In the shadow of France. Legal acculturation and legal transplants in the Southern Netherlands/Belgium

J.-F Gerkens (University of Liège) and D. Heirbaut (University of Ghent)

Today’s Belgium 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 that it did not start a new trend, but confirmed, albeit rather abruptly, an existing one.

A. 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 in between 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, achieved independence and it became also known under the name in the vernacular for the Low Countries, Netherlands, 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 it 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 law was limited. Neither the Burgundians,
nor their Habsburg successors managed to impose legal unity.¹ During the high middle ages law essentially was a local and regional phenomenon and it remained that way, 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 opened the way for legal transplants,² 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 indication of this are the so-called renunciations of Roman law, by which a party gave up the rights Roman law awarded it. The earliest appear in the mid thirteenth century and only in charters by clerics, 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.³ 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. 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 the latter already took hold on the thirteenth century with the officialities, bishop’s courts with a university trained judge,⁴ and even some influences on legal practice, like the reappearance of the testament.⁵

⁴ M. Van Melkebeek, De officialiteit van Doornik: oorsprong en vroege ontwikkeling (1192-1300), Brussels, Academy, 1985.
⁵ P. Godding, La pratique testamentaire en Flandre au 13e siècle, Legal history review/Tijdschrift voor rechtsgeschiedenis, LVIII, 1990, 281-300. See also P. Godding, Le testament princier dans les Pays-Bas méridionaux (12e-15e siècles): acte privé et instrument
Apart from that, the supremacy of indigenous law was uncontested. Nevertheless, 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. 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. 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. 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. A third mechanism of unification were the legal experts of the customary law courts: its presidents, bailiffs and like officials, and spokesmen (the spokesman was the person who by answering the president’s questions formulated the decision of the court), who were most of the time active in more than one court. All these mechanisms appeared in a haphazard way, driven by circumstances, not by any great design. Consequently, it could also, though exceptionally, happen that a
customar legal system fragmented. This happened in the county of Flanders, where the once unitary feudal law fell apart at the end of the thirteenth century.¹⁰

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,¹¹ 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.¹² 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.¹³ It is also in this century that books of learned law become more numerous in libraries.¹⁴

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 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.¹⁵

---

¹² D. Heirbaut, ‘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, 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).
¹³ Gilissen, ‘Romeins recht’, 111.
courts were not staffed by university trained lawyers, but the major cities hired them to advise these courts.\(^\text{16}\) 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.\(^\text{17}\)

As this shows, even in the late middle ages the impact of Roman law remained limited. Actual legal transplants of substantive law are rare, like the doctrine of *laesio enormis*.\(^\text{18}\) Moreover, these Roman law rules served to plug the gaps in customary law and to strengthen its existing principles.\(^\text{19}\) 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).\(^\text{20}\) Roman law, however, influenced, certainly in the highest courts, the procedure\(^\text{21}\) 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.\(^\text{22}\) 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,\(^\text{23}\) but the real guide seems to have been France. In a larger context the Southern Low Countries belonged with Northern

\(^\text{16}\) Van Caenegem, *Droit romain*, 13-16.
\(^\text{19}\) Godding, ‘Réception sélective’, 103.
\(^\text{22}\) Van Caenegem, *Droit romain*, 45.
France, with 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.\textsuperscript{24} 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).\textsuperscript{25} 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. It is remarkable that the first legists and notaries to appear in the Low Countries worked for the count of Flanders and that in both cases Count Guy of Flanders hired them to specifically 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.\textsuperscript{26} The case of the legists is more complicated, because the pioneering study by Gilissen\textsuperscript{27} 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 of Paris.\textsuperscript{28} Only one generation later, under Guy’s son Robert, we find legists on the count’s council in Flanders.\textsuperscript{29} Even so, it is clear that 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 of Paris and its turn that influenced the other principalities. However, it is remarkable, once


\textsuperscript{26} The documents are published in: T. de Limburg-Stirum, Codex diplomaticus Flandriae. Inde ab anno 1296 ad usque 1325, Bruges, Emulation, 1879-1889, I, nr. 43, 149-151; nr. 50-53, 163-186; J. Murray, Notarial instruments in Flanders between 1280 and 1452, Brussels, Academy, 1995, nr. 2-3, 132-136.

