Foreign Law as ratio decidendi. The 'French' Parlement of Flanders in the late 17th and early 18th centuries

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Before studying the place of foreign law in judicial decisions' *ratio decidendi* and, more largely, its influence on the practice of a judicial system, one has to define the notion of 'foreign law'. Foreign law is generally defined in opposition to national law, which is considered to be the whole of legal rules governing the relationship inside a sovereign state. The distinction between 'national' and 'foreign' law thus proceeds from a territorial and centralized conception of the production of legal sources, a conception that has been progressively established in Ancien Régime France, definitively imposed by the Revolution and given concrete expression by the Napoleonic Codes[1]. The traditional dichotomy opposing an internal legal order particular to each country and an international, private and later public, legal order can be considered to be a common heritage of most countries in continental Europe. Today, we can still recognize the trace of such an opposition in the speech of those who are taking issue over the primacy of European law, arguing that law imposed by a foreign lawmaker (in Brussels) and applied by courts external to the national judicial order (in Luxemburg) could not prevail on national law and should therefore be called 'foreign law' rather than 'supranational law'. The topic of this paper is to study whether Ancien Régime France presents a different approach and practice towards the notion of foreign law as the history of French Flanders gives a particularly interesting case study.

When Louis XIV conquered, as a result of the Devolution war, the southern part of the Spanish Low Countries, he formally promised to respect the local character and specific legal identity of the territories brought under French sovereignty. The 'capitulations' – which are to be considered as a kind of constitutional acts defining the political, administrative and judicial organization of conquered territories[2] – contain very explicit dispositions as concerns the respect for local particularities. The capitulation of Lille dated August 27th 1667, for example, declares that the inhabitants of the town and country of Lille will truly and peacefully continue to enjoy the privileges, customs, habits, immunities, rights, liberties, jurisdiction, justice, police and administration granted by the former kings of France but also by the sovereign lords of these countries[3]. It is thus in execution of those commitments that a court is instituted in 1688[4]. First established in Tournai with the title of Sovereign Court, its mission is to dispense justice in the newly conquered territories in name of the king. Among the reasons given to justify the creation of a new court (for from a historical point of view most of those territories had been part of the Parlement of Paris' jurisdiction until the beginning of the 16th century), we can find the following significant passage in the establishment Act: "we have decided to institute a court of justice composed by people of the country (i.e. local judges) having knowledge of the local laws… and for these judges are more competent to judge

[1] *J.-L. Halpérin*, L'impossible Code civil, Paris 1992.

[2] *Fr. Zanatta*, Une technique d'encadrement juridique des occupations militaires sous l'Ancien Régime : les capitulations des villes et états dans le Nord de la France au XVIIe et XVIIIe siècles, in France occupée, France occupante : le gouvernement du territoire en temps de crise (de la Guerre de Cent ans au régime de Vichy), Orléans 2008.

[3] Art. XLIX: "*Que lesdites villes de Lille et châtellenie jouiront pleinement et paisiblement de tous privilèges, coutumes, usages, immunitez, droits, libertez, franchises, jurisdiction, justice, police et administration à eux accordéz tant par les rois de France par ci-devant, que par les princes souverains de ce pays…*"; the capitulations of Tournai (June 24th) and Cambrai (April 5th) contain similar dispositions : Archives départementales du Nord, Placards 8172, p. 26 sq. et 46 sq.; Placards 8180, p. 270 sq.

[4] Edit du roy portant établissement du conseil souverain de Tournay, conformément aux capitulations (April 1668): in Recueil des édits, déclarations, arrests et reglemens qui sont propres et particuliers aux Provinces du Ressort du parlement de Flandres, imprimé par l'ordre de Monseigneur le Chancelier, Douai 1730, p. 9-11.

according to the country's customs and common uses, their judgements will be better accepted by its inhabitants"[5]. The judicial privileges thus sound like a guarantee of all other privileges. To respect the laws and customs of Flanders it indeed appeared essential to the inhabitants of the conquered territories to fall within the competence and jurisdiction of a court that had its seat in the province and was composed only of local judges knowing the country's legal particularities[6]. A Sovereign Court, set up in Parlement in 1686, was thus seen as the symbol of the province's legal identity and stood as security for the respect of its institutions and legal traditions.

During the first years of its existence, the court had to deal with a lot of difficulties: a moving jurisdiction as a result of the international treaties[7], appeals still brought before the former superior courts of the southern Netherlands which were not competent any more[8], but above all a feeling of legal insecurity. That insecurity was a result of the variety of customs of which only the most important had been officially recorded. As, before the conquest, most of the territories fell under the jurisdiction of the superior courts of the Spanish Low Countries (the Council of Flanders, the Council of Hainault and the Great Council of Malines), local customs were interpreted, and even after 1667 continued to be, according to these courts' precedents. But the problems were even more important as concerned royal legislation. The kings' statutes previous to the conquest of the northern province (except those that had been promulgated before 1526 when the treaty of Madrid put an end to the feudal rights of the king of France over Flanders[9]) were to be considered as foreign law, whereas the statutes promulgated after the conquest were to be executed as internal law. As a result of this, the famous Civil Ordinance of 1667, for example, was never in use in the conquered territories;

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[5] "*Nous avons résolu de créer pour cet effet un Tribunal dans notre ville de Tournay et de le composer de gens du pays, suivant ce que Nous avons promis par les capitulations accordées aux habitans des villes qui se sont soumises à notre obéissance, afin que par la connoissance qu'ils ont des loix et coutumes du pays, la justice qu'ils rendront aux peuples soit mieux reçûë et plus selon leurs mœurs*". For more information on the court's history, see *G.-M.-L. Pillot*, Histoire du parlement de Flandres, 2 vol., Douai 1849 and the contributions published in *J. Poumarède et J. Thomas* (ed.), Les parlements de province. Pouvoirs, justice et société du XV[e] au XVIII[e] siècle, Toulouse 1996: *J. Lorgnier*, Cour souveraine et parlement de Tournai, pièce maîtresse de l'ordre judiciaire français dans les anciens Pays-Bas (p. 141-164) and *R. Martinage*, Pouvoir royal et justice au parlement de Tournai, 1686-1709 (p. 165-190). For a complete bibliography on the Sovereign Council of Tournai and 'Parlement of Flanders', see *S. Castelain and A. Cliqueteux-Lebel*, Petit guide à l'usage des personnes intéressées par les archives du parlement de Flandre (http://chj-cnrs.univ-lille2.fr/IMG/pdf/parlementdeflandre.pdf).

