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Law Reports as Legal Authorities in Early Modern Belgian Legal Practice

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12 Law Reports as Legal Authorities in Early Modern Belgian Legal Practice

Alain Wijffels

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A. JURISDICTIONAL DIVERSITY IN THE EARLY MODERN SOUTHERN NETHERLANDS

The early modern legal landscape in the Southern Netherlands was rooted in particular interests. These interests could be local or regional, but the legal diversity was also the result of vested interest groups which were not always organised along specific territorial lines, such as the Church, merchant or feudal interests, or any other social groups enjoying privileges. In

general, the particular law of a territorial or non-territorial community was backed up by a particular forum. Members of the university in Leuven, for example, enjoyed to some extent a special status which was supported by the jurisdictional privilege of their own university court. Within a given territory, land could be governed depending on its status by feudal law, law applicable on *allodia*, law applicable on tenures – and in each case, litigation would be pursued before a specific court, whether feudal, allodial or *censale*.¹ By the end of the Middle Ages, most of the Low Countries' territories (parts of which would eventually come or return under the sovereignty of the French Crown) were included in a personal union, first of the Burgundian dukes, then of the Habsburgs. Each principality of that union had by then also developed a superior court which acted as an appellate court within that principality (and, for some types of case, as a first-instance court), sometimes referred to as a "provincial court". Moreover, the Burgundian dukes developed an overarching appellate court, commonly known as the Great Council of Mechlin² (which also heard some first-instance cases), and, under the Habsburg rule, the Privy Council³ exercised adjudicating powers on a regular basis. However, the main role of the Privy Council was to assist the sovereign or his representative in the Netherlands in preparing legislative acts and to act as the central executive body in domestic policies and their implementation. The Privy Council's judicial role was never fully acknowledged, it was simply a feature of the *Ancien Régime's police et justice* without separation of powers. The Great Council, on the other hand, lost over time its appellate jurisdiction for most territories, whether they came to be permanently governed by a foreign power (the United Provinces or France), or remained under Habsburg rule.⁴ Neither the Privy Council nor the Great Council were therefore to play a decisive role in developing a common Belgian law. Particular laws by and large prevailed and were supported and developed by particular courts.

In spite of several common features with legal developments in both the

1 P Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, Bruxelles: Palais des Académies, 1987.

2 A Wijffels, "Grand Conseil des Pays-Bas à Malines – vers 1445–1797", in E Aerts et al (eds), *Les institutions du gouvernement central des Pays-Bas habsbourgeois (1482–1795)*, Bruxelles: Archives Générales du Royaume, 1995, vol I, 448–462.

3 H de Schepper, "Conseil Privé (1504–1794)", in E Aerts et al (eds), *Les institutions du gouvernement central des Pays-Bas habsbourgeois (1482–1795)*, Bruxelles: Archives Générales du Royaume, 1995, vol I, 287–317.

4 A Verscuren, *The Great Council of Malines in the 18th century. An Aging Court in a Changing World?*, Cham: Springer, 2015, 101–104.

adjacent Northern French *pays de coutume* and the Northern Netherlands, even after the latter's secession at the end of the sixteenth century, the Habsburg Netherlands presented a different picture in a number of ways. In contrast to France, there was no strong current similar to the formation of a *droit coutumier commun*, supported by the monarchy, royal courts and a significant legal literature. Nor did the Habsburgs' central government in Brussels, notwithstanding intermittent exceptions, endeavour to build any extensive common statutory framework for their Netherlandish dominions. In contrast to the situation in Holland, no systematic or sustained jurisprudential effort was made in order to achieve anything similar to the creation of the Dutch-Roman law in any of the Southern provinces. In any event, comparatively few works by early modern authors in the Habsburg Netherlands used the phrase "Belgian law".⁵ Most of the academic production by Leuven law scholars was focused on Roman or canon law.⁶

B. EVIDENCE OF "FORENSIC REASONING"

Due to a persistent misunderstanding, Belgian (and more generally, European) historiography fails to acknowledge appropriately the relationship between the development of legal science and the development of legal reasoning in forensic practice. To begin with, standard historiography of the so-called "*ius commune*" underrates the successive changes in legal methods which, from the late Middle Ages until the codification era starting towards the late eighteenth century, affected the very structure of legal thinking.⁷ In that sense, in spite of the progress made in *ius commune* studies during

5 The first legal monograph in the Southern Netherlands credited with referring in its title to "Belgian law" is: F[ranciscus] Zypaeus, *Notitia iuris belgici*, Antverpiae: Apud Hieronymum Verdussium (ed pr), 1635; a few years earlier, the phrase "Belgian" (which, at the time, could refer to the whole of the Low Countries, the political secession of the Northern provinces notwithstanding) occurred in Paul van Christijnen's law reports: P Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curijs actarum et obseruatarum decisiones*, Antverpiae: ex officina Hieronymi Verdussii (ed pr), 1626ss. These titles were not, as regards the use of "Belgium" and "Belgian", trendsetters. A Anselmo published in the seventeenth century a compilation of statutes under the title *Codex Belgicus* (and, more originally, a *Tribonianus Belgicus*, a commentary on statute law), while in the eighteenth century, G de Ghewiet published in the Flemish regions annexed by the French Crown his *Institutions du droit belgique*.

6 See Chapters 1–4 by L Waelkens in the *History of Leuven's Faculty of Law*, Bruges: Die Keure and KULeuven, 2014.

7 As there is little point in departing here from the standard historiography, the author may *brevitatis gratia* refer to his own general understanding of the successive remoulding of Roman law texts from the Middle Ages until the nineteenth century in his textbook: A Wijffels, *Introduction historique au droit. France, Allemagne, Angleterre*, Paris: PUF 2020 (revised edition, 3rd edn).

the second half of the twentieth century, there is no *communis opinio* on the essential features of that *ius commune*. *Ius commune* historiography remains shackled by national biases and a post-codification attachment to both Enlightenment classifications and a nineteenth-century positivistic approach to the hierarchy of legal authorities. To make things worse, some legal historians tend to emphasise systematically the opportunistic traits of advocates' and other practitioners' arguments in written opinions: arguably, a rather callous way to write off the underlying methodology which even the least jurisprudentially talented advocate must comply with in order to remain functional in the interaction of litigation between legal professionals (counsel, magistrates and judges). No one would argue that advocates' memoranda (then or nowadays) are intended to reflect consistently the same standards of legal scholarship. Provided they have read law at a law faculty, however, few practitioners escape in their arguments and reasoning the general patterns and the mould of legal thinking which prevailed during their legal education and which continued to direct them through the books of authority, especially those written by legal scholars, which were commonly used or at least referred to in legal practice. In their wake, these patterns and books of the authorities gradually brought up more recent literature, which in turn reinforced the changing general mould of legal reasoning. These were long-term developments, and apart from the enduring prestige of a few late Medieval authors and the occasional reliance on legal-humanistic scholarship, during the last two centuries of the *Ancien Régime*, practitioners fell back mostly on early modern literature which offered a subject-based, systematic treatment of particular topics or areas of the law, and which took into account the substantive law combining civil law and the particular laws of their jurisdiction. In the Southern Netherlands at least, there appears to be little *prima facie* evidence of any marked impact of the more theoretical literature of the Law of Reason in legal practice.