\textsuperscript{27} Gilissen, ‘Légistes’, 117-231.

\textsuperscript{28} Heirbaut, ‘Cadre juridique’, 137-139.

\textsuperscript{29} 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 Raadharen achter de figuur van Lodewijk II van Nevers 1322-1346), Bruges, Emulation, 1999, 265-266) only repeats the data from Gilissen.
again, that changes in substantive law remained exceptional, even though appeal was possible in Paris against Flemish judgments.\textsuperscript{30}

Next to 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,\textsuperscript{31} as many students from the Low Countries saw studies in Leuven as a prelude to studies at the more prestigious university of Orleans.\textsuperscript{32}

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 in the first half of the sixteenth Roman law made an enormous advance,\textsuperscript{33} but once again the main impetus was French. For example, the first author to use Roman law extensively was Willem van der Tanerijen in 1474-1476.\textsuperscript{34} 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 him inspiration from a French book, the late fourteenth century Somme rural of Jean Boutillier.\textsuperscript{35} Even though Boutillier wrote on customary law, he used the terminology of Roman law a lot and referred to it. As Boutillier 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

\textsuperscript{31} About the law faculty of Leuven university, see V. Brants, La faculté de droit de Louvain à travers cinq siècles (étude historique), Brussels, Larcier, 1906 (reprinted: Brussels, General archives of the kingdom, 2002); Lovanium docet. Geschiedenis van de Leuvense rechtsfaculteit (1425-1914), Leuven, Faculty of law. Section of Roman law and legal history, 1988.
\textsuperscript{34} William van der Tanerijen, Boec van der lopender practijken der raidtcameren van Brabant, ed. E. Strubbe, Brussels, C.A.D., 1952, 2 vol.
\textsuperscript{35} G. Van Dievoet, Jehan Boutillier en de Somme rural, Leuven, Universitaire uitgaven, 1951.
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 to that of Roman law.\textsuperscript{36} In that aspect, his work was continued by a local author, Philippe Wielant, in the first years of the sixteenth century. Wielant brought the strengths of Roman law to the study of customary law.\textsuperscript{37} 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).\textsuperscript{38} 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. their official compilation and subsequent promulgation by decree.\textsuperscript{39} 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.\textsuperscript{40} 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.\textsuperscript{41} In fact, the more the latter was an instrument of centralisation, as in those

\begin{itemize}
\item \textsuperscript{36} Gilissen, ‘Romeins recht’, 120-122.
\item \textsuperscript{37} About Wielant, see J. Monballyu, Filips Wielant. Verzameld werk, I, Corte instructie in materie crimienele, Brussels, Academy, 1995, 7-20.
\item \textsuperscript{38} About de Damhouder, see J. Monballyu and J. Dauwe, ‘Joos de Damhouder en zijn ‘Practycke in civile saecken’’, 1-14, in J. De Damhouder, Pracktycke in civile saecken, Ghent, Tijdschrift voor privaatrecht, 1999 (reprint of The Hague, 1626).
\item \textsuperscript{39} 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, 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, Handel en recht in de Antwerpse rechtbank (1585-1713), Leuven, 2009 (unpublished Ph. D. thesis Catholic University of Leuven). For a general survey, the publications by Gilissen have not yet been replaced, but one can hope that either of the two young scholars mentioned will have a chance to update Gilissen’s work.
\item \textsuperscript{40} J. Gilissen, ‘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, 36-67, 239-2909.
\item \textsuperscript{41} Gilissen, ‘Romeins recht’, 123-125, 135-137.
\end{itemize}
cases where local customs where replaced by a single provincial law. Roman law also gained ground because it had a supplementary role, plugging the gaps of customary law. In this, the model was the homologated custom of Burgundy. However, during the sixteenth century Roman law suffered an ‘authoritative degradation’, as it became ‘subsubsidiary’ instead subsidiary. When there was a gap in the local law, jurist had to consult provincial custom, and only if the latter too did not resolve the issue, they could turn to Roman law. This proves that homologation only could bring Pyrrhic victories to Roman law. It expanded its influence, but it also strengthened and enshrined customary law 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 with local law, or at least did not contradict its principles. Given that Roman law meant those elements of Roman law which the local lawyers are willing to stomach, its meaning varied with the local circumstances. 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 happened, this happened, as 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. Roman law was, in general, only welcome if it could strengthen indigenous law, not of it came to weaken it.

