THE BELGIAN REPORTS
AT THE CONGRESS OF WASHINGTON
OF THE INTERNATIONAL ACADEMY
OF COMPARATIVE LAW

RAPPORTS BELGES AU CONGRÈS
DE L’ACADÉMIE INTERNATIONALE
DE DROIT COMPARÉ À WASHINGTON

DE BELGISCHER RAPPORTEN
VOOR HET CONGRES
VAN DE «ACADEMIE INTERNATIONALE
DE DROIT COMPARÉ» TE WASHINGTON

il bénéficie gratuitement d’un accès à la

identifiant ci-dessus dans la base Strada
er notre helpdesk (tél. : 02/548 07 20 -
us d’un de nos distributeurs librairie, grossiste,
au être réclamée.

somme abonné à Strada lex. En ce sens, le code

e-fis, pour l’associer à un seul abonnement
les conditions de votre abonnement à Strada
présent ouvrage n’est pas remplacée par une
le Strada lex et l’utilisateur indéfini poursuivi

maître les conditions de consultation
en fin d’ouvrage.
THE BELGIAN REPORTS
AT THE CONGRESS OF WASHINGTON
OF THE INTERNATIONAL ACADEMY
OF COMPARATIVE LAW

RAPPORTS BELGES AU CONGRÈS
DE L’ACADÉMIE INTERNATIONALE
DE DROIT COMPARÉ À WASHINGTON

DE BELGISCHE RAPPORTEN
VOOR HET CONGRES
VAN DE «ACADÉMIE INTERNATIONALE
DE DROIT COMPARÉ» TE WASHINGTON

ERIC DIRIX & YVES-HENRI LELEU (éd.)
Pour toute information sur notre fonds et les nouveautés dans votre domaine de spécialisation, consultez notre site web : www.bruylant.be

© Groupe De Bœck s.a., 2011
Éditions Bruylant
Rue des Minimes, 39 • B-1000 Bruxelles

Tous droits réservés pour tous pays
Il est interdit, sauf accord préalable et écrit de l'éditeur, de reproduire (notamment par photocopie) partiellement ou totalement le présent ouvrage, de le stocker dans une banque de données ou de le communiquer au public, sous quelque forme et de quelque manière que ce soit.

Imprimé en Belgique

Dépôt légal 2011/0023/118

TABLE DES MATIÈRES

<table>
<thead>
<tr>
<th>Table des matières</th>
<th>v</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>xi</td>
</tr>
<tr>
<td>Preface</td>
<td>xiii</td>
</tr>
<tr>
<td>Voorwoord</td>
<td>xv</td>
</tr>
</tbody>
</table>

I.A.
HISTOIRE DU DROIT ET ETHNOLOGIE JURIDIQUE
LEGAL HISTORY AND ETHNOLOGY

In the shadow of France. Legal acculturation and legal transplants in the Southern Netherlands/Belgium, by Dirk Heirbeaut, Ghent University and Jean-François Gerbens, University of Liège ........................................ 3

I.B.
THÉORIE GÉNÉRALE DU DROIT
GENERAL LEGAL THEORY

Le fait religieux dans ses rapports avec l'État en droit belge, par Jan Velaers et Marie-Claire Foubert ........................................ 37

I.D.
FORMATION JURIDIQUE
LEGAL EDUCATION

The Role of Practice in Legal Education, by Walter De Bondt, Professor at the University of Ghent and at the Free University of Brussels and Daniël Guypers, Professor at the University of Antwerp .................. 87
I.A.

HISTOIRE DU DROIT
ET ETHNOLOGIE JURIDIQUE

LEGAL HISTORY AND ETHNOLOGY
IN THE SHADOW OF FRANCE.
LEGAL ACCULTURATION AND LEGAL TRANSPLANTS
IN THE SOUTHERN NETHERLANDS/BELGIUM (*)

BY

DIRK HEIRBAUT

Ghent University

AND

JEAN-FRANÇOIS GERKENS

University of Liège

I. – General overview

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

(*) D. Heirbaut wrote part I and J.-F. Gerkens parts II and III. The authors would like to thank prof. em. R.C. Van Onselen, P. Osenon, J. Simon, E. Dehéne and B. Van Dael for their remarks. The authors would also like to thank Jorge A. Sánchez Cordeiro, editor of the reports on legal culture and legal transplants and E. Drix and Y.-H. Lelea, editors of the Belgian reports for their permission to publish in both volumes. This article has been realised with the support of the research programme Interuniversity Attraction Poles P06/01 - Justice and Society: sociopolitical history of justice administration in Belgium (1795-2005), Interuniversity Attraction Poles Programme – Belgian State – Belgian Science Policy.
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 among these a patchwork of principalities could be found, the most important of them being in the South, Flanders, Brabant, Hainaut, Namur, Liège and Luxemburg and in the North, Holland, Utrecht, and Guelders. From the end of the fourteenth century, French princes, the Dukes of Burgundy, started the unification of these so-called Low Countries, a process which was completed by their Habsburg successors in the sixteenth century (two ecclesiastical principalities, Liège and Stavelot-Malmédy managed to retain their independence), only a few decades before a revolt against the Spanish Habsburgs led to a separation. The North, the United Provinces, achieved independence and became also known under the name The Netherlands in the vernacular of the Low Countries, whereas the South remained Spanish and took the Latin name for the Low Countries, Belgium. An experiment of independence with Spanish and Austrian blessing proved to be short-lived and the Southern Low Countries were to remain Habsburg until the French annexation in 1795, though they passed from the Spanish to the Austrian branch in the early eighteenth century.