Legal reasoning in early modern practice can be traced through different sources.⁸ The main ones are court records; practice-related manuscript sources; printed *consilia*; printed reports; and other printed sources.

⁸ For the Great Council of Mechlin, which takes central place in the present brief chapter, see D Leyder, *Les archives du Grand Conseil des Pays-Bas à Malines (vers 1445–1797)*, Bruxelles: Archives Générales du Royaume, 2010.

(1) Court records

Court records may vary according to the “style” of each court. For a superior court (such as the Great Council), the main records of judicial decisions (“extended sentences” and their abridged version, the “*dicta*”) do not provide on the whole any relevant information with regard to the use of legal authorities. The extended sentences provide a survey of the proceedings and the mainly factual arguments of the litigants.⁹ Discussions on particular laws are occasionally included (e.g. on a controversial customary or statutory rule), but references to civil law occur only exceptionally, and even then practically never with any technical references to the scholarly authorities.

The case files, which often form the bulk of an ancient court’s archives, were not, strictly speaking, part of the court’s records, as they contained documents submitted (in linen case bags) by the litigants’ proctors during the proceedings, and then apparently left at the registrar’s office after the case had been decided or when the proceedings were indefinitely discontinued. In such case files, the main evidence for legal reasoning and arguments are the written submissions, usually drafted at different stages of the proceedings by advocates in the superior courts. These submissions contain both factual and legal arguments. The latter may refer to particular laws and *ius commune* authorities. By the late sixteenth century, an increasing number of references were made to legal literature relating to particular laws (e.g. commentaries on customs or statutes), which was often at least partly buttressed by civil law scholarship. A second type of document which informs us about legal reasoning in practice occurs less frequently: these are legal opinions (for which different names are used, e.g. *motifs de droit*) sought by a litigant and submitted (in addition to the counsel’s memoranda) to reinforce the legal case in favour of that litigant. Those opinions could be drafted by a senior advocate, occasionally by a judge, but typically they were requested (for consideration) from one or more members of the law faculties (in the Habsburg Netherlands, mostly from the university in Leuven). By and large, these opinions followed the patterns used in the *consilia* literature. In some cases, as was also common practice in other jurisdictions, the collected *consilia* of a law professor were published in print.

9 A Wijffels, “Grand Conseil de Malines: La rédaction des sentences étendues et le recueil de jurisprudence de Guillaume de Gryspere”, in A Wijffels (ed), *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports*, vol I: *Essays*, Berlin: Duncker & Humblot, 1997, 299–316.

(2) Practice-related manuscript sources

A still largely uncharted area of legal literature, at the level of both local courts and superior courts, consists of a wide and heterogenous range of manuscripts, usually written by practitioners, which deal with topics that were relevant for legal practice: procedure, customs, evidence, decisions and rulings by courts. Some fit well in more or less established genres of legal literature (e.g. procedural treatises, running commentaries on customs, reports of cases), but more often than not they are hybrid genres.¹⁰ During the Middle Ages, the first works on customary law were usually drafted by practitioners who relied on decided cases to find out what a specific customary rule entailed, or how a disputed rule was regarded by the local forum. Customary law continued for centuries (even after customs had been more or less extensively written down) to be evidenced through judicial decisions which reflected in that respect some form of case law.

Those practice-related manuscripts which come closest to the genre of (continental-style) law reports are the most relevant for ascertaining legal reasoning methods and their use of authorities in the practice of the (higher) courts.¹¹ Reports were often written by judges, some of whom, in collegiate courts, had taken part in the hearings and the discussions leading to the decision. In smaller jurisdictions, or jurisdictions where the legal profession represented only a limited social group, but also in larger and more important jurisdictions, many law reports remained unpublished, although in certain cases, the evidence of surviving manuscripts indicates that they may have more widely circulated among practitioners, sometimes over several generations. For many early modern practice-related works, the distinction between printed and unpublished works is not all that important, although printed works were more likely to reach a readership beyond its jurisdiction of origin.

10 For an example (again, related to the Great Council), see the description of such a manuscript by J Th de Smidt, "Quelques remarques sur le MS B1 E-5 de la Bibliothèque de l'Université de Leyde, le manuscrit PRAXIS", in J A ANKUM et al (eds), *Saturnalia Roberto Feenstra. Sexagesimum Quintum Annum Aetatis Complenti ab alumnis collegis amicis oblata*, Fribourg: Éditions Universitaires, 1985, 533–544.

11 P Godding, "L'origine et l'autorité des recueils de jurisprudence dans les Pays-Bas méridionaux (XIIIe–XVIIe siècles)", in *Rapports belges au VIIIe Congrès international de droit comparé (Pescara, 29 août–5 septembre 1970)*, Bruxelles: Centre interuniversitaire de droit comparé, 1970, 1–37; Id, *La jurisprudence*, Turnhout: Brepols, 1973; Id, "Jurisprudence et motivation des sentences", in C Perelman and P Fories (eds), *Motivation des décisions de justice*, Bruxelles: Bruylant, 1978, 37–67.

(3) Printed *consilia*

An indigenous production of *consilia* developed soon after the creation of the University of Leuven in 1425.¹² The first printed collection only appeared around the mid-sixteenth century, when opinions by Nicolaus Everardus (d 1532, in his lifetime a judge and president of the Court of Holland and of the Great Council), often written half a century earlier, were published.¹³ Although the courts' archives show that in important cases it was not unusual to seek an opinion from one or more law professors in Leuven, only the *consilia* of a few have been collected and published. Elbertus de Leeuw's (Leoninus) opinions were first published during his lifetime, but Johannes Wamès's (Wamesius), who died in 1590, were only published during the second quarter of the following century. Although *consilia* could arguably better withstand for a while the changing models of legal reasoning between the mid-sixteenth and mid-seventeenth century, these examples illustrate that even during the second half of the seventeenth century and later, such *consilia* could still prove useful as authorities on specific points. However, their patterns of reasoning were then no longer in step with the early modern more positivistic and systematic approach. As a genre, printed *consilia* in the Southern Netherlands faded by the end of the seventeenth century, without being replaced by any obvious substitute.¹⁴

(4) Printed reports

By comparison, the Low Countries were late in publishing law reports. Notwithstanding evidence of unpublished reports from the end of the Middle Ages onwards, and some intensification of reporting, at least in superior courts, during the second half of the sixteenth century, the first published report – and with respect to volume, the most important of the whole early modern period – was not published before the second quarter

12 U Wagner, "Niederlande", in H Coing (ed) *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Bd II, *Neuere Zeit (1500–1800), Das Zeitalter des gemeinen Rechts*, II/2, *Gesetzgebung und Rechtsprechung*, Munich: C H Beck'sche Verlagsbuchhandlung, 1976, 1399–1430, at 1417–1430.