---

45 This very apt terminology is to be found in Van Hofstraeten, Acculturatie, 166, a book which is full of new and very useful terms for any student of the history of legal acculturation and legal transplants.
48 This is very well demonstrated in De Ruyscher, Handel, see e.g. 73, 157, 399.
49 About this selective reception, see Godding, ‘Réception’, 91-103.
This attitude towards Roman law was, strangely enough, also possible because the professors at Leuven University cared little for customary law. From the sixteenth century on the Habsburgs awarded a monopoly to the Leuven law studies. At the provincial councils of justice even advocates needed to have a Leuven law degree, unless there were exceptional circumstances. 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 ‘irrealistic training’ they received at the university. This judgement may be too harsh, as the Leuven professors assimilated the advantages of humanism without giving up their interest in solving practical problems. Thus, they mentally prepared future lawyers for assimilate, to treat their own law with the toolbox of Roman law, which also included writing it down in the homologations. Still, the overall impact of Leuven must have been limited. Even in the tribunal of the city of Antwerp, on which sat more university trained lawyers than on other courts, the influence of Leuven remained limited. Another channel for this infiltration of the methodology, rather than the substance of Roman law were the provincial councils of justice and the highest court of the land, the Great Council of Malines. Given the stagnation of customary law after homologation and the lethargy of the legislator their importance cannot be overrated.

51 Cf. J. Buntinx, ‘Post-graduate onderwijs in de rechten te Gent’, Archief- en bibliotheekwezen van België, XLII, 1971, 26-33. There was also a law faculty in Douai.
53 J. Van den Broeck, De rechtsleer in de Zuidelijke Nederlanden tijdens de 18de eeuw, Brussels, Academy, 2001, 35.
54 Lovanium docet, 8.
56 De Ruyssscher, Handel, 112.
57 De Ruyssscher, Handel, 399.
Much has been made of the differences between the successive schools of Roman law, yet, one should keep in mind that in the Southern Netherlands lawyers were first and foremost pragmatic and traditional. The school to which an author belonged was less important than the availability and usefulness of his work. Even in the sixteenth century this meant that Bartolus and other late medieval authors dominated, because they served the needs of practice and better alternatives were not available, as it took some time for new authors to be circulated. However, French works later challenged the supremacy of Bartolus, but, once again, utility determined success. Thus, a greater scholar, like Charles Du Moulin may be overshadowed by a lesser, though more useful author. In the eighteenth century legal authors may have had a preference for Dutch literature, but in the courtroom French authors remained important and their influence grew even stronger during the second half of the eighteenth century. Local authors were for a long time less popular, because there were fewer of them and because their work had less chances of being printed. During the seventeenth century collections of

63 Martyn, ‘Usus modernus’, 252.
(annotated) decisions of the highest courts\textsuperscript{70} gained in importance with French editions competing with local collections.\textsuperscript{71} 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 to them, even in the seventeenth century, Italy was a better guide than France.\textsuperscript{72}

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\textsuperscript{73} and it was not very original. The great monument of legislation was the 1611 Perpetual Edict, with its 47 articles it a meagre imitation of the great French ordinances.\textsuperscript{74}

A counterpart to the French influence is the quasi absence of Spain\textsuperscript{75} and Austria,\textsuperscript{76} 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 crucial 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

\textsuperscript{70} About this type of source, see V. Demars-Sion and S. Dauchy, ‘A propos d’un “recueil d’arrêt inédit: la Jurisprudence du parlement de Flandre de Georges de Ghewiet’, Legal history review/Tijdschrift voor rechtsgeschiedenis, LXXVII, 2009, 157-189.