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

LEGAL ACCULTURATION AND LEGAL TRANSPLANTS

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

During the High Middle Ages local customary law reigned supreme and the renaissance of Roman law in the Mediterranean did not affect this state of affairs for a long time. The best indications of this are the so-called renunciations of Roman law, by which a party gave up the rights Roman law awarded. The earliest appear in the mid-thirteenth century and only in charters by clerics, whereas for their appearance in lay charters we have to wait until the end of that century. Moreover, Roman law is only mentioned because it is to be rejected. (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, but accounts of the reception of learned law tend to underplay the fact that it was composed of two elements, Roman and Romano-canonical law, and that the latter already took hold in 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)

With this exception, the supremacy of indigenous law was uncontested. Yet, legal transplants and legal assimilation took place, though on a smaller scale. The Southern Low Countries had hundreds of customary legal systems and, nevertheless, some clusters of legal transplants, (2) because lawyers cared more about getting results than about the purity of their customary law.

(3) J. Gilbies, «L'apparition des renunciations aux exceptions de droit romain dans le droit flamand au XVIIe siècle», in Mélanges Fernand De Voscher, III, Brussels, Office international de la biénotat, 1959, 514-626.
(4) M. Van Melebeke, De officiälien van Doorstal: oorsprong en groote ontsluiting (1192-1360), Brussels, Academeny, 1986.
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. (6) 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. (7) 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 choose their head, but by the early thirteenth century this had become more organised and the lower courts had turned into subordinate courts, which had to follow their head’s opinion. (8) A third mechanism of unification were the legal experts of the customary law courts, its presidents, bailiffs, spokesmen (the spokesman was the person who by answering the president’s questions formulated the decision of the court) and so on, who were most of the time active in more than one court. (9) 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 customary legal system fragmented. Thus, in the county of Flanders the once unitary feudal law fell apart at the end of the thirteenth century. (10)


(7) See e.g. C.L. HOOGERF, Het Haarlemse stadsrecht (1245), Amsterdam, Cabojauiipers, 2001, 3-5.

(8) B. VAN CAENEGEM, Geschiedenis van het strafprocesrecht in Vlaanderen van de 11e eeuw tot de 15e eeuw, Brussels, Academy, 1996, 301-314.

(9) D. HEIRBAUT, «Who were the makers of customary law in medieval Europe? Some answers based on sources about the spokesmen of Flemish feudal courts», Legal history review/ tijdschrift voor rechtsgeschiedenis, LXXV, 2007, 267-274.

LEGAL ACCULTURATION AND LEGAL TRANSPLANTS

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, 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. 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. It is also in this century that books of learned law became more numerous in libraries.

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 university trained lawyers, the legists. From the fourteenth century onwards, hundreds of them appear in the Southern Netherlands and they infiltrate from the top down. They first appeared in the newly established central courts, the councils of justice. Lower courts were not staffed by university trained lawyers, but the major cities hired them to advise these courts. 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

---

[12] D. Herbratt, «The oldest part of the Lois des pers du castrum de Lille (1283-1308/1314) and the influence of Roman law and law reporting on the continents», Legal history review/Rechts- en volkshuishoudingsgeschiedenis, LXV, 2007, 139-152. See also D. Herbratt, The precursors of the earliest law reports on the continent at source of the sources, the forgotten makers of customary law (forthcoming).
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. (17)

As this shows, even in the late middle ages, the impact of Roman law remained limited. Actual legal transplants of substantive law, like the doctrine of laesio enormis, are rare. (18) Moreover, these Roman law rules served to plug the gaps in customary law and to strengthen its existing principles. (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). (20) Roman law, however, influenced, certainly in the highest courts, the procedure (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. (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, (23) but the real guide seems to have been France. In a larger context the Southern Low Countries were together with Northern France, the so-called lands of customary law, the pays de droit contumier and many new elements were copied from French law, like, for example, the inquest by turba. (24) Even for Roman law, the

