law, unless it interfered with the more important linguistic, social or religious problems.[89] In 1996 a scandal broke out over the paedophile Marc Dutroux, who was responsible for the disappearance of several young children. Although Dutroux was caught, the bungling way in which judicial and police authorities handled this case, has led to a situation in which disrespect for the courts has nearly become common sense.[90] Most striking was

85. For example F. Ost & M. Van Hoecke, *La jurisprudence en Belgique*, 33 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 107, 113–137 (1994).
86. On Belgian federalism, *see infra* Chapter 3, §3.09 [D].
87. In Flanders university education and organisation were reformed in 1991, but in French-speaking Belgium there have been no comparable reforms.
88. Cf. e.g., K.-J. VANDORMAEL, HET GRONDWETTELIJK HOF: RECHTER OF REGELGEVER? ANALYSE VAN DE DRAAGWIJDTE VAN DE RECHTSPRAAK VAN HET GRONDWETTELIJK HOF (Ghent, Larcier, 2015).
89. Cf. L. HUYSE, DE LANGE WEG NAAR NEUFCHÂTEAU 192 (Leuven: Van Halewijck 1996); L. Huyse & A. Verdoodt, *Dertig jaar justitiebeleid. Kroniek van een aangekondigde crisis*, 20 PANOPTICON 3–12 (1999); M. Storme, *Slotrede*, *in* VERTROUWEN IN HET GERECHT 124 (Diegem: Kluwer Rechtswetenschappen 1995).
90. Cf. S. Gutwirth, K. Raes & D. Roef, *België, een rechtstaat met vormgebreken*, 23 RECHT EN KRITIEK 4 (1997).