[6] The edict of 1668 organizing the new court foresees one *Premier Président* (Jean-Baptiste de Blye), one *Président* (Jean de Bargibant), seven *conseillers* or councilors (Jean Lemaire, Jacques Durant, François Odemaer, Charles Muyssart, Gaspard-Melchior Delesaux, Pierre Hattu and Adrien Mondet), one *procureur général* or public prosecutor (Robert de Flines) and also two honorary knights. All of them are native of the province and have been chosen for their knowledge of the local customs and for their judicial experience in local courts (Ath, Tournai, Courtrai, Audenarde, Lille, Douai): they are considered to be "*les praticiens les plus habiles et les plus capables et expérimentés en la jurisprudence desdits Pays*". For more biographical information, see *P.-A. Plouvain*, Notes historiques relatives aux offices et aux officiers de la cour du parlement de Flandres, Douai 1809 (http://polib.univ-lille3.fr/data/XIX/III/2/index.html).

[7] *V. Bufquin*, Le parlement de Flandres, la cour d'appel de Douai, le Barreau, Douai 1965, p. 16.

[8] A few months after having established his court in Tournai (July 9th 1668), the king decided a general 'evocation' of all lawsuits "*pendants pardevant les justices de la domination du Roy catholique*" and prohibited "*de se pourvoir à l'advenir en premiere instance ailleurs que par devant leurs juges domicilaires & ordinaries &, par appel, au Conseil, à peine de mille livres d'amende & de nullité des procedures & jugements qui pourroient intervener*": *M. Pinault, Seigneur des Jaunaux*, Histoire du parlement de Tournay contenant l'établissement et les progrès de ce tribunal avec un détail des édits, ordonnances et reglemens concernant la justice y envoyéz, Valenciennes 1701, p. 7-8.

[9] *S. Dauchy*, Introduction historique aux appels flamands au Parlement de Paris (1320-1521), in *R.C. Van Caenegem* (dir.), Les arrêts et jugés du Parlement de Paris sur appels flamands conservés dans les registres du Parlement, Brussels 2002 (Commission royale pour la publication des Anciennes Lois et Ordonnances de Belgique, Recueil de l'ancienne Jurisprudence de la Belgique, 1re série, t. III).

the court adopted its own style – composed by First President de Bly and approved by a royal decree of September 1671[10] – inspired by the procedure of the Council of Hainault and also influenced by the statutes of the Hapsburgs and the practice of the Great Council of Malines[11]. On the contrary, the criminal ordinance of 1670 replaced – but only after having been addressed to the court in 1679 – all dispositions concerning criminal law and criminal procedure previously in use, dispositions that suddenly became foreign law while the royal ordinance turned into internal law.

The records of the Parlement of Flanders (also called Parlement of Tournai until the court left that city for Cambrai in 1709 before finally moving to Douai in 1714) thus seem susceptible to provide very interesting information to study the place of foreign law in a court's practice. Nevertheless, we have to remind that the records do not reveal judges' *rationes decidendi*[12] and that the litigants' arguments, often copied out in the 'extended decisions', are not a reliable basis to study the reasons given by the judges for their decisions. Those reasons can only be known by reports, the so-called *recueils d'arrêts*.

Six collections of reports from the Parlement of Flanders have been printed. Two of them have been published in the early years of the 18th century: the *Recueil d'arrêts notables du parlement de Tournay* by Matthieu Pinault des Jaunaux[13] printed at Valenciennes in 1702 and completed by a *Suite des arrêts notables du parlement de Flandre* published at Douai in 1715 and the *Arrêts du parlement de Flandre sur diverses questions de droit, de coutumes et de pratique* by Jacques Pollet, published in 1716[14]. The four other collections, those of Dubois d'Hermaville, de Baralle, de Flines and de Blye have been gathered in 1773 by a bookseller and publisher from Lille and printed, in two volumes, under the general title *Recueils d'arrêts du parlement de Flandre*[15]. Those reports – all six of them are the work of judges who were members of the court during the first years of its existence[16] – express the newly created jurisdiction's necessity to fix its jurisprudence. We have to remember that, apart from the reports of des Jaunaux published during his life, and of Pollet published two years after his death, the other collections were not intended for publication. They have to be considered as private notes for the personal use of their authors and put at the disposal of the other members of the court; lawyers were probably also authorized to consult them. Their purpose was mainly to avoid a large variety of legal solutions or a sudden reversal of jurisprudence[17], but their authors did not aim at reaching a large public. This explains why those notes not only reveal the judgements' *rationes decidendi* but even – as concerns de Baralle and especially de Flines – the judges' individual opinion, *dissentientibus* or *consentientibus*, and the arguments they exposed to support their opinion[18], which was contrary to the obligation not to reveal the

[10] *M. Pinault*, p. 18.

[11] *Guyot*, Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale, 17 vol., Paris 1784-1785, vol. 6, *Douai* (p. 271): "[Le stile du Parlement de Flandre] est tire du style du Grand Conseil de Malines, des coutumes du pays et principalement des chartes du Hainaut".

[12] Cf. *S. Dauchy et V. Demars-Sion*, La non-motivation des décisions de justice, principe ou usage ?, Revue Historique de Droit Français et Etranger, 82 (2), avril-juin 2004, p. 223-239 and *V. Demars-Sion and S. Dauchy*, La non motivation des décisions judiciaires dans l'ancien droit français: un usage controversé, in *W. H. Bryson and S. Dauchy*, Ratio decidendi. Guiding Principles of Judicial Decisions, vol. 1 : Case Law, Berlin 2006 (Comparative Studies in Continental and Anglo-American Legal History, bd. 25/1), p. 87-116.

[13] http://polib.univ-lille3.fr/data/XVIII/III/4/index.html.

[14] A second edition was published in 1772.

[15] For a complete study of the (published and manuscript) law reports of 'the parlement de Flandre', see *G. Cazals*, Les recueils d'arrêts du parlement de Flandre (to be published soon).

[16] For a short bio-bibliography of the Flemish authors of law-reports, see *P. Arabeyre, J.-L. Halpérin and J. Krynen* (dir.), Dictionnaire historique des jurists français, XII[e]-XX[e] siècle, Paris 2007.