(17) For the first notaries in Flanders, see J. MURRAY, « The profession of notary public in medieval Flanders, » Legal history review/revue de droit des usages, LXI, 1993, 3-31; J. MURRAY and P. SCHMIDT, « Notaries in Flanders, » Legal history review/revue de droit des usages, LXI, 1993, 55-64.
(19) GORDING, « Réception sélective, » 108.
(20) C. DOUCKERMEYER and P. GORDING, Enquêtes par turbe du Conseil de Namur (1450-1500), Bruxelles, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1972; J. MOUSSEAU, Turben opgenomen door de Kortrijkse Schepenbank (1485-1581), Bruxelles, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1980.
(21) See also for the Council of Brabant, P. GORDING, Le conseil de Brabant sous le règne de Philippe le Bon (1439-1467), Bruxelles, Académie, 1990, 315-464, 469.
(22) VAN CAMBEGEM, Droit romain, 46.
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). Thus, as soon as his overlord, the French king, started to use Roman law, the count of Flanders had to do also, if only to fight fire with fire. Consequently, the first legists and notaries to appear in the Low Countries worked for Count Guy of Flanders who hired them specifically to counter the French king. For the notaries public this is well-known, as they authenticated the appeals of Guy against his excommunication at the order of Philip IV of France and these documents are referred to in any history of the medieval county of Flanders. The case of the legists is more complicated, because the pioneering study by Gilissen wrongly interpreted the sources. According to Gilissen, Count Guy had from 1279 on legists serving on his council and these were all foreigners. However, none of them ever worked in Flanders itself. Most of them were active in Paris where they defended the count's interests before the Parlement de Paris. Only one generation later, under Guy's son Robert, we find legists on the count's council in Flanders. Flanders reacted to France when it turned to Roman law and once Flanders did so, the other principalities eventually followed. Many examples can be given, but the best is once again, the law of procedure before the highest court. Flanders imitated the Parlement de Paris and influenced in its turn the other principalities. However, it is remarkable, once again, that changes in substantive law remained exceptional, even though appeal was possible in Paris against Flemish judgments.

(29) Heerschot, « Cadre juridique », 130-139.
(30) There is need of a new study of the first legists in Flanders. Unfortunately, even M. Van der Merwe, « De bestrondering van het graafschap Vlaanderen tijdens de 14de eeuw. Bijdrage tot een politieke sociologie van de vlaamse en van de noord-weeken achter de faguer van Lodewijck II van Nevers 1522-1546 », Bruges, Emulation, 1989, 206-206 only repeats the data from Gilissen.
As well as French royal institutions, the University of Orleans was another intermediary for bringing Roman law to the Netherlands, as it was the most popular university for students from the Southern Low Countries in the fourteenth and fifteenth centuries. The lure of Orleans continued even after the founding of a university in Leuven (in the duchy of Brabant) in 1425, (31) as many students from the Low Countries saw studies in Leuven as a prelude to a diploma from the more prestigious University of Orleans. (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 so in the first half of the sixteenth Roman law made an enormous advance, (33) but once again the main impetus was French. For example, the first author to use Roman law extensively was William van der Tanerijen in 1474-1476. (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 his inspiration from a French book, the late fourteenth century Somme rural of Jean Boulillier. (35) Even though Boulillier wrote on customary law, he used the terminology of Roman law a lot and referred to it. As he dealt with the law of nearby Northern France, his book was also extremely popular in the Southern Netherlands. It was printed many times in the original French and in the Dutch translation, both languages more accessible to ordinary practitioners than Latin. Through Boulillier, the practitioners in

(31) About the law faculty of Leuven university, see V. BRANTZ, La faculté de droit de Louvain à travers cinq siècles (Étude historique), Brussel, Larcier, 1906 (reprinted: Brussel, General archives of the kingdom, 2002); Louvainse dochter, Gaechthuysen van de Louvainse rechtsfaculteit (1425-1914), Leuven, Faculdij of law, Section of Roman law and legal history, 1963.


(36) G. VAN DRIEVEEST, Jean Boulillier et de Somme rural, Louvain, Universitaire uitgaven, 1951.
the Southern Netherlands came into contact with the legal grammar of the learned law and they started to adjust their own terminology. (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. (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). (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. its official compilation and subsequent promulgation by decree. (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. (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. (41) In fact, romanization was stronger when centralisation was at work, as in those cases where local customs were replaced by a single provincial law. (42)

(36) GILSSEN, «Romeins recht» 120-122.
(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 RYSTRAETEN, Juridisch humanisme en commercieel acculturatie. Inflectie- en normologische factoren van de Antwerpse Consulatidies compilaties (1699) en het Geldersch Lood en Strooierrecht (1920); Maastricht, Universitaire pers, 2008; D. DE RUYSSER, Handel en recht in de Antwerpse rechtspraak (16de-17de eeuw), Heule, UGA, 2009. For a general survey, the publications by Gilsen have not yet been replaced, but one can hope that the two young scholars mentioned will have a chance to update Gilsen’s work.
Roman law also gained ground because it had a supplementary role, plugging the gaps of customary law. (43) In this, the model was the homologated custom of Burgundy. (44) However, during the sixteenth century Roman law suffered an «authoritative degradation», (45) as it became «subsidiary» instead of subsidiary. When there was a gap in the local law, jurists had to consult provincial custom, and only if the latter too did not resolve the issue, they could turn to Roman law. (46) This proves that homologation only could bring Pyrrhic victories to Roman law. It expanded its influence, but it also strengthened and enshrined customary law (47) so much that further impact became less likely.