13 O M D F Vervaart, *Studies over Nicolaas Everaerts (1462–1532) en zijn Topica*, Arnhem: Gouda Quint, Rotterdam: Sanders Instituut, 1994.

14 For a topic-related analysis of a very broad range of *consilia* from the (both Southern and Northern) Netherlands, see W Druwé, *Transregional Normativity in Learned Legal Practice. Loans and Credit in Consilia and Decisions in the Northern and Southern Low Countries (c 1500–1680)*, Leiden: Brill, 2019.

of the seventeenth century: Paul van Christijnen's (Christinaeus) *Decisiones* of cases decided by the Great Council, the Council of Brabant and a few other courts in the same area where the author had practised for nearly half a century as an advocate and legal officer of the city of Mechlin. In terms of legal methods, Christinaeus' *Decisiones* appear to illustrate the late *mos italicus*, although the general arrangement of subject matter following the rubrics of Justinian's Code, supplemented by a volume on feudal law, may be regarded as a modest nudge towards the demands of the early modern systematic approach. Paul van Christijnen (and in later editions, his son Sebastian) extensively used legal authorities in their reports, referring to both the traditional late-medieval civil-law authorities and the growing body of more recent legal literature which, on the whole, remained steeped in the traditional method.¹⁵

In contrast to what has been observed for *consilia*, the genre of law reports continued to be developed during the eighteenth century, although not on the same scale as in other jurisdictions. Legal particularism may in that regard also have been an inhibiting factor.

(5) Other printed sources

During the eighteenth century, factums were occasionally printed,¹⁶ but did not develop to a genre of published collections as in France. Many works by professional advocates and judges were written with a scholarly ambition and do not reflect forensic arguments. Even procedural treatises or handbooks, such as those by Filips Wielant and Joost de Damhouder, follow a descriptive and analytical mode of presentation.¹⁷

C. LEGAL AUTHORITIES AND JURISPRUDENTIAL CHANGES

As in most jurisdictions, the effects of sixteenth-century legal humanism on legal practice were limited and much delayed. Until the beginning of the seventeenth century, late-medieval methods prevailed, and were then only

15 A Wijffels, "Christinaeus, *Decisions*", in S Dauchy, G Martyn, A Musson, H Pihlajamäki, A Wijffels (eds), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, Cham: Springer, 2016, 177–180.

16 For an example, see the case study discussed *infra* (argument printed as a "motif de droit").

17 F Wielant wrote a *Practycke civile* and a *Practycke criminele*, which were translated, edited and reworked by J de Damhouder, whose Latin version of both the treatise on civil procedure and that on criminal procedure subsequently (in the Latin version or other translations) widely circulated throughout Europe.

progressively replaced by characteristic early modern models of legal argumentation, merging particular laws and civil law in a systematic approach focused on topics defined by positive law categories.¹⁸ A degree of *ius commune* was maintained through the extensive use, even in practice-related legal literature, of foreign legal scholarship, which was itself increasingly focused on its own *iura propria*. That may partly explain why in the Habsburg Netherlands, references to foreign authorities were increasingly sought in French and Dutch works, while references to authorities from other continental jurisdictions were apparently less common. Perhaps more so than in contemporary early modern scholarly literature, practice-related literature continued to rely explicitly, in addition to the more recent literature, to works which belonged to the older layers of legal scholarship, including the late-medieval *mos italicus* authors.

D. FORENSIC AUTHORITIES IN FORENSIC REASONING

A rough impression of legal authorities referred to by legal practitioners in the early modern Southern Netherlands may be gained from an old study on the late-fifteenth and sixteenth-century practice at the Great Council of Mechlin (Wijffels 1985),¹⁹ and from two recent doctoral dissertations dealing with, respectively, the law reports by Charles de Méan (Lagasse 2017)²⁰ and eighteenth-century practice at the Great Council of Mechlin (Ronvaux 2018).²¹ Those three studies do not all deal with the same types of source and the vantage-point of each researcher was different. They cannot therefore offer a homogenous view on the topic. Wijffels considered references to legal authorities in advocates' memoranda and other legal opinions in legal proceedings from c 1470 until 1580, brought before the Great Council in

18 J Schröder *Rechtswissenschaft. Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule*, Munich: C H Beck (2nd edn), 2012.

19 A Wijffels, *Qui millies allegatur, Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca 1460–1580)*, [Rechtshistorische Studies, XI], Leiden: Brill, 1985 [necnon in: *Verzamelen en bewerken van de jurisprudentie van de Grote Raad*, Nieuwe Reeks, X, Amsterdam: Werkgroep Grote Raad].

20 B Lagasse, *Charles de Méan, le Papinien liégeois. Travail réalisé en vue de l'obtention du grade de Doctor in law de l'Université Gent et de Docteur en sciences juridiques de l'Université de Liège*, 2 vols (sd = 2017; the publication of the dissertation is forthcoming).

21 M Ronvaux, *Le Grand Conseil de Malines et le droit namurois au XVIIIe siècle. Thèse présentée en vue de l'obtention du grade de docteur en sciences juridiques, Faculté de droit et de criminologie, Université catholique de Louvain*, 3 vols (sd = 2018). Since the writing of this chapter, the dissertation has been published as: M Ronvaux, *L'ancien droit privé namurois et sa pratique au XVIIIe siècle*, 2 vols [Annales de la Société Archéologique de Namur, 2019 [=2020], Tome 93, Fascicules 1 & 2]. Further references to Ronvaux's dissertation are to the published version.

first-instance and appeal cases originating from the Northern Netherlands (mainly Holland, Zeeland and Utrecht); Lagasse offers a general survey of legal authors found in the printed reports of de Méan (1604–1674), a member of the higher council in the ecclesiastical principality of Liège; whereas Ronvaux gives a general survey of legal authors referred to by counsel in eighteenth-century proceedings before the Great Council originating from the county of Namur. Although the three surveys are certainly not *eiusdem generis* (neither by their object, nor by their methods), they provide at least some rough indication of general trends in the use of legal literature during, respectively, the sixteenth, the seventeenth and the eighteenth century.

(1) The sixteenth century

Wijffels' research on late fifteenth and sixteenth-century references in memoranda and opinions submitted in the course of litigation originating in the Northern Netherlands before the Great Council of Mechlin was primarily focused on civil and canon law authorities. His main finding was that throughout the period that he researched, late-medieval authorities prevailed. Legal humanistic learning hardly played any role in forensic argumentation, even though several practitioners were aware of the humanistic literature and had legal-humanistic works in their library.²² The use of those late-medieval authorities was also reflected in the prevalence of the *mos italicus* method in the practitioners' reasoning. From the case files, it was possible to establish that the same general pattern appeared both in the submissions originally presented before the Court of Holland in The Hague and (in appeal) before the Great Council of Mechlin. The research also highlighted that explicit references to *ius commune* authorities were largely based on the most conventional doctrinal authorities, both in civil law and canon law. Nicolaus Everardus' *Loci legales* (the author of which held prominent judicial offices both in The Hague and Mechlin) encapsulate and illustrate accurately some of the main features of the argumentation patterns followed by practitioners in their submissions.²³

22 See, for example, A Wijffels, "Loys de Lucenne, avocat au Grand Conseil de Malines. La quiétude privée d'une bibliothèque, l'embarras public d'une liaison dangereuse" (2000) 40 *Publication du Centre Européen d'Etudes Bourguignonnes*, 129–141.