[17] In his introduction, entitled Au lecteur, *M. Pinault, seigneur des Jaunaux*, Recueil d'arrests notables du Parlement de Tournay, Valenciennes 1702, explains that "ces ouvrages peuvent aussi beaucoup contribuer à empescher la variété et la contrariété des arrests…".

[18] *S. Dauchy* and *V. Demars-Sion*, Argumentation et motivation dans les recueils d'arrêts des cours souveraines

secrets of the court's deliberation[19]. For legal historians, of course, these documents are an inestimable source to study *ratio decidendi* and the underlying legal sources and legal reasoning. Also interesting from this point of view are the unpublished reports of a Flemish lawyer, Georges de Ghewiet. Although he intended to publish his *Jurisprudence du parlement de Flandre* in the years 1725-1730, his work remained unpublished at his death in 1745[20]. His reports are based on the work of Pollet (that he used as the starting point of his own work) and are to be considered more as a doctrinal study than as a traditional collection of court reports. De Ghewiet did not only complete the reports published by Pollet by new decisions of the Parlement, he also gave very interesting legal observations based upon customs, legislation, court reports, roman and canonical law and legal literature mainly from the Netherlands and from France, but also from several other European countries[21]. All those reports and commentaries allow us to characterize the legal identity of the province and to specify what contemporary authors and practitioners understood by 'foreign' law in the late 17th and 18th centuries. They also make it possible to measure whether the country's original internal law resisted or, on the contrary, adapted – or was forced to adapt – itself to the royal efforts to centralize and unify law and justice in the realm.

I. Assert local identity by refusing to apply 'foreign' French Law

In the table of contents of his *Jurisprudence du parlement de Flandre*, Georges de Ghewiet mentions under the word *Auteur* that one should not thoughtlessly follow the French authors: "*il ne faut s'attacher légèrement aux auteurs français*". Further explanation is given in the third part of his work when referring to some particular French authors: "we often wrongly use what we find in their works", he says, "because we do not make the effort to examine whether our habits and customs are based on the same principles as the laws and customs of France"[22]. And as judges and lawyers had most of those French authors on their bookshelves[23], he repeats Pollet's warning that "it is important to verify systemically if our customary law is based upon the same principles as those French authors are talking about"[24].

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de France. L'exemple du parlement de Flandre (fin XVIIe-début XVIIIe siècle), in *A. Cordes* (dir.), Juristische Argumentation – Argumente der Juristen, Köln-Weimar-Wien 2006, p. 127-152.

[19] A royal decree of 1344 states the oldest know interdiction to reveal the secrets of the court's deliberations, presenting it as a result of the judges' oath to hold the deliberations secret. Cf. *V. Demars-Sion* and *S. Dauchy*, (note 11), p. 89 sq.

[20] The original manuscript kept in the public Library of Bergues has been edited by *S. Dauchy* and *V. Demars-Sion*, La jurisprudence de Flandre de Georges de Ghewiet, Brussels 2009 (Commission royale pour la publication des Anciennes Lois et Ordonnances de Belgique, Recueil de l'ancienne Jurisprudence de la Belgique, 2e série).

[21] For more information, see *V. Demars-Sion* and *S. Dauchy*, A propos d'un 'recueil d'arrêts' inédit: la *Jurisprudence du parlement de Flandre* de Georges de Ghewiet, Tijdschrift voor rechtsgeschiedenis – Legal History Review, 2009/1.

[22] Jurisprudence du parlement de Flandre, part III, arr. XXXVIII (n° 4 *in fine*): "*A la verité, il ÿ a quelques auteurs francois qui tiennent que les enfans exposéz doivent etre nourris aux frais des hauts justiciers ; mais il est bon d'observer, avec M. Pollet, part. 2, arr. 36, qu'on fait souvent une mauvaise aplication de ce qu'on trouve dans ces auteurs, faute de se donner la peine de bien examiner si nos usages et nos coutumes sont fondées sur les memes principes que les coutumes et usages de France*".

[23] A lot of printed booklists of Flemish judges and lawyers of the 18th century are available in the municipal Library of Lille (L 8 558), as an inventory of their personal library has often been made in order to sell the books after their death. The list of de Ghewiet's personal library, with over 700 titles, has been published: *S. Dauchy* and *V. Demars-Sion*, "La bibliothèque du juriste flamand Georges de Ghewiet", Bulletin de la Commission royale pour la publication des anciennes lois et ordonnances de Belgique, vol. XLVIII, 2007. See also *G. Cazals*, and, for a comparison with the libraries of lawyers in Bordeaux in the late 18th century, *H. Leuwers*, L'invention du barreau français, 1660-1830. La construction nationale d'un groupe professionnel, Paris 2006, p. 212-213.

[24] Jurisprudence du parlement de Flandre, part II, arr. XXXVI (concerning the rights of married people in the

De Ghewiet is clearly warning against a comparative approach that "often leads us, when we are judging, to use legal principles derived from 'foreign' law, because they seem familiar to us"[25]. He not only addresses a warning to local judges who would draw legal solutions in French customary doctrine (to be understood as the various commentaries on the customs of the realm) and from French court reports (i.e. the printed reports of judgements of the different royal parlements), he also points out the distinction between 'local internal law' and 'French foreign law'. But how did contemporary practitioners define the province's legal specificity and how did they refer to foreign law and to what foreign law?

First, we can observe that local practitioners explain and interpret local customs by using the legal literature of the Low Countries, not only because commentaries on the customs of the French speaking part of Flanders were scarce[26], but mainly because the neighbouring customs of the Flemish speaking part of the old county, although they did not fall into the court's jurisdiction, were considered to be part of the same legal family. Laurent Vandenhane's *Vlaemsch recht*[27] is therefore without surprise one of the treaties de Ghewiet most frequently refers to: it is quoted over 90 times. Commentaries on 'French' law should on the contrary been banished because the customs of the realm do not share a common heritage with 'Flemish' law. Relating a case brought before the court in 1715 about the question who should support the cost of abandoned children, Georges de Ghewiet concludes that "even if a universal rule can be put forward in France, it should not been used against what it observed in Flanders" and he reminds that "the Flemish supreme court precisely was set up to judge in

custom of Lille), n° 5: "*Ce sentiment ne sera peut etre pas du gout de ceux qui s'attachent à l'étude des auteurs françois, mais on doit prendre garde qu'on fait souvent une mauvaise application de ce qu'on ÿ a lu, faute de se donner la peine de bien examiner si nos coutumes sont fondées sur les memes principes que celles de la France*". In his observations (n° 22) he explains that Pollet's opinion is confirmed by other Dutch authors as Zypæus: "*L'avis que donne ici M. Pollet, nomb. 5, de bien examiner si nos coutumes sont fondées sur les memes principes que ceux dont parlent les auteurs françois, est tres important*; Zÿpæus *in Not. jur. Belg.*, lib. 1 *De legibus*, nu. 11 *circa med.*, dit : *male studiis suis et reipublic. consulere, qui neglectis moribus nostris, gallicos semper legunt, laudantque auctores ; quorum pleræque decisiones regni illius edictis, et axiomatibus innituntur, cum nos moribus nostris vivamus*".