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

This attitude towards Roman law was, strangely enough, also possible because the professors at Leuven University cared little for

(45) This very apt terminology is to be found in Van Hoofvaarten, Assimilatie, 166, a book which is full of new and very useful terms for any student of the history of acculturation and legal transplants.
(48) This is very well demonstrated in Dr Ruyssen, Handel, see e.g., 73, 137, 399.
(49) About this selective reception, see Godding, «Réception», 91-103.
customary law. (50) From the sixteenth century onwards the
Habsburgs awarded a monopoly to Leuven law studies. (51) At the
provincial councils of justice even advocates needed to have a Leu-
ven law degree, unless there were exceptional circumstances. (52)
This state of affairs, unfortunately, did not stimulate the Leuven
professors to be very active or creative and it is even suggested that
the great attachment of practitioners to local law may have been a
reaction to the unrealistic trainings they received at the univer-
sity. (53) This judgement may be too harsh, as the Leuven profes-
sors assimilated the advantages of humanism without giving up
their interest in solving practical problems. (54) Thus, they men-
tally prepared future lawyers to assimilate, to treat their own law
with the toolbox of Roman law, which also included writing it down
in the homologations. (55) Nevertheless, even in the tribunal of
the city of Antwerp, on which sat more university trained lawyers than
on other local courts, (56) the influence of Leuven remained limited.
(57) Another channel for this infiltration of the methodology,
rather than the substance of Roman law, was the provincial coun-
cils of justice and the highest court of the land, the Great Council
of Malines. (58) Given the stagnation of customary law after
homologation and the lethargy of the legislator, their importance
cannot be overstated.

(50) Apart from a few of them at the end of the sixteenth and the beginning of the seven-
teenth century (P. GODDE, "La formation des étudiants en droit à Louvain [fin 16e début
17e siècle]: fait-il place au droit coutumier ou diocletien de nos régions", in Liber amicorum Jan
Beninga in de cade Nederlandsche tijdens de middeleeuwen en de vroome tijd, Louvain,

(51) Cf. J. BOUTINX, "Post-graduatie onderwijs in de rechten te Gent", Archief en bibliothek-
enen van België, XLII, 1971, 20-33. There was also a law faculty in Douai.

(52) G. MARTYN, "De advocaat[e] in het oude graafschap Vlaanderen", in G. MARTYN e.a.

(53) J. VAN DEN BROEKEN, De rechtseer in de Zuidelijke Nederlanden tijdens de 18de eeuw,
Brussel, Academica, 2001, 35.

(54) Leuvense denk, 8.

(55) L. BRUYGEMAN, "Imperatori植物m aministratum non solum armis decoratam sed legibus opert
esse armatum... Notes on the influence of Justinian's Code on the codification of customary
law in the Southern Netherlands", in L. DE LATOR (ed.), Viva vox iuris romanil Beslag in

(56) De ROTSCHEIN, Handel, 112.

(57) De ROTSCHEIN, Handel, 399.

(58) A. WULFF, "Quo millies allegata? Les allégations du droit nassau dans les dossiers du
Grand Conseil de Malines (causes septentrionales, ca. 1600-1550)", Leyden, Brill, 1985, 2 vol.
Much has been made of the differences between the successive schools of Roman law, (59) yet, one should bear in mind that in the Southern Netherlands lawyers were first and foremost pragmatic and traditional. (60) The school to which an author belonged was less important than the availability and usefulness of his work. (61) Even in the sixteenth century this meant that Bartolus and other late medieval authors dominated, (62) because they served practice better, and better alternatives were not available, as it took some time for new authors to be circulated. French works later challenged the supremacy of Bartolus, but, once again, utility determined success. (63) Thus, a greater scholar like Charles Du Moulin may be overshadowed by a lesser, though more useful author. (64) In the eighteenth century legal authors may have had a preference for Dutch literature, (65), but in the courtroom French authors remained important and their influence grew even stronger during the second half of the eighteenth century. (66) Local authors were for a long time less popular, (67) as there were fewer of them (68) and their work had less chances of being printed. (69) During the seventeenth century collections of (annotated) decisions of the high-