\textsuperscript{71} De Ruysscher, Handel, 399; P. Godding, ‘L’origine et l’autorité des recueils de jurisprudence dans les Pays-Bas Méridionaux (XIII\textsuperscript{e}-XVIII\textsuperscript{e} siècles)’, in: Rapports belges au VIII\textsuperscript{e} congrès international de droit comparé, Brussels, C.I.D.C., 1970, 33.


\textsuperscript{74} For an analysis, see G. Martyn, Het Eeuwig Edict van 12 juli 1611, zijn genese en zijn rol in de verschrijfelijkging van het privaatrecht, Brussels, General archives of the kingdom, 2000; for a modern reprint, see Het Eeuwig Edict van 12 juli 1611, ed. G. Martyn, Antwerp, Berghmans, 1997.

\textsuperscript{75} Cf. Martyn, Eeuwig edict, 98.

\textsuperscript{76} Van den Broeck, Rechtsleer, 31.
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.\textsuperscript{77} Wielant wrote in Dutch (and French),\textsuperscript{78} 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.\textsuperscript{79}

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 speaking territories stuck to the regional law, but at the higher levels French was on the rise.\textsuperscript{80} From 1750 all written documents at the Great Council of Malines, the highest court in the land, were in French.\textsuperscript{81} Legal authors also switched to French\textsuperscript{82} 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.\textsuperscript{83} In line with the Vernunftrecht which favoured a top down overhaul of the old law, he wanted radically to change the laws and institutions of the Southern Netherlands. 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. In 1790 the Austrians had already restored order at the price of their reforms.\textsuperscript{84}

\textsuperscript{77} R. Willemyns, Het verhaal van het Vlaams. De geschiedenis van het Nederlands in de Zuidelijke Nederlanden, Antwerp, Standaard, 2003, 141.
\textsuperscript{78} His Antiquités de Flandre, of which S. Dauchy is preparing an edition.
\textsuperscript{79} Willemyns, Vlaams, 142-143.
\textsuperscript{80} Willemyns, Vlaams, 154-157.
\textsuperscript{81} Van den Broeck, Rechtsleer, 23.
\textsuperscript{82} Van den Broeck, Rechtsleer, 21-23.
\textsuperscript{83} Van den Broeck, Rechtsleer, 23-28, 34.
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.

B. Post 1795 law in Belgium

1. 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 in one swoop the French, in the so-called Code Merlin, abolished the many customs of the Southern Netherlands and imposed French law. 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, as during the 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, Belgian may be even more faithful to its French heritage than France itself. Its judicial organisation is still closer to the Napoleonic model. In 2004, at the commemoration of two hundred years Civil Code, Belgium had preserved more of the original articles than France. It still has

---

the original Napoleonic Code of Criminal Procedure, which is no longer in force in France itself. In short, Belgium may be Napoleon’s most faithful subject. 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. 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, the 1967 Judicial Code slavishly stays within the French mould. The Commercial Code does not contradict the general pattern. The structure of it remained intact during the nineteenth century, but its articles were replaced during the second half of the nineteenth century. Belgium then industrialised at a break-neck speed (when World War I broke out, only the United States, the United Kingdom, Germany and France had an industry 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

88 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 know 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, 187-199).
89 Art. 139, 11° (abolished in 1971, Moniteur belge, 8 july 1971).
90 It was, however, also based on ideas already developed by Haus in the 1830’s (F. Stevens, ‘La codification pénale en Belgique. Héritage français et débats néerlandais (1781-1867)’, in: X. Rousseaux and R. Levy (ed.), Le pénal dans tous ses états: justice, états et sociétés en Europe (XIe-XXe siècles), Brussels, FUSL, 1997, 300-301).
to other countries. 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. It dealt with real securities because this part of the Code showed many defects 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 and it makes clear that projects for a new code either did not want to get rid of the French heritage, or failed. In each case specific circumstances can explain the outcome to some extent, but this article being a winner’s history of French law, it should be more concerned with the reasons for French success, than with the explanations for individual failures to break away from France.