[25] *Ibid*, n° 22: "*Et on doit par la méme raison ne point s'atacher aux principes d'une coutume qui nous est familiere quand il s'agit de juger des cas dans une autre coutume, principalement lorsque cette derniere est d'une autre province, par ce que les coutumes étant ordinairement fondées sur des motifs et sur des raisons differentes, on ne peut s'en ecarter sans injustice pour suivre une autre qui nous est plus connüe*".

[26] *M. Pinault des Jaunaux*, Coutumes générales de la ville et duché de Cambray, pays et conté du Cambrésis…, Cambrai, 1691 and *François Patou*'s Commentaire sur les coutumes de la ville de Lille et de sa châtellenie…, 3 vol., which was not published before 1788-1790. Several judges of the sovereign court and also some lawyers have made commentaries on local customs, but almost all of them remained in manuscript: e.g. Les coustumes, stils et usages de la ville et cité de Tournay… commentés par G. de Ghewiet (Bergues, Municipal Library, mss 72-73). *Robert de Flines'* Commentarii in consuetudines Tornacenses, *Jean Heindericx'* Commentaire sur la coutume de (la cour féodale de) Furnes and his Notes (ou Annotations) sur la coutume générale du Hainaut are only known from references in de Ghewiet's work or by quotations from other authors. One published commentary is the Commentaire sur quelques articles des coutumes de la Salle, bailliage et chatellenie de Lille par M. le premier président de Blye, 2 vol., Lille, 1773 [t. 2], p. 419-427. We should not forget that, according to their authors, some printed court reports also aimed to interpret and fix local customary law: the full title of Pollet's book is: Arrêts du parlement de Flandre sur diverses questions de droit, de coutume et de pratique, 'ouvrage utile pour l'intelligence des coutumes et usages du pays' and in the second part of his work the judgements of the Sovereign Court and Parlement of Tournai often seem to be a pretext to give comments on several local customs. Cf. *G. van Dievoet*, Coutumes du Tournaisis, Brussels 2006 (Commission royale pour la publication des Anciennes Lois et Ordonnances de Belgique, Recueil des anciennes coutumes de la Belgique, Coutumes de Tournai et du Tournaisis, t. III).

[27] *L. Vanden Hane*, Vlaemsch Recht, dat is costumen ende wetten ghedereteert bij graven ende gravinnen van Vlaenderen…met d'interpretatien…, Anvers 1676, 4e éd. verrijckt met particuliere tafelen ende oock eene Generale, ghemaect by forme van Concordantie. This table made it easy to compare the dispositions of the different Flemish customs.

accordance with the country's uses", and he lays great stress upon the fact "it has been frequently confirmed by the king himself"[28]. In their legal reasoning, judges refer most frequently to collections of case law of the former southern Low Counties, as well the printed collection of decisions of the Great Council of Malines by du Laury[29] as the manuscript collections from Cuvelier and de Grysperre[30], collections that circulated among the judges of the Sovereign Court of Tournai and the Parlement of Flanders and in this matter assured their authors great influence. Because the Sovereign Court in Tournai was considered to take over the Great Council of Malines' jurisdiction in the new conquered territories, its decisions should fit in with the former supreme court's jurisprudence and, when necessary, the court of Malines was therefore still looked to for advice after 1668. When Flemish authors refer to 'French' law reports, it can be either to prove that French law is completely foreign and extraneous to local customs or, as concerns some particular provinces as Brittany, to underline that Flemish law is as particular as the laws of the other peripheral territories of the realm.

According to most authors (and that opinion is shared by the court), the main difference with France concerns the authority recognized to Roman law in the territories detached from the former Low Counties. De Ghewiet indeed reminds that, according to the edits of the 16th and 17th centuries organizing the homologation procedure in the Hapsburg and later Spanish Low Countries, judges have to use Roman law when customary law remains silent or obscure about the legal question to be settled[31]. But Roman law is not confined to an additional role, it is also considered to be the most appropriate way to settle dissenting opinions among judges: de Ghewiet reports a court's resolution from January 28th 1698 confirming that dissention among councillors should be decided according to Roman law[32]. Ladislas de Baralle, who wrote down not only the legal reasoning he presented to the court as reporting-councillor but also the judges' final *rationes decidendi* indeed confirms that the court often judged according to the authority of Roman and secondarily according to canon Law, even when the parties' legal arguments were based upon local customs[33]. When doing so, the court (as is reported by the authors of law reports) generally rely on the most renowned authorities of learned law from the Low Counties and France but also from Italy, Germany and Spain. As Roman law is reputed to be a formal source of law – de Ghewiet regularly repeats that Roman law is to be considered as 'common law' of the territories separated from the Low Countries – we can understand why judges and lawyers were rather hostile or at least reserved towards French

[28] Jurisprudence du parlement de Flandre, part III, arr. XXXVIII, n° 4 : "*Mais quand l'usage seroit aussi universelement receu en France que les demandeurs le pretendent, il ne pourroit prejudicier a ce qui s'observe en Flandre. La Cour de parlement a eté etablie pour juger conformement aux usages du païs ; et toutes les fois que l'occasion s'est presentée, le roÿ a declaré et fait connoitre qu'il ne pretend rien innover en ce regard*". De Ghewiet intended to publish the text of his pleadings in this case, pleadings in which he is referring to various legal sources and also to case law of the former Hapsburg and Spanish Netherlands.

[29] *R.-A. du Laury*, Jurisprudence des Pais-Bas autrichiens établie par les arrêts du Grand conseil de sa majesté impériale et catholique résidant en la ville de Malines auxquels sont ajoutés quelques decrets portés au Conseil privé de sadite Majesté, Brussels 1717.