(64) C. Van Hoebroek, Assiduitate, 179-192; 371-376.
(65) Van den Broeck, Rechtsprijs, 201.
(69) Van den Broeck, Rechtsprijs, 11-12. Many of these manuscripts still have to be published. For a recent example of such an edition, see G. De Creeveld, «Jurisprudence du parlement de Flandre», in S. Dauvy and V. Demaeg-Dack, Brussels, Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 2008.
LEGAL ACQUISITION AND LEGAL TRANSPLANTS

15

A counterpart to the French influence is the quasi-absence of influence on Roman law, which was a major source of inspiration for legislation in the eighteenth century. However, law was also the great source of inspiration for the French legal system, which was not very influential on the Italian legal system. The greatest influence on the Italian legal system was the 1611 Porretan Edict, but with its limitations, the Italian legal system was likely to be unsuccessful anyway. In the eighteenth century, the Austrian legal system developed the tendency to look to France, the model for homologation and the selective reception of the French legal system. The French legal system was not very influential on the Italian legal system, which left its lawyers more or less free to follow their own inclinations and make their own decisions.
preordained event than is sometimes thought. The traditional story is that the French Dukes of Burgundy promoted French and that this continued under their successors. The historical reality was not so simple, as French also lost ground in the seventeenth century because Latin was the language for the man of letters, culture and law. (77) Wielant wrote in Dutch (and French), (78) seventeenth century authors in Latin. Although French remained strong as the language of the central administration, the Austrians had no compelling reason for continting 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. (76)

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. (80) From 1750 all written documents at the Great Council of Malines, the highest court in the land, were in French. (81) Legal authors also switched to French (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. (83) In line with the Vernunftrecht which favoured a top down overhaul of the old law, he wanted to radically change the laws and institutions of the Southern Netherlands, but his complete break with the past could not have come in a place less suited for it. In 1789, the year of the French Revolution, the Southern Netherlands also had a Revolution, to preserve the Ancien Régime, not to destroy it. It was short lived, as already in 1790

(78) Ria Antiquités de Flandre, of which S. Douchy is preparing an edition.
(79) Willems, Vlaams, 142-143.
(80) Willems, Vlaams, 164-167.
(81) Van den Broeck, Rodheater, 23.
(82) Van den Broeck, Rodheater, 21-22.
(83) Van den Broeck, Rodheater, 23-39, 34.
legal acculturation and legal transplants

the Austrians restored order at the price of their reforms. (84) 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 at one swoop the French, in the so-called Code Merlin, abolished the many customs of the Southern Netherlands and imposed French law. (85) Under Napoleon the Southern Netherlands were just a part of France and all the great Napoleonic codifications and reforms (judicial organisation (1800)), Civil Code (1804), Code of Civil Procedure (1806), Commercial Code (1807), Code of Criminal Procedure (1808), Penal Code (1810)) automatically came into force there. As such, this is not amazing, given that during the nineteenth century French law was transplanted all over the world. Belgium, however, is special in that it still is, to a large extent, enchainned by French law, whereas almost all other countries have now broken free from it. In fact, Belgium may be even more faithful to its French heritage than France itself. Its judicial organisation is still closer to the Napoleonic model. (86) In 2004, at the commemoration of two hundred years Civil Code, Belgium had preserved more of the


original articles than France. (87) It still has the original Napoleonic Code of Criminal Procedure, which is no longer in force in France itself. In short, Belgium may well be Napoleon’s most faithful subject. (88)

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. (89) 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 (90) and the 1867 Judicial Code slavishly stays within the French mould. (91) The Commercial Code does not contradict the general pattern. Its structure remained intact during the nineteenth century, but its articles were replaced during the second half of the nineteenth century. Belgium then industrialised at break-neck speed (when World War I broke out, only the United States, the United Kingdom, Germany and France

---

(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 1893 Napoleonic statute organising the office of the notaries Belgian was still ruled as late as 1980 by the premier consul and not by the king of the Belgians. It is also telling that this statute is, following its original date according to the revolutionary calendar, even today only known as the «Vendée statute» (Loi de Vendée) (for its history in Belgium, see F. Stevens, «La loi de Vendée en Belgique, in De tit d’un loi. Loi du 25 Vendée ou XI. Statut du notariat, Paris, Instituts international d’histoire du notariat, 2003, 187-199).
(89) Art. 130, l° (abolished in 1971, Meniteur 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 débat belge (1781-1867)», in X. Roudraux and Y. Levy (ed.), Le pénal dans tous ses états: justice, états et sociétés en Europe (XIe-XXe siècles), Brussels, PULB, 1997, 300-301).
had an economy bigger than the one of tiny Belgium) and its ruling classes were well aware that it desperately needed new legislation to cope with the problems posed by industrialisation. Given that Belgium was ahead of France in developing its industry, it could not always follow France and it had this time, to develop its own rules and also look to other countries. (92) 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. (93) It dealt with real securities because this part of the Code showed many defects (94) 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 (95) and it makes clear that projects for a new code either did not want to get rid of the French heritage, or failed. (96) In each case specific circumstances can explain the outcome to some extent, but this article, being a winner's history of French law, should be more concerned with the reasons for French success, than with the explanations for individual failures to break away from France.