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

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

---


93 Loi du 16 décembre 1851 sur la révision du régime hypothécaire (Moniteur belge, 22 December 1851).


95 See Heirbaut, *Ministers*, and the references there.

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.  

b. French law as 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 of the cases, less a reception of new rules than an assimilation of the old ones. After all, the old customs of the Southern Netherlands, can be grouped together with those of Northern France, the so-called pays de droit coutumier (regions of customary law). True, Napoleonic law formulated the existing legal rules in a new way, but 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. An 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 the general expectations, though there could be some local differences, which was also true in France itself.

---


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.\(^{100}\)

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 resistance to it.\(^{101}\) 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.\(^{102}\) Thus, what fueled resistance was not the French origin of new rules, but their revolutionary character. Whether 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\(^{103}\) 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 the old law to solve a dispute.\(^{104}\) Art. 2 of the Code stated that the latter was only to be applied to the future, future effects of old situations still being ruled by the old law. Contracts and wills also offered possibilities for staying with the old law.\(^{105}\) Régine Beauthier in a ground-breaking article has shown that the result of

---


this resistance was a paradox: instead of being a bar to the success of the French Code, it actually enabled it.\textsuperscript{106} Thus, the resistance 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.\textsuperscript{107} 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.\textsuperscript{108} Brussels publishers quickly saw they could offer a bargain to Belgian lawyers and still come out ahead.\textsuperscript{109}

c. Legal education

A shared history, laziness and greed all drove Belgian lawyers in the arms of French law. University education ensured that would not try to escape from it. Eighteenth century legal education at Leuven had not been of the highest level\textsuperscript{110} and the French made it only worse. First they abolished law studies in Leuven and then established only a

\textsuperscript{106} Beauthier, ‘Article 2’, 257.
\textsuperscript{108} H. Dopp., La contre-façon des livres français en Belgique, 1830-1852, Leuven, Uystpruyst, 1932.
\textsuperscript{109} For a survey of these Belgian editions, see F. Verbeke, Belgian law: an annotated bibliographic guide to reference materials, 1803-1993, Brussels, Belgische commissie voor bibliografie en bibliologie, 1994, 115-135.
\textsuperscript{110} Van den Broeck, Rechtsleer, 31-35.
vocational school. The United Kingdom of the Netherlands had a 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, to teach. The influence of this new policy is visible in La Thémis, a review which was very critical of French law. 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, but they made little headway and independence ended even that. A few foreigners remained, but many others left. 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 a monopoly for awarding law degrees to a central commission in Brussels. The commission did not appreciate original thinkers and passed those who slavishly followed French handbooks.

In 1876 a reform of higher education made it possible for universities to confer law degrees themselves 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

112 The best-known of them is L.A. Warnkönig (G. Wild, Leopold August Warnkönig, 1794-1866. Ein Rechtslehrer zwischen Naturrecht und historischer Schule und ein Vermittler deutschen Geistes in Europa, Karlsruhe, 1961, esp. 12-34 about Warnkönig in Belgium).
113 Stevens, ‘Rechtsonderwijs Zuidelijke Nederlanden’, 133-149.
private law.\textsuperscript{119} 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, 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 had to be naturalised.\textsuperscript{120} The authors of the 1867 Penal Code were a Dutchman and a German.\textsuperscript{121}

d. 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.\textsuperscript{122} The great reform of commercial law was a collective effort of all Belgian politicians\textsuperscript{123} and would also have taken place without ministers of justice. Ministers shelved projects of new codes or did not defend them in parliament.\textsuperscript{124} Enthusiasm for new projects was, at best, lukewarm.\textsuperscript{125} In doing so, the minister fulfilled expectations: he had to be a caretaker who did not rock the boat.\textsuperscript{126} Even if a new text could be written, it had to shy away from great innovations.\textsuperscript{127} This has changed somewhat in the last two decades. Parliament approved two new codes and the current minister