[30] See *A. Wijffels*, Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries), in *J.H. Baker* (dir.), Judicial Records, Law Reports, and the Growth of Case Law, Berlin 1989 (Comparative Studies in Continental and Anglo-American Legal History, bd. 5), p. 181-206.

[31] Jurisprudence du parlement de Flandre, part II, arr. II, n° 10: "*... on est obligé de suivre le droit romain dans les cas qui ne sont pas décidés par nos coutumes*", but this supposes that the particular customs as well as the general custom of the country remain silence about the legal solution. Cf. Jurisprudence du parlement de Flandre, part III, arr. LXVI, n° 9: "*… dans le resort de la Cour, les coutumes particulieres se rapportent à l'usage general, et subordinément au droit romain, pour les cas dont elles ne disposent point*".

[32] Jurisprudence du parlement de Flandre, part I, arr. V, n° 4: "*il a été arrête au parlement de Flandre, par resolution du 28 janvier 1698, qu'en cas de partage de sentiment la decision sera faite suivant les maximes du droit ecrit*".

[33] *S. Dauchy* and *V. Demars-Sion*, Argumentation et motivation…, n. 13.

customary doctrine. When reporting a court's decision of February 23rd 1689 that rejected a petition because it was prescribed according to Roman law – and this although the plaintiff asserted that French authors unanimously allow a longer prescription –, he argues that "the opinion of the latter should not be taken into consideration because these authors do not receive Roman law"[34]. This is also the reason why he regularly points out that the principles of the custom of Paris reported by de Ferrière[35] as well as by most authors commenting upon French customs, are contrary to 'Law', which means in his opinion that they are opposed to Roman law. French customary law thus is regarded as 'foreign law' on two accounts: first because it goes against local customs and secondly because it is contrary to Roman, and subsidiary Canon, law that always have to be considered as superior because it is based upon reason and equity. In his published treaty about the 'Institutions of Belgian law', de Ghewiet even defends the idea that, in the southern Low Countries, Roman law has been adopted as 'written law', adding that the place and role acknowledged to learned law distinguishes Flanders from the other *pays de coutume*[36].

The attachment of the Flemish councillors and lawyers to their legal identity can also be verified, and perhaps in a more explicit way, as concerns legislation. In his *Jurisprudence du parlement de Flandre*, de Ghewiet – when formulating observations on the criminal ordinance of 1670 – makes a clear distinction between the time 'before' and 'after' the conquest and surrender of the French speaking part of Flanders. Legislation prior to the conquest – that can be found in the 'Placcards' of Flanders and Brabant – continued to be observed in the jurisdiction of the Sovereign Council of Tournai whereas royal edicts prior to 1667 were to be considered as foreign and should therefore not be applied by the court nor by the judges within its jurisdiction. The king's edicts and ordinances posterior to the conquest have of course to be observed, in so far as they had been officially addressed to and registered by the court. This is the reason why the criminal ordinance of 1670 was not observed before 1679 and did not replace King Philip II's edict of July 9th 1570 before the date of 1679. It also explains why the most important text to which practitioners and litigants are systematically referring (and to which authors pay special attention[37]) is without any possible doubt the edict of July 12th 1611, better known as 'perpetual Edict of the archdukes Albert and Isabella for a better organisation of the countries' justice'[38]. Organizing civil law and procedure in the Southern Low Countries, and continuing to do so after 1667 in the jurisdiction of the Sovereign Court and Parlement of Flanders, its dispositions are systematically confirmed by the court and, when they put forward precedents, judges and lawyers always refer to legal literature[39] and law reports from the Netherlands[40] and Liege[41]. Although a derogatory judicial

[34] Jurisprudence du parlement de Flandre, part III, arr. CXII, n° 5: "*on ne devoit pas suivre ici les auteurs françois qui ne recoivent pas le droit romain pour loi*".

[35] *Claude de Ferrière*, Corps et compilation de tous les commentateurs anciens et modernes sur la coutume de Paris, Seconde édition revue, corrigée et augmentée par l'auteur, et par M. Claude Joseph de Ferriere, son fils, enrichie des scavantes observations de Monsieur Le Camus, Paris 1714, 4 vol.

[36] *G. de Ghewiet*, Institutions du droit Belgique, Lille 1736, part. 1, tit. 1, § 7, art.2 (p. 13): "*quoique ce pays soit un pays coûtumier, le droit romain y est considéré tout autrement que dans les pays coûtumiers de France, où ses principes et ses decisions ne sont pas adoptées que comme raison, au lieu que dans ce pays le droit romain est adopté comme Loi écrit*e".

[37] Jurisprudence du parlement de Flandre, part III, arr. XXXV: *Edit perpetuel de 1611*.

[38] *G. Martyn*, Het eeuwig Edict van 12 juli 1611, facsimile of the original French and Dutch text with an introduction, Antwerp 1997.

[39] In particular *Antonius Anselmo*, Commentaria ad Perpetuum Edictum serenissimorum Belgii principum Alberti et Isabellæ evulgatum 12. iulii MDCXI, Antwerp 1701 and *Jean Baptiste van Steenberghe*, Ordonnance et édicts perpétuels des archiducs, nos princes souverains, pour meilleure direction des affaires de la justice en leur pays de pardeça, émané le 12 de juillet 1611, avec les interprétations et éclaircissemens depuis y donnéz**,** Ghent 1672.

[40] These law reports do not only concern the Great Council of Malines but also the council of Brabant: *Pierre Stockmans*, Decisionum Curiæ Brabantiæ sequicenturia, Brussels 1670.

