



HAL
open science

Central and Peripheral Courts: Changing Historical Perspectives

Alain Wijffels

► **To cite this version:**

Alain Wijffels. Central and Peripheral Courts: Changing Historical Perspectives. [Kjell Å. Modéer & Martin Sunnqvist (eds.)] *Suum cuique tribuere. Legal Contexts, Judicial Archetypes and Deep-Structures Regarding Courts of Appeal and Judiciaries from Early Modern to Late Modern Europe* (31-51), 2018. hal-03328352

HAL Id: hal-03328352

<https://hal.science/hal-03328352>

Submitted on 30 Aug 2021

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Central and Peripheral Courts: Changing Historical Perspectives

The notions of what is supposed or perceived to be « central » or « peripheral » are relative, and may therefore change in different cultural and historical contexts. They are also relative because of different perspectives. In many ways, Sweden may be regarded – and perhaps may regard itself – as peripheral in comparison to ‘Europe’ as a continent, or ‘Europe’ as in the European Union, while it holds geographically (and to a large degree, also historically) a central position among Scandinavian countries. Our general geographical formatting tends to conceal how even territories which appear ‘central’ in the conventional mapping of our (part of the) world may be peripheral in a different sense. Belgium, for example, a country which has traditionally been seen as a territory and polity situated in the centre of Western Europe, and which is now the seat of some major institutions of the European Union, has had a multi-secular peripheral history in the European context¹. Politically, it has been (and still is) of marginal importance because of its small size; while historically, under Spanish, Austrian, French and Dutch rule, Belgium was mostly regarded by its rulers as a peripheral (albeit at times strategically relevant) territory among their dominions. The Cold War finally reminded Europeans, whatever their eurocentric and nationalist past, that they had *all* become politically peripheral.

Non-Western civilisations have also used the conceptual dichotomy of central and peripheral polities – for instance the self-styled ‘Empire of the Middle’, as China used to be referred to. But in the Western tradition, especially since eighteenth-century rationalism, the distinction between what is defined as central and, in contrast, what may be in different degrees peripheral, has been a fundamental feature of bringing a strict hierarchy in our whole thinking, a principle of structuring the human mind and projecting that structure from there on to the whole outside world. Only over the past few decades has that rationalist way of thinking and structuring our reality partly been challenged and jettisoned².

The dichotomy between central and peripheral is therefore not simply an issue of territorial or geographic structures, such as the famous or infamous, but still common, world maps following the old Mercator two-dimensional projection and putting the diminutive European continent right in the centre, causing all sorts of distortions in

¹ These are just examples. The point is that a country’s central or peripheral geographical or political position is not an absolute standard for assessing its influence or conformity to general developments. In legal history, Switzerland, a centrally situated cluster of regional polities, resisted for centuries a strong impact of *ius commune* or Roman law on its legal particularisms; it was not until the nineteenth century that the legal developments of its larger French and German neighbours affected much more deeply Swiss law. In constitutional law, it may be argued that the so-called Restorations in Western and Central Europe after the defeat of Napoleon created constitutional systems (based on new written constitutions) which were, as regards constitutional monarchies and parliamentary systems, strongly inspired by the (unwritten) English constitution which many exiled statesmen had been acquainted with since the upheavals of the French Revolution.

² Changes of paradigms in corporate governance have strongly influenced the departure from the hierarchical model in a great variety of areas. In legal thinking, the shift has been aptly analysed by François Ost and Michel Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels, Facultés Universitaires Saint-Louis Bruxelles, 2002).

representing territories relegated to the far Northern, Southern, Eastern or Western fringes of the map³. Legal theory, to take an example which may appeal to jurists, both in the common law and in the civil law traditions, was until a few decades ago strongly determined by, and therefore centred on, concepts and principles developed around private law. In many countries, until a generation or two ago, the curriculum in law schools was therefore overwhelmingly focused on private law subjects. Concepts and principles of private law could readily, or so one thought, be transposed to areas of public law, which were often regarded as not being founded on the same consistent legal-scientific theoretical basis as what had been achieved by Roman law scholarship (on the Continent) or common law judges (in England) – and in both cases, *viz.* Roman legal scholarship and common law doctrines, private law took central stage⁴.

Various forms of governance, especially since the late eighteenth century, were also affected by this paradigm based on a basic configuration around a centre and a range of peripheries. The modern state, for example, as it was restructured in France during the Revolution and under Napoleon, and which served as a model to many other countries, whether they had been subjected to French rule or not, was a model of public governance where the hierarchical apex was also at the centre of the whole state edifice. The pyramidal administrative structures, which were also reflected in the pyramid-like construction of the courts' system from the eighteenth century onwards, were adaptations in the area of public governance of an all-encompassing reform of state powers according to the paradigm of a central source of all legitimate power, expressed through the hierarchy of state institutions⁵. By the nineteenth century, the notion of a country's capital city became much more than a mere location, such as the seat of higher or even supreme constitutional authorities. It became in practice the unique source of political decisions and the administrative hub from where all communication – sometimes literally: cf. the nineteenth-century structure of many national railway systems – would flow. In spite of earlier examples – in ancient times, all roads were said to lead to Rome –, the scale and intensity of centralisation were unparalleled when the rationalist way of thinking was transposed into public governance during the nineteenth century⁶.