\textsuperscript{119} Cf. C. Malliet, \textit{Elementaire bibliografie Belgisch recht}, Ghent, Mys & Breesch, 1999, 65
\textsuperscript{120} About Laurent, see the articles in J. Erauw, B. Bouckaert, H. Bocken, H. Gaus en M. Storme (ed.), \textit{Liber memorialis François Laurent 1810-1887}, Brussel, Story-Scientia, 1987, esp. the biographical article by G. Baert.
\textsuperscript{123} D. Heirbaut, \textit{Ministers}, 39-41.
\textsuperscript{124} D. Heirbaut, ‘Codificatie’, 1700-1703.
\textsuperscript{125} See for examples, D. Heirbaut, \textit{Ministers}, 27-28, 42-43.
\textsuperscript{126} D. Heirbaut, \textit{Ministers}, 69-73.
\textsuperscript{127} 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 (\textit{Moniteur belge}), 22 november 1884).
(2009) even proposes a complete reorganisation of the judicial system.\textsuperscript{128} As to the latter, the future is still 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.\textsuperscript{129} A new major Code of economic law is in preparation,\textsuperscript{130} but it is written at the behest of the department of economics... The lethargy of the lawmaker 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,\textsuperscript{131} it was only abolished in 2001.\textsuperscript{132}

e. 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, 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, 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 legislators sometimes has abrogated a part of the code to replace it with a new part with its own numbering, so that in between article 2091 and article 2119,
one finds articles 1 to 144. In some cases the legislator did not insert the new text in the code, but in part (?) of those cases he changed his mind a century later. One does not have to read the text of the French Civil code in Belgium, in both French and Dutch, to just see that Belgium has not shown much respect to its most successful immigrant (I don’t understand this sentence very well). 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.

f. 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, 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 do not like unpractical academics and active ministers of justice. Their attitude is most of all pragmatism, 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 it popularity less to its high academic standards than to its very useful surveys of leading cases.

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. 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 the success had been impossible from the start, as the new code still stuck to the principle of party autonomy, or more 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, because once again the interests of practitioners, this time the judges, seem to be more important than an efficient procedure.

3. The current situation: begging for European intervention

For an example, see the report for the 2006 congress of the International Academy of Comparative law, D. Heirbaut and M.E. Storme, The Belgian legal tradition: from a long quest for legal independence to a longing for independence, in: E. Dirix and Y.-H. Leleu, The Belgian reports at the congress of Utrecht of the International Academy of Comparative Law, Brussels, Bruylant, 2006, 35. (I would like to express here my gratitude to the editors of this volume.)

The French influence is still strong in Belgium, but is no longer what is used to be. For this several reasons can be given. Already mentioned are the changes in legal in education which made it possible to look to other countries than France and which is has led to a great importance of comparative law in Belgium. A second factor are the social and economic changes, 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 started in 1856, it 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, which means that in Flanders they have to use Dutch. Law teaching in Dutch had become possible at Ghent University, later followed by others, in 1923 and 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 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 is globalisation is the influence of immigrants and their ideas about what the law should be.  

137 This paragraph summarizes somewhat the report made for the session about legal tradition at the 2006 congress of the International Academy of Comparative law, D. Heirbaut and M.E. Storme, Belgian legal tradition, 4-43. That report should, however, be completed by: E. Dirix, Privaatrecht en multicultariteit, Antwerp-Oxford, Intersentia, 2007 and G. Martyn, ‘The judge and the formal sources of law in the Low Countries (19th-20th centuries): from ‘slave’ to ‘master’?, in: W.
Given the ongoing processes of globalisation and European unification, the growing rift between lawyers on both side 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 their Dutch- and French-speaking Belgians still need to make compromises, which their growing differences make harder to find. Consequently, Europeanisation, seen a mixed blessing in many other member states of the Union, is welcomed because it offers a way out of a 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.

a.- Historical Perspective

1. – 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 under 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 the time, more and more “Belgians” became Roman citizens and this is how Roman law spread all over the Belgian territories. This period of Roman Belgium ended with the end of the Western Roman Empire and the migrations of the end of the 5th century A.D. For the Belgian territories, the migrations meant the arrival of the Franks and the departure of many Romanised citizens, who headed South. Law being still applied on a personal basis, Roman law basically left Belgium with the Romanised 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).