[41] *Charles de Méan*, Observationes et res judicatæ ad jus civile Leodiensium, Romanorum aliarumque gentium

mode had been instituted in the Parlement's jurisdiction as regards appeal procedure, revision, evocation and other questions relative to civil procedure[42], it was never considered to be foreign law by contemporary jurists and should not be considered differently by historians. Several royal decrees moreover have formally ratified particular dispositions of statutes previous to the conquest. A declaration of 1712, 35 years after the establishment of a royal Sovereign Court in French Flanders, orders for example strict observation of article XV of the Perpetual Edict (and of the edict of the Spanish King Philip II) concerning the publication and enactment of substitutions "because the king's concern is to respect the current use of his Flemish province… as far as it pursues the same objectives as the royal decisions"[43]. But once again, it would be against the letter and mind of the capitulations' articles governing the jurisdiction's legal and institutional organization, and therefore anachronous, to consider as a reception of foreign law neither that declaration of 1712 nor the court's references to ancient legislation as reason given for its decisions. The same cannot be said about a judgement of 1680 that is expressly referring to an ordinance of king Charles II of Spain dated 1669. Even de Ghewiet is astonished that an ordinance of the king of Spain, passed after Louis XIV established his jurisdiction on the conquered territories, guided the court's decision. Trying to justify here 'foreign law' as *ratio decidendi* he writes: "the Parlement of Flanders has always been following the same principles as those decreed by Charles II and those principles were already in use before the Great Council of Malines when that court extended its jurisdiction over the territories that became French in 1667"[44].

II. Integration of the jurisdiction's foreign law: local particularity vs. royal efforts of assimilation and standardization

The authors of commented collections of case law – most of them councillors closely connected to the Sovereign Court during the first years after its settlement – have drawn

canonicum et feudale…, 4 vol., Liege 1670.

[42] Cf. *supra*, note 11.

[43] [*Six and Plouvain*], Recueil des édits, déclarations, arrêts du Conseil d'Etat et lettres patentes enregistrées au parlement de Flandres..., 9 vol., Douai 1985-1788 (vol. 4, p. 95-97) : "*Nous avons été informés par les remontrances qui Nous ont été faites par notredite Cour de Parlement, que cette Déclaration contient quelques dispositions qui ne sont pas entierement conformes aux ordonnances reçues dans les Provinces de son resort, & particulièrement à l'Edit ou Placard du Roi d'Espagne Philippe II, du 16 décembre 1586, & à l'article XV de l'Edit perpetuel des Archiducs du 11 juillet 1611, qui pourvoient suffisamment à la plûpart des abus auxquels Nous avons voulu remédier par notredite Déclaration; & comme notre intention n'a pas été de déroger aux usages desdites Provinces, ni à ce qui est établi sur cette matiere par lesdits Edits, & que Nous voulons au contraire maintenir nos Sujets du resort de notredit Parlement de Flandres dans leurs Loix & Usages […] Nous avons par ces présentes signées de notre main, dit, déclaré & ordonné […] que l'Edit ou Placard du Roi d'Espagne Philippe II, du 16 Décembre 1586, & l'article XV de L'Edit perpetuel des Archiducs du 11 juillet 1611, en ce qui concerne les substitutions & fideicommis, soient exactement conservés dans le ressort de notredit Parlement de Flandre*". On article XV, see *G. Martyn*, La 'purge d'héritages' dans les Pays-Bas méridionaux: l'apport des archives du Conseil privé (1577-1692), Tijdschrift voor rechtsgeschiedenis – Legal History Review, LXIII (1995), p. 273-309.

[44] Jurisprudence du parlement de Flandre, part I, arr. XXXI, n° 25: "*Les cousins issus de germains ne sont de ce seul chef recusables au parlement de Flandre. Arret de 1680 rendu dans la seconde chambre entre M. de la Hamaÿde et les heritiers du S^r^ Scorion au sujet de la recusation de M. Visart. Cela est conforme à l'art. 14 de l'edit des recusations de 1669 ci-dessus […]. Quoi que cet edit soit de Charles II, roi d'Espagne, posterieurement à l'etablissement du conseil souverain en la ville de Tournai, il a eté resolu dans une assemblée tenuë en 1678 par les prevot et juré, maÿeur et eschevins faisant les consaux de laditte ville, de suivre le reglement marqué par cet edit, et le parlement de Flandre a toujours eté et est encore dans les memes principes. Tel etoit aussi auparavant l'usage du Grand conseil de Malines qui suivoit en fait de recusation du chef de parenté ce qui etoit disposé en fait d'incompatibilité pour les officiers du corps, laquelle va jusques aux cousins germains, soit du chef de consanguinité ou affinité, selon l'ordonnance ou stil dudit Grand conseil, chap. 1, art. 6. […]*".

arguments from the works of numerous European jurists, showing a broad circulation of legal literature in Ancien Régime Europe and proving the existence of a true cross-boarder legal culture. This foreign legal literature, learned and customary doctrine as well as collections of foreign court's case law, is basically used for comparative ends: authors and practitioners search for arguments confirming local law and customs or, on the contrary, expressing the country's legal particularity. Nevertheless, the comments of local practitioners, in particular Georges de Ghewiet who is the only author reporting decisions posterior to the translation of the court from Tournai to Cambrai in 1709 and finally to Douai in 1714, hide another reality: the attempts of the royal authorities to assimilate the northern province by unifying law, procedure and judicial organization in conformity with French standards and, in response, the efforts of the local lawyers to defend local identity against the undermining process set up by the central authorities. The first royal assaults upon local idiosyncracies concerned legal education and the use of Flemish in justice and administration. In April 1679, the king promulgated the edict of Saint-Germain which made compulsory the teaching of French (customary) law in the law Faculties of the realm, also in the local university of Douai, and created 'French law professors'[45]. Although the primary purpose of the royal measure was to promote French 'national' law and concomitantly reduce the place and influence of Roman law, it also contributed to the assimilation of peripheral provinces as Flanders. Another royal decree of December 1684 formally forbad litigants to use Flemish in the courts falling within the competence of the royal court set up in Tournai and one year later another decree also imposed that all testimonies should be written in French[46].

A few years later, the royal edict of March 1693 dealt a first severe blow to local autonomy. It introduced venality whereas the king had previously, in 1667, formally granted to the councillors a 'perpetual' right to present candidates[47]. The reasons of such a sudden and brutal change were mainly financial, but the measure also expressed the king's will to pursue uniformity of the superior courts[48]. On April 11th the court received a written order to enact the royal decision and it had no other choice than to comply because the Flemish court did not have the faculty to present any *remonstrances*[49]. The royal edict, imposed against the local rights and regardless of the king's word, severely shook the court and de Ghewiet once again bears witness of the traumatism the royal decision provoked in Flanders. In his introduction to the *Jurisprudence du parlement de Flandre* he makes a distinction between the decisions pronounced by the court before and after 1693, a distinction that can only be understood in

[45] *Isambert* e.a., Recueil des anciennes lois françaises, t. 19, p. 195 sq. The royal decree was enacted by the sovereign Court of Tournai on January 12th 1680. Cf. [*Six and Plouvain*], Recueil des édits, déclarations…, *op. cit.*, vol. 1, p. 290, n° 60. Cf. *Chr. Chêne*, L'enseignement du droit français en Pays de droit crit (1679-1793), Geneva 1982.