23 A Wijffels, "Everardus, A Book on Topics", in S Dauchy, G Martyn, A Musson, H Pihlajamäki and A Wijffels (eds), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, Cham: Springer, 2016, 65–67.

For the period 1460–1580, the memoranda also show a progressive diversification of the legal literature referred to. Until the mid-sixteenth century, a growing number of civil law references were based on doctrinal writings; a similar tendency can be found for canon law references. In civil law, a handful of authors held a quasi-monopoly in the advocates' references during the first decades of the period under investigation; their predominance was gradually eroded in the course of the sixteenth century, but only to a limited extent: even by the second half of the sixteenth century, the Accursian Gloss, the commentaries by Bartolus, Baldus, Angelus de Ubaldis, Alexander Tartagnus, Paulus de Castro and Jason de Mayno represented more than 80 per cent of the references to writings on the Digest (and a similar figure may be mentioned for writings on the Code, with Cynus and Bartholomaeus de Saliceto replacing Alexander and Angelus). Canon law doctrinal authorities are somewhat more diversified, although here again, advocates in The Hague and Mechlin followed conventional patterns: for example, in both courts, the same commentaries on the *Liber Extra* represent more than 80 per cent of all the references to commentaries on that collection (viz by Nicolaus de Tudeschis, Innocent IV and, to a lesser extent, Felinus Sandeus, Antonius de Butrio, Johannes Andreae and Johannes de Imola). Those canon lawyers were the contemporaries of the civil law commentators mostly quoted by the same practitioners in the Low Countries and reflected essentially the same legal method.

Beyond the commentaries which continued to prevail, other genres of legal literature played a minor, but nonetheless increasing, part in the practitioners' references: from about 5 per cent of all references to doctrinal writings in 1461–1480 to nearly 20 per cent a century later. The growth and diversification become more obvious from the 1520s onwards, when new techniques and formats of legal imprints came on the market. Even then, a survey of the literature recurrently quoted confirms the traditional outlook of the practitioners' references: a third of the references to works other than commentaries are references to Guilelmus Durantis' *Speculum* and Alexander Tartagnus' *consilia*. They are followed by monographic works (including *consilia*) by Guido Papa, Ludovicus Romanus, Baldus, Bartolus, B de Chasseneuz and N Everardus – except for Zasius, no other author associated with legal humanism appears in the list of recurrently quoted legal writers.

(2) The seventeenth century

His political and judicial commitments notwithstanding, Charles de Méan also had scholarly interests. His *Observationes et res judicatae ad jus civile Leodiensium, Romanorum, aliarumque gentium, canonicum et feudale*,²⁴ was also a work of filial *pietas*, as it was intended to enhance the authority of his father's attempt to draft the Liège customs, a project which, however, was eventually not officially sanctioned. The *editio princeps* of the first five parts of the 725 *Observationes* (supplemented by a sixth part of 106 *Definitiones* published posthumously by Charles' son Pierre in 1678) date from 1652–1669. Lagasse's survey of authors referred to in de Méan's work mentions 420 authorities, of which 396 from the Second Middle Ages until de Méan's own lifetime. In a chronological overview (for which Lagasse decided to allocate the same author to two different centuries if the author is deemed to have been active in both centuries, hence a total hereafter of more than 100 per cent), it appears that about a quarter of the doctrinal authorities were authors from the Second Middle Ages (eleventh to fifteenth centuries, of which more than half from the last century), two thirds from the sixteenth century, and some 40 per cent from the seventeenth century. To some extent, these figures are inevitably distorted, because second-hand references tend to increase the part of older authorities, whereas near-contemporary or contemporary authorities are less likely to appear as second-hand references. In any case, the figures clearly show that for a scholarly-minded Liège jurist of the mid-seventeenth century, late-medieval civil and canon law authors were on the wane. Lagasse also provides an overview of the authors by country of origin. A third of the authors are identified as Italians, slightly more than a fifth as French. The Low Countries (without differentiating between North and South), except Liège, represent about a tenth of the references, authors from Liège 4 per cent. Authors from the German nation represent a little more than 10 per cent; from Spain nearly 7 per cent; from Portugal nearly 1.5 per cent. Lagasse notes that the most quoted authorities are Jacques Cujas and Antoine Favre. Other frequently quoted authors are Bartolus, Baldus, André Tiraqueau, Charles Dumoulin, Diego de Covarrubias, Andreas Gail, François de Barry, Jacobus Menocchio and Jaime Cáncer. These surveys do not entirely support Lagasse's claim that

24 I have used the edition, Ch de Méan, *Observationes et res judicatae ad jus civile Leodiensium, Romanorum, aliarumque gentium, canonicum et feudale*, Liège: Typis Everardi KInts (Editio tertia), in eight parts including the additions and index, 1740–1741.

de Méan's work reflects a "predominant" influence of legal humanism, which the author mixes up with the so-called "practical" legal doctrine emerging in the sixteenth century.²⁵ In spite of de Méan's obvious interest for Roman law and its ancient historical developments, the bulk of the legal literature he cited reflects an interest for early modern scholarship which contributed to develop a more systematic and subject-related approach to legal methods, and which focused on, or integrated, developments of particular laws. Legal-humanistic expertise appears more as an ancillary genre, in particular for updating Roman law scholarship. What the survey most obviously expresses, is that in the Southern Netherlands, by the mid-seventeenth century, indigenous legal literature played a relatively minor role, whereas the civil law scholarly tradition (especially when written in Latin or French) was still, by continental Western European standards, fairly cosmopolitan.

(3) The eighteenth century

Ronvaux's overview of doctrinal authorities in memoranda of eighteenth-century litigation from Namur before the Great Council is based on 1,027 references occurring in 276 case files.²⁶ Ronvaux identified 209 legal authors.²⁷ About half of those authors appear in one case only, whereas the five most often quoted authors represent half the total of all references found in the case files; the ten most often quoted authors represent three-quarters of all references. The top five identified by Ronvaux are: Joannes Voet (eighty-two references); Pierre Stockmans (forty-four references); Charles de Méan (thirty-nine references); Antoine Favre (thirty-seven references); and Andreas Gail (thirty-five references). A chronological overview (following somewhat different criteria than those applied by Lagasse for de Méan) shows that less than 10 per cent of the references are to medieval authors; about 30 per cent to sixteenth-century jurists; somewhat more than 50 per cent to seventeenth-century jurists; and just a little more than 10 per cent to eighteenth-century jurists.²⁸ Here, too, one may suppose that older references will tend to be over-represented, but it is clear that late-medieval authorities had become marginal: even so, they still occur in significant numbers, which means that as the ancient layer of *ius commune* literature, they were still part of the legal landscape at the end

²⁵ Lagasse, *Charles de Méan, le Papinien liégeois*, vol I, 168.