(94) Loc. cit. 16 December 1851 sur la révision du régime hypothécaire (Moniteur belge, 22 December 1851).
(96) See Heiraut, Ministers, and the references there.
a) The French legal transplant as the brutal successor of a gradual acculturation process

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

b) French law, a well-known neighbour

If one looks not at the diversity of legal rules at the local level, but at the common elements they shared, the French legal transplant was, in most cases, less a reception of new rules than an assimilation of the old ones. After all, the ancient customs of the Southern Netherlands can be grouped together with those of Northern France, the so-called pays de droit coutumier. True, Napoleonic law formulated the existing legal rules in a new way, but it also gave them more clarity and visibility by abolishing their diversity and exceptions. For example, primogeniture was abolished, but this actually strengthened the underlying current of the old law, which had accepted primogeniture only as an exception to the general rule of equality amongst heirs. (98) 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 mar-


ria of a gradual process. Because it was so abrupt for the Belgians. For centuries the Dutch had been guided by France. The growing gap between father and son was stronger during the eighteenth century. The time during the eighteenth century when the Netherlands had been a French territory. This explains, inter alia, why in the Netherlands, the Belgians held more hostages than the United Kingdom.

French law was close to the existing customs and its invasion had been prepared for centuries, but nevertheless there was some opposition. 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. Thus, what fuelled it was not the French origin of new rules, but their revolutionary character. Whether it was Joseph II or the French Revolution, a hated change led to protest and even that did not amount to much. A short-lived peasants’ revolt of a few months in 1798 and some unrest in the two years thereafter had no legal impact at all, because many people had also gained through the Revolution, e.g. by the abolition of feudalism.

Moreover, resistance was also possible by less visible means. Judges, notaries, lawyers and their clients tried to find ways to keep on using the old law. French law itself opened some venues for this approach. For example, art. 4 of the Civil Code made it a crime for a judge to refuse a judgement because the Code was obscure and inefficient and thus the judges sometimes had to turn to the old law to solve a dispute. Art. 2 of the Code stated that the latter

(102) P. GODDING, «Ancien droit, 605-606.
was only to be applied in the future, as future effects of old situations were still being ruled by the old law. Contracts and wills also offered possibilities for staying with the old law. (105) Régine Beauchier 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, (106) as it had a perverse effect. It mitigated the worst effects of the legal transplants, making it more acceptable for the population to get used to it. This was only possible because French law was given enough time to settle. The French remained in power for twenty years and thereafter it took the Dutch fifteen years to write, vote and prepare the application of new codifications. (107) These should have come into force in 1831, but, 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. (108) Brussels publishers quickly saw they could offer a bargain to Belgian lawyers and still come out ahead. (109)

(106) BEAUCHIER, « Article 2, 257.
(109) For a survey of these Belgian editions, see F. VERHEER, Belgian law : an annotated bibliographic guide to reference materials, 1803-1984, Brussels, Belgecho commissie voor bibliografie en bibliologie, 1994, 115-135.
d) Legal education

A shared history, laziness and greed all drove Belgian lawyers into the arms of French law. University education ensured that they would not try to escape from it. Eighteenth century legal education at Leuven had not been of the highest level, and the French only made it worse. First they abolished law studies in Leuven and then they established only a 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 the monopoly on awarding law degrees to a central commiss-
sion in Brussels. (117) The commission did not appreciate original thinkers and let those who slavishly followed French handbooks pass.

In 1876 a reform of higher education made it possible for universities to confer law degrees themselves (118) and new ways of teaching became possible. By then, Belgian lawyers had become so used to French law that it took them some time to become aware of their new freedom. Until the 1950's it was still possible to use French handbooks of private law. (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, as the legislative diarrhoea does not leave much time for critical scholarly work. Nevertheless, the situation is much better than in the nineteenth century, when many of the leading lawyers were foreigners. François Laurent, Belgium's greatest lawyer ever, was a native of Luxemburg and had to be naturalised. (120) The authors of the 1867 Penal Code were, originally, a Dutchman and a German. (121)

e) The inactivity of the Justice department

A crucial element for the survival of French law is that Belgian ministers of Justice have not been very active. (122) The great reform of commercial law was a collective effort of all Belgian politicians (123) and would also have taken place without ministers of justice. Ministers shelved projects of new codes or did not defend them in parliament. (124) Enthusiasm for new projects was, at best, lukewarm. (125) In doing so, the minister fulfilled expectations: he