[46] A few years after the establishment of a sovereign court, *Georges de Ghewiet* made a translation of the famous *Ordonnance criminelle* of 1670 that was printed in Tournai in 1679 (the same year the Criminal ordinance was registered by the court). But, as he explains in his Institutions du droit belgique, it was of no use because the king imposed plaiding in French before his courts. Cf. *G. van Dievoet*, Leven en werk van de Vlaamse jurist Georges de Ghewiet (1651-1745), De Franse Nederlanden – Les Pays-Bas français, Stiching 'Ons Erfdeel vzw', 1983, p. 11-28

[47] See *G.-M.-L. Pillot*, vol. 1, p. 220 sq. The system proposed in 1668 (the king chooses one candidate among three names presented by the court) is copied from the court of Hainault; cf. *Ph.-J. Raparlier*, Exposition de la lettre et de l'esprit des chartes générales du Haynaut, Douai 1771, cap. 1, art. IX, p. 3.

[48] Among the reasons given for the introduction of venality, the king expresses his will "*d'observer autant qu'il se peut une conduite 'uniforme' au gouvernement de son Etat et en l'administration de la justice*" and therefore it seems necessary "*de rendre* [le parlement de Tournai] *conformes aux autres*".

[49] On the conflict between the king and the Parlement about the introduction of venality, see *R. Martinage*, Quelques aspects des relations du pouvoir royal et du parlement de Tournai au début de son existence, in Les juridictions supérieures, Actes des journées de la Société d'histoire du droit et des institutions des pays flamands, picards et wallons tenues à Leeuwarden, Nimeguen 1994, p. 53-65 and *F. Souillart*, L'introduction de la vénalité au parlement de Flandres, Master dissertation, Lille 2007.

reference to the forced introduction of heredity and venality of judicial charges in the Parlement's jurisdiction. 1693 indeed marks a turning point in the province's history, as it put an end to the relative institutional isolation in which the Flemish court lived since it had been installed.

From that moment on, a movement of gradual but systematic erosion of the province's distinctive legal and procedural characteristics, and in the same way a lining up with French legislation, can be observed. Legislation concerning clandestine marriages – i.e. when children get married without consent of their parents – grants an illustration of that process. The statutes of the former Low Countries concerning marriage (chiefly Charles V[th] edict of 1540 completed by an ordinance of Philip IV dated 1623) hardly diverged from the royal legislation as resumed in the declaration of Saint-Germain-en Laye dated 1639. The only difference between those texts concerned the faculty given to the judge by the Hapsburg legislation of 1540 to arbitrate conflicts between children and their parents: children could ask the judge's permission to get married when their parents did not consent. But for both legal regulations were very similar and even seemed to repeat each other[50], nothing could really prevent the Parlement of Flanders from continuing implementing the edicts of the former Low Countries. In their comments, all authors indeed confirm that the statutes of 1540 and 1623 are always given as *ratio decidendi* for the court's judgements[51]. This status quo changes in March 1697 when Louis XIV[th] promulgates a new ordinance concerning matrimonial questions[52]. Article 2 enjoins priests to verify the age of those who want to get married and whether the future bride and groom have got the consent of their parents or legal guardians. Considering that the royal edict abrogated the former regulation, some priests refused to marry under aged persons, even when authorized by justice, which led to a lot of confusion about the abrogation or not of the foreign statutes[53]. To clarify the situation, a royal declaration "for interpretation of the edict of 1693 as concerns the marriage of minors in Flanders" was send to the Parlement on March 8[th] 1704[54]. In his preamble, the king repeats he does not intend to go against the laws, customs and traditions of the province and under this term we can understand why de Ghewiet continues to refer to the old statutes of the 16[th] and 17[th] centuries about a lawsuit judged by the Court in 1715[55]. But at the same time the king informs his Flemish subjects that he has asked his private Council to verify whether those ancient laws and customs were not contrary to accepted standards of good behaviour nor in formal contradiction with royal legislation[56]. This means, if we read between the lines, that the king, although his commitment to respect the particular laws and customs of his Flemish subjects, feels free to check whether that laws and custom, clearly presented here as 'foreign law', are not in opposition with royal internal law.

A new turning point is passed in September 1742 when King Louis XV sends a new edict

[50] *Dubois d'Hermaville*, arr. 38, even speaks about that question of a "*commun usage dans l'Europe*"; cf. Recueil d'arrêts du parlement de Flandres, vol. 1, p. 163.
[51] *De Baralle*, arr. XLIX, 1690 April 7[th].
[52] Edit du roi concernant les formalités qui doivent être observées dans les marriages: [*Six and Plouvain*], Recueil des édits, déclarations…, vol. 2, p. 602-606.
[53] Cf. *Guyot*, Répertoire universel, vol. 11, *Mariage* (p. 348).
[54] Déclaration du roi pour les mariages des mineurs en Flandres, en interprétation de l'Edit du mois de Mars 1697: *[Six and Plouvain*], Recueil des édits, déclarations…, vol. 3, p. 339-342.
[55] Jurisprudence du parlement de Flandre, part III, arr. XXXV: *Du mariage et du consentement des peres et meres aux mariages de leurs enfans*.
[56] *Ibid*., p. 340-341: "*…après avoir fait examiner ces usages en notre Conseil, Nous avons trouvé qu'ils n'ont rien de contraire au bonnes mœurs, qu'ils sont conformes aux Ordonnances des Princes auxquels ces provinces ont été sujettes; que celles des Rois nos prédécesseurs, ni les nôtres, n'excluent pas nos juges de connoitre de la justice ou de l'injustice des oppositions, ou des refus des peres, meres, tuteurs ou curateurs de consentir aux marriages des mineurs: d'ailleurs par notre Edit du mois de Mars 1697, Nous n'avons pas entendu déroger à ces usages, mais seulement employer notre autorité pour faire observer les Loix Canoniques…*".