²⁶ Ronvaux, *L'ancien droit privé namurois*, op cit, vol I, 107–124.

²⁷ See the full list, *ibid*, 108–114.

²⁸ See the diagrams, *ibid*, 117.

of the *Ancien Régime*. Conversely, one would expect the contemporary eighteenth-century legal literature to be underrepresented, all the more so because the source material includes case files from the early decades of the century. Their low occurrence nonetheless suggests that (Namur) practitioners were not exceedingly keen to keep up with the latest legal works being produced. Ronvaux also looked at the national origins of the legal writers referred to.²⁹ French authors come first with 35 per cent, followed by Italians with 25 per cent. Jurists from the Habsburg Netherlands and Liège represent 13 per cent; German authors 12 per cent; Dutch authors 9 per cent; and Spanish jurists 6 per cent. However, a breakdown based on the number of references shows that the Southern and Northern Netherlands provide relatively substantially more authorities: 25 per cent for the Southern Netherlands and 17 per cent for the United Provinces. (The corresponding figures for the other countries are: France 31 per cent; Italy 14 per cent; Germany 10 per cent; and Spain 3 per cent.) The share of home-produced legal literature took a substantial part, but the general picture, even for regions such as Namur and the other Habsburg provinces in the Netherlands which had become a backwater in European legal science, remained fairly cosmopolitan. Ronvaux also observed that legal writings focusing specifically on the county of Namur (mostly circulating in handwritten collections) were rarely quoted, even though they were often far more relevant for dealing with issues of customary or statutory law.³⁰ The printed format of a legal work may have strengthened its status as a “book of authority”.

(4) Law reports as authorities

During the sixteenth century, in the practice of the Great Council, the share of legal literature other than commentaries on the *corpora iuris* in the whole of the references to legal literature grew from approximately 5 per cent to 20 per cent or more. Half of those are references to *consilia*. By contrast, law reports represent only 8.5 per cent of the legal literature other than commentaries. Before the 1580s, most of the latter are to the reports by Guy Pape, the rest is scattered over the *Decisiones* of the Roman Rota, the *Decisiones Capellae Tholosanae*, and reports by Matteo D’Afflitto, Nicolas Bohier, Octavianus Cacheranus and Jean Papon. Although home-grown

²⁹ See the diagrams, *ibid*, 115–116.

³⁰ *Ibid*, 120–121.

manuscripts of reports circulated, the advocates' memoranda contain only exceptionally references to unpublished judicial precedents.³¹

By the early seventeenth century, when Paul van Christijnen (Christinaeus) wrote his reports, the genre of reports, in so far as one can rely on his own *Decisiones*, appears to have been a well-established authority. It provided even most of the "foreign" authorities in those reports, if one discounts the *ius commune* literature.³² The distinction is, however, rather artificial; because, especially during the sixteenth century, collections of *Decisiones* were still very much part of *ius commune* scholarship, notwithstanding their association to a particular reporter discussing the practice of a particular court.

Lagasse's survey of authors³³ referred to in de Méan's *Observationes* does not identify their works, but the index by Mathias Gordinne³⁴ on which the survey is based, does specify different works by author. Although the latter's list may not be entirely reliable, it does provide some general indication to what extent de Méan used *consilia* and *decisiones* as authorities in his own work. Several of the approximately 400 authors cited as authorities (including some authors of non-legal works) have written different types of work used by de Méan, but out of those 400, at least more than fifty are authors of *consilia* mentioned by de Méan, and at least more than sixty authors of reports. More than a quarter of de Méan's authorities are therefore jurists who had written a collection of one of the two most closely practice-related genres of legal literature in the civil law tradition. The list of authors of *consilia* includes most of the late-medieval authors of such works. Late-medieval reports were much scarcer, which means that in that genre, comparatively more (late-)sixteenth and contemporary seventeenth-century authors appear in de Méan's work, from a large array of continental European jurisdictions. As in the case of van Christijnen's reports, de Méan as a legal professional was willing to draw a large variety of Belgian and foreign law reports to his pool of authorities.

31 A Wijffels, "References to Judicial Precedents in the Practice of the Great Council of Malines (c 1460–1580)", in A Wijffels (ed), *Miscellanea Consilii Magni III [Verzamelen en bewerken van de jurisprudentie van de Grote Raad]*, Nieuwe Reeks, XII], Amsterdam: Werkgroep Grote Raad, 1988, 165–186.

32 A Wijffels, "Orbis exiguus. Foreign authorities in Paulus Christinaeus's Law Reports", in W H Bryson, S Dauchy, M Mirow (eds), *Ratio decidendi. Guiding Principles of Judicial Decisions*, vol II, *Foreign Law*, Berlin: Duncker und Humblot, 2010, 37–62.

33 Lagasse, *Charles de Méan, le Papinien liégeois*, vol II, Appendix 3 on 527–628.

34 M Gordinne, "Index omnium autorum, Qui in Operibus D Caroli de Mean citantur per ordinem Alphabeticum", in *Additamenta ad Opera Nob D Caroli de Mean*, Tomus Septimus sive Pars septima, Liège: Typis Everardi Kints, 1741, 84–97.

Similar to Lagasse's overview, Ronvaux identifies the authors quoted by practitioners in eighteenth-century legal opinions, but not the works referred to. Perhaps the list of authors may suggest a broader range of new literary genres being used, but several of the names in Ronvaux's list of 210 authors are mainly known as *arrêdistes*, including four of the five authors who provide 50 per cent of all the quotes in Ronvaux's corpus (viz Stockmans, de Méan, Favre and Gail).³⁵

E. CASE STUDY: FAMILY PROPERTY LAW IN A MILITARY HOUSEHOLD

A military officer challenged the validity of his deceased wife's will, who, while living in Namur with her mother, had left her chattels (movables) to her sister. The case was decided in revision by the Great Council of Mechlin in favour of the officer. It is reported in Coloma's law reports,³⁶ and a case file in the court's records contains a printed *motif de droit* on behalf of the officer's opponent, which can be dated between 1713 and 1716.³⁷ The decision of the Great Council (at the end of revision proceedings) is dated 27 January 1717 in the report.³⁸

The officer relied on the custom of Namur, which stated:

52. Item, si la femme survit à son mary, elle aura pour douaire coutumier en propriété tous les biens meubles délaissés par sondit mary, restans après les debtes payées, et l'usufruit de tous les biens réels allodiaux ou cottiers apportez en mariage par sondit mary, et aussi des acquests faits ensemble, et ce quand il ne sera convenu d'autre douaire par le traicté de mariage.³⁹

It was common ground that the customary provision also operated in favour of the husband. The officer's opponent argued that the Namur custom was not applicable in this case, because of the military status of the husband. In such a case, a statute issued in 1587 by Alexander Farnese, Captain-General

35 Ronvaux, *L'ancien droit privé namurois*, op cit, vol I, 107.

36 Jean-Alphonse, comte de Coloma, *Arrêts du Grand Conseil de S M I et R séant en la ville de Malines . . .*, Mechlin: Chez P J Hanicq, 1781, vol I, 268–279.