(123) D. Heirbaut, Ministers, 39-41.
(125) See for example, D. Heirbaut, Ministers, 27-29, 42-43.
had to be a caretaker who did not rock the boat. (126) Even if a new text could be written, it had to shy away from great innovations. (127) This has changed somewhat in the last two decades. Parliament approved two new codes and the current minister (2009) even proposes a complete reorganisation of the judicial system. (128) As to the latter, the future is very uncertain, whereas for the former ambitions have been limited. The new codes are so-called mini-codes, they deal with a relatively small part of law (international private law (2004) or companies (1999)) and most of the time they confirm existing practices. (129) A new major Code of economic law is in preparation, (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, (131) it was only abolished in 2001. (132)

f) A lack of respect for French law

One of the paradoxes of French law in Belgium is that it still lives, because the veneration of the Belgians does not stop them from making a mess of their French inheritance. The Commercial Code still has the Napoleonic structure, but all the original articles were thrown out in the second half of the nineteenth century, the four articles on commercial courts surviving until 1967. The Civil Code offers the best view of the strange adherence of Belgium to its

---

(126) D. HEINRICH, Ministères, 69-73.
(127) For example, in 1884 the minister clearly stated that a commission had to revise the Civil Code: « Seulement abriter les grandes lignes... en harmonie avec les moeurs et le tempérament du pays » (Report to the King for the Royal Decree 15 November 1884 (Moniteur belge, 25 November 1884).
(129) This is most of all true for the Code of companies (cf. O. Hommema en Y. De Coninck, « La pertes et l’influence de la codification », in Le nouveau Code des sociétés, Brussels, Bruylant, 94 and 147-150.
French law. One half is still original while the other has been mutilated in any possible way imaginable. Even if one is willing to disregard the content, the form of the new changes is bewildering enough. New articles are not numbered in a uniform way. The fancy of the moment determines whether it is 577-2, 331quinquies, 213 a, or even 488bis, j. The legislator sometimes abrogated articles of the code in order to replace them with a new text with its own numbering, so that, for example, in between article 2091 and article 2119, one finds articles numbered 1 to 144. In some cases in which the legislator did not insert the new text in the code, he changed his mind a century later. (133) Thus, reading the Belgian version of the French Civil Code it is easy to see that Belgium has not shown much respect to its most successful immigrant. However, once again, there is a paradox. Belgium’s irreverence towards French law and its willingness to constantly adapt it to new situations has ensured that it remains living law until the present day.

g) The pragmatism of the practitioners: the invisible hand

All of the above can, with some exaggeration, be reduced to one common cause: the dominance of the law practitioner in Belgium. It is hard to find great legislators in Belgium, its past (though not its present) does not reveal many great law professors. Judges, advocates, proctors, notaries and the like are the leading personalities of Belgian law. They were the ones who had become impregnated by French law and culture before 1795, who had become accustomed to French law in 1830, who preferred cheaper French books in the decades thereafter, who did not like unpractical academies and active ministers of justice. Their attitude is most of all pragmatic, which means that legal literature has to serve practical needs. Successful law reviews in Belgium reflect this. Experiments have been undertaken, but if the law review is not an instrument of legal practice, its impact will be limited. For example, the *Tijdschrift voor privaatrecht*, the greatest promoter of legal scholarship in Belgium outside the universities, owes its popularity less to its

high academic standards than to its very useful surveys of leading cases. (134)

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. (135) 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 Alberic Allard would have achieved the goal of an efficient procedure, but the proctors lobbied so successfully against it, that parliament only approved its preliminary title. Almost a century later, in 1967, parliament voted a Judicial Code (the proctors remained silent this time, they had been bought off). Ten years later a leading specialist of procedural law already called it a failure. One of the two framers blamed this on the practitioners, but success had been impossible from the start, as the new code still stuck to the principle of party autonomy, or more 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

(135) For an example, see the report for the 2006 congress of the International Academy of Comparative law, D. Hiebert and M.K. Storme, "The Belgian legal tradition: a long quest for legal independence to a longing for independence", in R. Deuz and Y.-H. Lejeu, *The Belgian Reports at the congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruxelles, 2006, 35. (I would like to express here my gratitude to the editors of this volume.)
Combat Judicial Delay is still in doubt, once again in the interests of practitioners, this time the judges seem to be more important than an efficient procedure. (136)

3. – The current situation: begging for European intervention

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

become the second model for Belgian law, together with French law. A distant third is German law, but in many cases its influence is only indirect, through either France or the Netherlands. Fourth is Anglo-American law, due to globalisation and the presence of international law firms in Brussels. Another effect of globalisation is the influence of immigrants and their ideas about what the law should be. (137)