about marriage to the Parlement of Flanders. In its introduction presenting the grounds of the royal decision we can read this very instructive passage: "for the French statutes about this matter have not yet been addressed to our Parlement, the local jurisdictions are still using some insufficient and particular ordinances that have been passed when our province belonged to a foreign domination; therefore our Sovereign Court is observing an uncertain jurisprudence and its judicial precedents are often very different and sometimes in opposition with the decisions of the others courts of the realm"[57]. The royal declaration of 1742 showed in fact the way to a new declaration dated June 24th 1749 imposing, as a logical result of royal policy pursued for nearly 40 years, the royal ordinances and banning the use of the former Hapsburg and Spanish edits of 1540 and 1623 whenever they are not in formal conformity with royal legislation[58]. The French monarchy finally imposed its national and centralized conception of internal law, a conception that fitted perfectly into its aim and efforts of assimilation of newly conquered territories and of unification of the laws and institutions throughout the realm. Where local practitioners had always considered French law as foreign law – not only because of the capitulations but also with regard to historical continuity – the royal government is using the notion of foreign law for all laws and statutes promulgated in territories subjected to a foreign domination, i.e. other than the king of France's dominion. This opinion is strengthened by another royal declaration, dated January 18th 1719, restoring the use of the so-called *appels comme d'abus* in the jurisdiction of the Parlement of Flanders[59]. That appeal procedure had been developed by the royal parlements at a very early stage to control the decisions of spiritual authorities – in particular the judgements of the Church courts – in order to avoid decisions going against the competence of royal jurisdictions or against the rights and interests of the monarchy. In the Low Countries, the competence of Church courts was controlled by a particular procedure known as *recours au prince* (i.e. a complaint addressed directly to the overlord), a control system created on the initiative of the central authorities and organized in the second half of the 16th century by Philip II[60]. The royal declaration of 1719 justifies the restoration of the use of the *appels comme d'abus* by reminding that the procedure was already in use in Flanders before 1526, when the county was part of the Parlement of Paris' jurisdiction. For historical grounds, the French procedure had thus to be restored (the royal declaration deliberately uses the word 'restore'), but also because that procedure was common to all parlements of the realm since the late Middle Ages. Once again, the local tradition is taken away not only because it has been introduced under foreign domination – and incidentally because the French tradition was in use previous to the Spanish one – but mainly because "it is necessary to have uniform

[57] [*Six and Plouvain*], Recueil des édits, déclarations…, vol. 6, p. 50-52: "*…l'on ne peut avoir recours qu'à quelques ordonnances particulières et insuffisantes, qui ont été faites pendant que ces provinces étaient soumises à une autre domination. Et il ne peut résulter de ce défaut de loix qu'une jurisprudence, non seulement incertaine, mais souvent différente de celle qui est établie dans les autres tribunaux du Royaume*".

[58] [*Six and Plouvain*], Recueil des édits, vol. 6, p. 340-344, art. 1: "*Avons révoqué et révoquons par ces présentes la Déclaration du 8 mars 1704; en consequence, ordonnons que notre Edit du mois de Septembre 1742, & les ordonnances qui y sont rappelées [à savoir les ordonnances 'françaises' de 1556, 1579, 1580, 1606, 1639 et 1730], soient executés selon leur forme & teneur, sans que les Edits [étrangers] de 1540 et 1623 puissent avoir lieu à l'avenir, en ce qui ne seroit pas conforme auxdites Ordonnances…*".

[59] [*Six and Plouvain*], Recueil des édits, vol. 4, p. 725-726: Déclaration du roi pour rétablir l'usage des appels comme d'abus…

[60] For a comparative study of both systems, see *V. Demars-Sion*, Les monarchies européennes aux prises avec la justice d'Eglise : l'exemple des anciens Pays-Bas espagnols, Revue du Nord, tome LXXVII, n° 311 (1995), p. 535-565 and, from the same author, Le parlement de Flandres, protecteur ou fossoyeur des particularismes locaux ?, in *J. Poumarède* et *J. Thomas* (ed.), Les parlements de province, p. 191-214 and La mise sous tutelle de la justice d'Eglise dans les anciens Pays-Bas et ses limites (XVe-XVIe siècles), Cahiers du Centre de Recherches en Histoire du Droit et des Institutions, n° 21/22 (De Pise à Trente: la réforme de l'Eglise en gestation. Regards croisés entre Escaut et Meuse), Brussels 2004, p. 213-229.

procedures in all our provinces”[61], which means ‘French’ law has to replace everywhere ‘foreign law’.

In ancient France, centralization has always been understood as ‘unity in diversity’. Because the peripheral provinces as Flanders, but also Roussillon or Alsace, came under French dominion at the apogee of royal absolutism, the opposition between local particularities – result of centuries of foreign sovereignty and/or independence – and royal centralization has probably been more acute. This explains the king’s early concessions, particularly in a period of war of which the result was not clear. In a first stage, the French authorities therefore only pursued a “transplantation of judicial institutions familiar to the population of the newly conquered territories"[62]. But it does not mean they did not aim, once the international treaties had fixed the border lines and conflicts about sovereignty had been settled, to organize the Flemish courts in conformity with the others supreme courts in the realm, thus striving for uniformity as concern their composition, organization, competence and procedure. It was, for example, not conceivable that territories conquered at a late stage would stay on the fringe of the central state’s efforts to promote a unified civil and criminal procedure. After a period of transition, the criminal ordinance 1670 and possibly also the civil ordinance of 1667were supposed to be applied also by the Parlement of Flanders; at least the Flemish court had to conform itself to what was considered to be a general practice. Such an evolution was in the nature of things and should in any way be interpreted as disrespectful towards the king’s given word to keep and stand surety for the province’s local character and specific legal identity. Because private law had neither been codified nor unified, local customs resisted better. But this does not imply that they could not be improved or adapted by royal decrees abrogating, when necessary, ‘foreign’ statures nor that case law of French sovereign courts should be taken into account and even preferred to ‘foreign’ jurisprudence. Flemish judges and practitioners have interpreted ‘foreign’ as contrary to local tradition and history, in other words by looking backwards, while the royal government looked forward and consequently understood it as impossible to assimilate with or dissolve in a common practice. In that sense, royal centralisation paved the way to Revolutionary unification and Napoleonic codification.

[61] A lot of changes in the organization and procedure of the court pursue uniformity with the other royal courts.
[62] *G.-M.-L. Pillot*, t. 1, p. 214: “… [le roi s’efforce] *de loyalement transplanter sur le sol conquis les institutions judiciaires auquel le peuple vaincu était accoutumé”*.