37 Brussels, Archives Générales du Royaume, Fonds Grand Conseil de Malines, Appels de Namur, N 352.

38 The case is discussed briefly in M Ronvaux, *L'ancien droit privé namurois*, op cit, vol I, 203.

39 "If the wife survives after her husband's death, her customary dowry will consist of all the chattels left by her husband, after debts have been paid, and of the usufruct of the real [immovable] property, whether allodial goods or tenures, brought by the husband into the marriage, and also of the property jointly acquired after the marriage, in so far as no other form of dowry will have been agreed in their ante-nuptial contract." (J Grandgagnage (ed), *Coutumes de Namur et coutume de Philippeville*, vol I, Bruxelles: Fr Gobbaerts, 1869, 11).

of the Army of Flanders and Governor-General of the Spanish Netherlands, would prevail.⁴⁰ The statute, it was submitted, referred to the civil law with regard to a soldier's real estate as far as the chattels were concerned.⁴¹

Jean-Alphonse de Coloma's (1677–1739)⁴² report of the case first concentrates on the issue whether such laws as the custom's rule are to be seen as pertaining to the person or to property, an issue for which Coloma adduces contrasting scholarly opinions, and the proposition that such laws ought to be viewed as "mixed statutes" (i.e. both personal and real), an opinion Coloma himself rejects.⁴³ He then considers how the action ought to be identified with regard to a usufruct, the object of which will be either movable or immovable. That issue, in turn, brings him to state that the custom of the officer's domicile should apply. The following issue is then how to determine a military officer's domicile. In this case, Coloma opts for a voluntary domicile where the officer's wife resided (Namur). The issue of the domicile and its relevance for determining the applicable custom is crucial in Coloma's reasoning for excluding the application of the 1587 statute issued by Farnese. According to that statute, the issue would have been governed by the "written" (i.e. civil) law, but Coloma argues that the statute does not apply to military staff who have a domicile. He thus bypasses the question whether that statute was in general applicable or not in the county of Namur. Apparently, the court heard several practitioners who testified that the statute was not applicable in Namur, either because it had not been published in the county at the time, or because it had never been in use, while the practice had been to apply the Namur custom to military officers who had their

40 The (Spanish) text is printed in *Tweeden Deel vanden Placcaert-Boeck inhoudende diverse ordonnantien, edicten ende placcaerten vande Konincklycke Maiesteyten ende Haere Deurluchtighe Hoogheden Graven van Vlaendren, Mitsgaeders van heurlieden Provincialen Raede aldaer, Gepubliceert inden voornoemden lande van Vlaendren t' Zedert den Iaere Vijfthien-hondert t' Zestisch tot ende met den Iaere Zesthien hondert Negen-en-twintich*, Antwerp: By Hendrick Aertssens, 1667, 663–671.

41 The passage mostly focused on in this case appears to be the provision (loc cit, 664): "De manera que un Soldado no podra ser convenido, ny llamado en justiciar por ningun delicto, ny deuda, ny por otra cosa ninguna, sino es por ante los Auditores, y juezes militares, y ninguno otro, Excepto en causas de acciones reales, hypothecarias, y de sucession de bienes raizes, y patrimoniales, porque en tel caso, cada uno podra proseguir y pedir su justicia segun las costumbres, y ante los juezes del lugar, donde estuieren situados dichos bienes, ques conforme la leyes comunes, y los placartes del Emperador mi Señor, de gloriosa memoria [viz Charles V], sin querer derogar fuera desto en cosa chica ny grande, a los privilegios militares, losquales queremos, y es nuestra voluntad, que sean inviolablemente guardados."

42 A Wijffels, "Van Paul van Christijnen (†1631) tot Jean-Alphonse de Coloma (†1739): rechters en advocaten bij de Grote Raad van Mechelen tegen de achtergrond van de zeventiende-eeuwse Europese rechtsontwikkeling" (1993) 9(1) *De zeventiende eeuw*, 3–14.

43 Coloma, *Arrêts du Grand Conseil de S M I et R séant en la ville de Malines*, vol I, 271.

domicile in the county. Coloma adds yet another argument for disapplying the 1587 statute: the latter, he submits, because it had been enacted by the Governor General, would not have departed from the emperor's Edict of 1547, which declared that with regard to soldiers, the local custom (sc where the property was situated) would apply to real actions and actions relating to inheritance.⁴⁴ The report states that the officer had won his case in first instance before the Council of Namur, a judgment confirmed in appeal by the Council of Luxemburg, and again in revision by the Great Council of Mechlin.

Not every part of Coloma's report is reasoned along the same lines. Coloma's main purpose, in this particular report, is the justification of the court's decision to apply the customary rule of Namur in favour of the officer, which entailed precluding the 1587 statute that would have imposed the application of civil law. For the general issue, whether the particular rule is dealing with the personal status, (real) property, or is "mixed", Coloma mentions as main authorities for the opposing views Charles Dumoulin and Bertrand d'Argentré,⁴⁵ two major sixteenth-century French authors known largely for their commentaries on customary law, still strongly supported by civil law scholarship. Each opinion is further discussed with references to (more recent) early modern authors from the Low Countries, both North and South: N Burgundus, C Rodenburg, A van Wesel and P Stockmans for the Dumoulin opinion; A Matthaeus (II), J A van der Muelen, with further references to P and J Voet, and to ao S van Leeuwen on the issue of mixed statutes. (In this report, Coloma does not refer to late-medieval authorities. In a reasoning which was intended to justify the application of a customary rule, it may have seemed more political not to rely on late-medieval scholarship, which, although it acknowledged the primacy of particular laws, it restricted the latter's province through rules of construction and evidence.) Coloma's own reservations are argued with references to Roman law texts, and also to the works of some of the Dutch authors already mentioned. On the usufruct issue, the general principles are buttressed with references to early modern French and Netherlandish authors: N Burgundus, Jean Grivel, N van Tulden, Ch Loyseau, A Wesel, P Stockmans, J A van der Meulen, as well as R Bachovius. On the issue of domicile, he refers to H Kinschot, P W Clerin (compiler of a *Code militaire des Pays-Bas*, ed pr

44 Ibid, 278.

45 Both references also occur in the *Motif de droit*, cf *infra*.

1704, including a commentary on the 1587 statute),⁴⁶ and more generally to L Le Grand, W van Radelant, J Voet, P Stockmans, J Pollet and R A du Laury. Occasionally, Coloma also refers to more particular municipal law, such as a decree (“Acte”) of the Privy Council.⁴⁷

It is not possible to retrace the origins of every part of the reasoning and of the references: some may reflect the memoranda and arguments of counsel (at different stages of the proceedings), some may reflect the *rapporteur’s* or other councillors’ opinions, while in the discussion on the mixed statutes, Coloma gives the impression of developing his own reasoning. Within the limits of this specific report, some of the general findings on the use of authorities in contemporary Belgian legal practice appear nevertheless borne out: a strong reliance on various genres of mainly early modern civil law scholarship, whether specifically focused on Roman law, customary law or statute law; a regular use of foreign scholarly authorities, although borrowed mainly from France and the United Provinces, and obviously other provinces of the Habsburg Netherlands as well.