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

II. – Specific institutions or legal mechanisms

A. – HISTORICAL PERSPECTIVE

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

a) Belgium, as a part of the Roman Empire, has of course been ruled by Roman law in Roman times. The Belgian territories were conquered by Caesar's armies during the Gallic Wars (58-50 B.C.). Of course, this did not mean that since then only Roman law had been in force on these territories. On the contrary, Roman law was applied on a personal basis, thus only to Roman citizens. But with time, more and more «Belgians» became Roman citizens and this is how Roman law spread all over the Belgian territories. (138) This period of Roman Belgium ended with the end of the Western Roman Empire and the migrations of the end of the fifth century A.D. For the Belgian territories, the migrations meant the arrival of the Franks and the departure of many Romanized citizens, who headed south. Law being still applied on a personal basis, Roman law basically left Belgium with the Romanized people of northern Gaul.

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

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

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

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

(138) On this process in general, see e.g.: W. KUNZEL and M. SCHERMADER, Römische Rechtsgeschichte, Cologne, Böhlau, 2001 98 seq.; H.F. JOLOWIEC, Historical introduction to the study of Roman law, Cambridge, University Press, 1939, 396 seq.
IRE, has of course been

The Belgian territories during the Gallic Wars (58-
that since then only
areas. On the con-
and more «Belgians»
Roman law spread all
period of Roman Belgium
Roman Empire and the
by A.D. For the Belgian
arrival of the Franks and
ens, who headed south.
This, Roman law basically
of northern Gaul.
period that started with
on territories, it meant a
ance of French law. This
with above (A. Pre 1795
probably very important,
them:
anything about Celtic law in
possible to tell what the
is also quite difficult to
Roman law and Celtic law
influence on
law is French law, even
to be influenced also by
above: B.3. The current

B. — THE DRIVING FORCES
OF THE LEGAL RECESSIONS

Both recepions 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 per-
sonal way. This means that Roman law was applicable only to
Roman citizens, not to the inhabitants of Belgium. This means
that for the Roman military conquest, the legal reception was
not a corollary of the conquest itself. Roman law was a privilege,
but in 212 A.D. it was extended to all inhabitants of the Roman
Empire who all became Roman citizens. (139) So this is how
Roman law also became — de facto and by way of consequence —
applicable almost to the whole territory.

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

C. — ROMAN AND FRENCH LAW
RECESSIONS AS WHOLESALES

As the recepions of Roman and French law were both whole-

(139) This was the result of the Constitutione Antoniniana (see e.g. KUNKEL and SCHERMAYER,
Römische Reichsrechtsgeschichte, 28 sq.; P. WITTEKIND, Römische Reichsrechtsgeschichte, Munich, Beuck, 1888,
512 sq.; JOLIÈVRE, Historical Introduction, 359 sqq.).

(140) As mentioned above under title B.3. The current situation: begging for European interven-

tion.
D. - THE CASE OF THE rechtsoverwerking (141)

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

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

E. - PSYCHOLOGICAL APPROACH.

THE RECEPTION WAS CONSCIOUS OR UNCONSCIOUS?

CONFESSION OR DENIED?

The discussion on introducing the legal transplant Verwirkung/Rechtsoverwerking also in Belgian law has been quite tough. (144) It

(141) Recently and for further publications, see: G. Van Malderen, «La rechtsoverwerking», in Obligations, Théorie et pratique (ampli. 1er Septembre 1968), Brussels, Kluwer, V.2.6.1, 67-73.
(142) D. Heirbaut, «Statistiques», 2245-2263, especially 2261.
was, of course, a very sensitive question, as it would have given much more power to the judges, and this was not the tendency of the French legal tradition (see above B.2 g. The pragmatism of the practitioners: the invisible hand). Indeed, it was left to the judge to decide whether the owner had waited for too long or not. This legal transplant has had some success amongst Flemish, but also amongst French speaking judges. The Belgian court of cassation has first seemed to admit the validity of this legal transplant, (145) but finally decided to reject it, (146) sticking to a strict conformity to the Civil Code.

As a member of the European Union, Belgium has of course transposed several European guidelines in Belgian law. Generally, one can say that Belgium is rather slow in fulfilling its international duties. It is also rather uninspired in doing so. If, for example, one looks at the directive on certain aspects of the sale of consumer goods, (147) Belgium has basically drafted only the text of the directive itself, (148) whereas in Germany the same directive has been used to make a major revision of the BGB. (149) Compared to France now, it is funny to notice that the transposition of this directive created a difference between French and Belgian law, whereas earlier both still had exactly the same text, the one drafted in 1804.

(141) Arbeit (194)

(142) It is interesting to see the legal institution of Verwirkung after its Dutch equivalent has been forfeited if the period of time, so that we would not have to further concern ourselves with the known in Belgian law formalism. A comparative study of the right in België en Nederland in Belgian law and the one in German law, developed by Gerres, is used as a legal transplant in


III. – Conclusions

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