2. - 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 the pre-Roman time. 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 the 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).

3. - 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 has been extended to all
inhabitants of the Roman Empire who all became Roman citizens\textsuperscript{139}. So this is how
Roman law also became – *de facto* and by way of consequence – applicable almost to the
whole territory.
b) On the contrary of the reception of Roman law, the reception of French law was an
immediate result of the French military conquest, when the Southern Netherlands have
been annexed by France (as reminded above: B.1. The French Revolution and Napoleon:
the wholesale and enduring transplant of French law).

4. – 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\textsuperscript{140}. These influences seem to have
reached Belgian law mostly over doctrinal mechanisms.

5. – The case of the “rechtsverwerking”\textsuperscript{141}
New foreign legal institutions could be received in Belgian Law either by way of legislation,
or by the courts. It doesn’t seem that the Belgian legislator used them very much in civil
law. Actually, most changes of Belgian Civil Code\textsuperscript{142} have been done in the first book (Law

\textsuperscript{139} This was the result of the Constitutio Antoniniana (see e.g. W.Kunkel/M.Schermeyer, *Römische
Rechtsgeschichte*, 13. Auflage, Köln, Böhlau, 2001, p.98ss.; F.Wieacker, Römische REchtsgeschichte,

\textsuperscript{140} As mentioned above under title B.3. The current situation: begging for European intervention.

\textsuperscript{141} Recently and for further publications, see: G.Van Malderen, *La rechtsverwerking*, in Obligations, Traité
théorique et pratique (suppl. 14, septembre 2008), Bruxelles, Kluwer, V.2.6-1, p.67-73.

\textsuperscript{142} D. Heirbaut, “Statistiques et grafiques des modifications depuis 1807”, in: D. Heirbaut and G. Baeteman
(ed.), *Edition cumulative du Code civil. Le texte actuel et l’édition originale avec toutes les modifications en*
of Persons), but these changes say more about the evolution of the 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 Cour de Cassation. It is interesting to see how the Supreme court reacted about the legal institution of “Verwirkung” usually called after its Dutch name “Rechtsverwerking” in Belgium. The “Verwirkung”-rule says that a right will be forfeited, if the owner of the right lacks to use it for a longer period of time, in order that the debtor could have the impression he would never have to fulfill his obligation anymore. This rule was unknown by Belgian law until 1979, when it has become the subject of a comparative study of the “Vereniging voor vergelijking van het recht in België en Nederland”\(^{143}\), the society for comparison of law in Belgium and the Netherlands. As such, it was a general clause, developed by the German jurisprudence. So for Dutch law, it was already a legal transplant.

6. - 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\(^{144}\). 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.f. The pragmatism of the practitioners: the invisible hand). Indeed, it was left to the appreciation of 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 Cour de Cassation has first seemed to

---

\(^{143}\) P. Van Ommeslaghe, Rechtsverwerking an Afstand van Recht, Tijdschrift voor Privaatrecht 1980, p. 735.

admit the validity of this legal transplant, but finally decided to reject it, sticking to a strict conformity to the Civil Code.

7. – 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 you look at the directive on certain aspects of the sale of consumer goods e.g., Belgium has basically drafted the text of the directive itself. In Germany, the same directive has been used to make a major revision of the BGB. Compared to France now, it is funny to notice that the transposition of this directive created a difference between French and Belgian law, where before, both laws still had exactly the same text, the text 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 of both sides of Belgium’s linguistic border. But this rift only made it more difficult to reach the necessary compromises to change Belgian law. As it has been stated above, the recent process of Europeanisation 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. But of course, 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

147 Directive 1999/44/EC.
148 The Belgian legislator literally inserted articles 1649bis to 1649octies, immediately after the articles of the old Code Napoleon, dealing with the 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 1649bis) and that the new law is meant to protect the buyer only if he is such a consumer.
perspective for Belgian law in the future. Somehow though, 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 oneself.