The only evidence in the calendared records of the court which gives a fragmentary impression of the argument on behalf of one of the litigants (viz the beneficiary of the deceased wife’s will) is a printed *motif de droict*, probably from the last round of proceedings (in review before the Great Council). The text (forty-one pages) is signed J O’Donnoghue [sic] de Niele, possibly Jean O’ Donnoghue (1678–1742), who became a member of the Great Council.⁴⁸

The *motif de droict* is structured around two main issues. The first is the counsel’s thesis arguing that the case should be governed by civil law (“*droit commun*”, i.e. *ius commune*) and military laws, excluding any local custom, such as the one of Namur. The second main argument is that the 1587 statute was in force and applicable with respect to movable property in Namur. Compared to the fragmentary information that the present state of the art offers with regard to the use of authorities in eighteenth-century legal prac-

46 Edition used: *Code militaire des Pais-Bas contenant Les Edits, Ordonnances, Decrets, le Stile de l’Audience Generale tant Civil que Criminel, & les Privilèges de Gens de Guerre. Ensemble Les Arrêts, Declarations, & autres Preuves de leur usage, avec un Commentaire très-exact sur le Placard du Prince de Parme du 15. Mai 1587 . . .*, Maastricht: Chez Lambert Bertus, 1721.

47 Coloma, *Arrêts du Grand Conseil de S M I et R séant en la ville de Malines*, 278 (“Voyez aussi l’Acte du Conseil Privé du 9 Octobre 1641, imprimé derriere la Coutume de Gand”).

48 J O’Donnoghue (sd), *Motif de droit pour Dame Agnes Badot veuve de feu Messire Philippe Emanuel de Franquen, Chevalier Conseiller & Commis des Domaines & Finances de Sa Majesté Impetrante de Lettres de Revision contre Le Sieur Jean François Joseph Du Menil, Lieutenant Colonel d’Infanterie Adjournalé*. Mechlin: Chez Iean François Jaye.

tice in Belgium, the *motif* offers few surprises. In addition to some direct references to Roman law texts and a somewhat jocular obiter reference to Baldus de Ubaldis,⁴⁹ the range of legal literature referred to looks familiar, and to some extent matches the range in the report on the same case in Coloma's work. But for a couple of exceptions (N Burgundus, P Peckius), most of the authors quoted are "foreign", but as already noted previously, the cosmopolitan outlook remains limited; in this case comprising almost exclusively authors from the Northern Netherlands (Grotius's Hollandish consultations, C Rodenburgh, J van Someren, J Voet, here also quoted with some insistence, and A van Wesel) and France (B d'Argentré, C de Ferrière and C Dumoulin). On issues of evidence, the counsel's memorandum also refers to G Mascardo and G Menocchio. All the Dutch and French authors mentioned no doubt belong to the *ius commune* literature in a broader sense, but most of them, because of the subject of their work or their method, would be strongly associated with their particular legal tradition. The predominance of Dutch and (Northern) French authors may therefore reflect a more restricted perception of a degree of common legal culture in adjacent territories.

One rather unusual use of authorities in the *motif* is linked to the "law of nations" (in the text: *droit des gens, ius gentium*).⁵⁰ The reference occurs in a passage which rejects the idea that joint property of spouses would be part of the "general customs in the world" which can be equated with the law of nations (i.e. a fairly traditional concept of *ius gentium*). The memorandum's author refers to several countries where, he submits, such a joint property does not apply. For each country adduced in support of that counter-argument, he mentions a legal authority borrowed from legal literature: for parts of France, De Ferrière's commentary on the custom of Paris;⁵¹ for Sicily, M Giurba on the laws of Messina;⁵² for Germany,

49 Ibid, 31, challenging a *turbe* detrimental to his client's interest: "Ces Messieurs doivent être ravis qu'ils ne sont pas tombés entre les mains de [f]eu Maître Balde. *Testis*, dit-il, *deponens absque alia ratione dicitur non ut homo sed ut pecus deponere.*" The reference may seem unsubstantial, but the Namur *turbæ* had, according to Coloma (*Arrêts du Grand Conseil de S M I*, 277), made a deep impression on the judges in Mechlin.

50 *Motif de droit*, loc cit, 16–17.

51 In the edition I have used C[laude] de Ferrière, *Nouveau commentaire sur la coutume de la prevosté et vicomté de Paris*, vol II, Paris: Chez la Veuve de Jean Cochart, 1703, Tit X (*De communauté de biens*), inc 3.

52 In the Dutch edition I have used M[arius] Giurba, *Lucubrationum pars prima, in omne ius municipalium et statutum appellans, S P G. Messanensis, sui que districtus, & totius fere Siciliae*, Amsterdam: Ex Typographejo Ioannis Blaeu, 1651, cap I, inc, 9.

A Matthaeus (II) *Paræmia*,⁵³ for England and Ireland, J Cowell's *Institutes*,⁵⁴ and even in Holland, where such joint property had been introduced, C Neostadius provides exceptions.⁵⁵ The selection of legal systems (and thus of authors supposed to document those legal systems) may at first glance seem arbitrary (and the extension of Cowell's English *Institutes* to Ireland may raise eyebrows), but it is at least partly explained by the counsel's remark that the Habsburg sovereign's armies included Germans, Englishmen and Irishmen, in some cases even organised as distinct national army corps.⁵⁶ Again, literature which is part of the civil law tradition in a wider sense is used each time in order to focus on a rule of substantive *ius proprium*. The link with the national provenance of soldiers deployed in the Habsburg Netherlands is a further argument for justifying the need to apply civil and military laws as uniform rules in multinational armed forces.⁵⁷

Some of the references which occur in the *motif* reappear in Coloma's report, but not necessarily in exactly the same light or to deal with the same issue. An example is Dumoulin's *consilium* 53, which Coloma mainly mentions as the leading opinion according to which a statute on joint matrimonial property is of a personal nature.⁵⁸ The *motif* does briefly refer to the

53 In the Brussels edition I have used (note the extension to other regions in the sub-title, including provinces of the Habsburg Netherlands) A[ntonius II] Matthaeus, *Paroemiarum Belgicarum Jurisconsultis usitatissimae: Editio altera, cui accesserunt Additiones post quamlibet Paroemiam, continentes Jus et praxim, Tam in Bonis Allodialibus quam Feudalibus, Circa easdem, non tantum in Foederato Belgio, sed & in Hispania, Gallia, Saxonia, Bavaria, Hannonia, Flandria, Brabantia, Aliisque Provinciis observatum*, Brussels: Apud Petrum de Dobbeleer, 1694, on the rule 'Man ende wijf hebben geen verscheyden goet', 18, n 6 *in fine*.

54 In the edition I have used J[ohn] Cowell, *Institutiones juris anglicani, ad methodum et seriem Institutionum imperialium compositae & digestae . . .*, Oxford: W Hall pro Ed Forrest, 1664, Book I, *De nuptiis*, n 18, 25.

55 In the edition I have used C[ornelius] Neostadius, *De pactis antenuptialibus rerum judicatarum observationes*, Arnhem: Typis Jacobi Biesii, 1657, Obs 9, notae, 25a *supra*.

56 *Motif de droit*, loc cit, 16: "Or il est notoir que dans les Armées de Sa Majesté il y a toujours eu Allemands & des Anglois & Irlandois, même des Corps de ces Nations." The reference to Giurba therefore remains in that sense unaccounted, unless the *motif's* author was anticipating that it would be mentioned in the editor's present volume.

57 *Motif de droit*, loc cit, 23, the insistence on a uniform legal regime for the whole army echoes a provision in the 1587 statute: "En el juzgar se conforamran con las leyes, y derecho comun, y las ordines, bandos, costumbres, privilegios, y constituciones de Guerra, sin atarie a ningunas leyes municipales, costumbres, ny constituciones particulares de ningunas provincias y lugares, a losquales los Soldados non estan subjectos, Porque los soldados qu'estan debaxo de sus vanderas a qualquiera parte que vayan, han de tener siempre las mismas leyes, costumbres, y privilegios, quo non es razon, que por andar de una provincia, o tierra a otra, ayan de mudar a caso paso de leyes, ny costumbres : ny tan poco conviene a la autoridad de la disciplina militar, que los soldados esten subjectos a las leyes, y costumbres de la provincia en que hazen la guerra." (loc cit, 667–668).

58 I have used the edition C[arolus] Molinaeus, *Omnia quae extant opera*, Tomus Secundus, Paris:

Dumoulin-d'Argentré⁵⁹ controversy on the nature of particular law rules governing the matrimonial joint property,⁶⁰ but it discusses the case of Dumoulin's *consilium* 53 more at length⁶¹ in order to argue *a contrario* that in that case, the military judge would have applied the civil law rule excluding joint property if the particulars of that case had not established that the spouses had mixed up their chattels and intended to create a community of ownership, conditions which were not met (counsel submitted) in the present case.

The author of the *motif* also refers more or less in detail to several other (unreported) cases, some older, some more recent, but not in the sense of modern case law.⁶² The cases are not primarily mentioned because a judicial decision would have explicitly established a particular principle, but for the twofold argument on behalf of his client (i.e. the application by default of civil law to military persons and the validity (and hence justiciability) of the 1587 statute), the counsel presents a reasoning from which he infers that the courts in those other cases (in the Habsburg Netherlands) must have followed the same reasoning.

F. CONCLUSION. THE BELGIAN *USUS MODERNUS*: A WEAK FORM OF *IUS COMMUNE*

From the second half of the seventeenth century onwards, early modern legal scholarship in the Southern Netherlands developed only to a comparatively limited extent a Belgian *usus modernus* (i.e. a mainstream doctrinal model combining civil law scholarship with the territories' particular laws by subject matter). Several factors may contribute to explain why Belgian legal scholarship remained in that respect a backwater of continental European legal developments. Unlike the political situation in France, or in some

Sumptibus Joannis Cochart, 1681, Cons 53, 963–966, which deals with a matrimonial community of goods established explicitly or implicitly, and which may extend to property wherever it is located.

59 I have used the edition B[ertrand] d'Argentré, *Commentarii in patrias Britonum leges, seu Consuetudines generales antiquissimi Ducatus Britanniae*, Paris: Sumptibus Nicolai Buon, 1628, ad art 218, with references to the controversy with Dumoulin at Nos 33–34, col 684–690.

60 *Motif de droit*, loc cit, 10.

61 *Motif de droit*, loc cit, 13s.

62 *Motif de droit*, loc cit, 13–15 (the case of *Don Pedro de Tosse and children* sd), 17 (case of the *countess d'Annapes*, 1698), 17–18 (case of *Baroness de Courreres*, 1703; see also 20), 18–19 (case of the *pléban* of St Rombouts ao v the widow of Desmarests, a medic, 1678). The case of de Courrieres (different spelling) is also mentioned by Coloma, *Arrêts du Grand Conseil de S M I et R séant en la ville de Malines*, 276.

German principalities, there was from the second half of the sixteenth century onwards no longer a ruler who sought to reinforce central government and consolidate political unity through a greater degree of legal uniformity. As a result, scholars were less keen to develop, through civil law or particular laws, a common Belgian legal tradition. Institutional and legal particularisms in the Habsburg Netherlands were rife and resisted either a *gemeines Recht* culture such as in the Holy Roman Empire or a *droit coutumier commun* momentum such as in France. The most convincing attempts at developing an inchoative Belgian *usus modernus*, as for example some of the works by Antoon Anselmo, were characteristically focused primarily on particular law authorities, such as the Perpetual Edict of 1611.

All that did not preclude a general *ius commune* culture, especially since Belgian jurists' scholarly contribution to civil law had been relatively strong until the second half of the seventeenth century. The training in civil and canon law at the University of Leuven continued to ensure that at different levels of executive governance and legal practice, law graduates maintained and extended at least a basic civil law culture. Legal practice of the era, however, shows the limitations of that acculturation in general. During the last century of the *Ancien Régime*, the Belgian legal landscape was not unlike that of the Northern French *pays de coutume*, but with far fewer unifying tendencies in statutory law, customary doctrine and legal literature. The lack of such unifying factors was not compensated by a strong Roman-law-based tradition comparable to the *Rooms-Hollands recht*. Early modern Belgian law was primarily an archipelago of particular laws surrounded by a sea of *ius commune*, but most Belgian legal practitioners increasingly remained landlubbers, only resorting to what the sea could offer in order to supplement the structural deficiencies of resources available on land.

That development seems confirmed through the, on the whole, rather modest output of practice-oriented legal literature such as consultations and law reports after the mid-seventeenth century. Law in the early modern Belgian territories certainly belonged to the civil law tradition, but it was a weak form of *ius commune* which, during the last centuries of the *Ancien Régime*, hardly contributed to major or innovative European legal developments. In that respect, Belgium had, as in international politics, become a peripheral area at the heart of North-Western Europe.