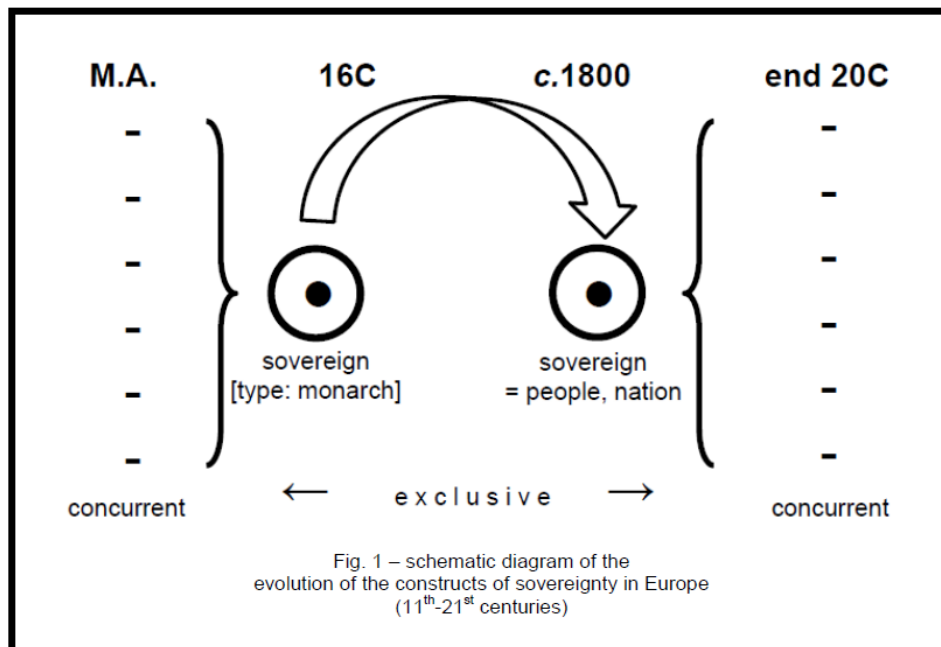
³ Again, such a political and cultural strategy of map-making should not be attributed to Europeans only: for the famous case of the recently 'rediscovered' map of the Chinese sea, see Robert Batchelor *London: The Selden Map and the Making of a Global City, 1549-1689* (Chicago, University of Chicago Press, 2014) and Timothy Brook, *Mr. Selden's Map of China* (New York, Bloomsbury, 2013) and the Bodleian Library website <http://seldenmap.bodleian.ox.ac.uk/>.

⁴ That more or less explicit or conscious focus on private law spread well beyond legal theory. Legal historiography, in particular in general introductions, often privileged in its 'internal legal history' approach (*Dogmengeschichte*) on private law topics. Until recently, that was also true in the area of comparative law: for example, several taxonomies of 'legal families' worldwide, considered primarily the private law of legal systems.

⁵ Leopold Auer, Werner Ogris, Eva Ortlieb (eds.), *Höchstgerichte in Europa* [Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 53] (Cologne etc., Böhlau Verlag, 2007); C.H. van Rhee et al. (eds.), *European Supreme Courts. A Portrait Through History* (London, Third Millennium Publishing, 2013).

⁶ A distinct discussion in this context ought to be allowed for the development of complex states. In this context, it may simply be pointed out that the establishment of federal states (such as the United States of America, Switzerland, Germany) from the late-eighteenth century onwards included, whatever the powers left to the component states of the union, a clearly defined central power. If nothing else, federal states at least implied a popular basis which had reached a sufficient degree of unity for legitimising a democratic polity. During the twentieth century, the transformation of unitary states to complex polities (federal states, or at least states with a measure of regional devolution), and,

One might object that most polities, in European history and around the world, have been conceived around the notion of a supreme power, and that supreme power was most often also a central power. However, if we look at European history since the Second Middle Ages (i.e. from around the eleventh century onwards), we notice that sovereign power was not always the same as a central or exclusive power. What is today regarded as devolution (or whatever the phrase used in different countries) is often a way of reconstructing (sometimes along different geographical or functional lines) a more diffuse notion of multi-layered and fragmented sovereignty which existed before the attempts to streamline the state structure along the exclusive principle of central supreme power. At the risk of over-simplifying the case (as in the diagram of Fig. 1): one may argue that during the Second Middle Ages, the prevailing paradigm of political power was one of concurrent or competing sovereignties, not only in each individual territory, but also through trans-jurisdictional corporations and networks⁷.



By the sixteenth century, a new paradigm was taking shape: that of exclusive sovereignty, i.e. where all legitimate power within a territory was concentrated into

conversely, the creation of the European Union standing on a “federal middle ground” (Robert Schütze, *European Constitutional Law*, Cambridge, Cambridge University Press, 2012, pp. 65-66), may be regarded as various forms of the general de-centralisation process in political governance during the second half of the twentieth century. In the case of the European Union, diverging dynamics have been at work: its main challenge may be said to have sought a state structure which departed from the state structure of the nation-state, without any pre-conceived model. On the Western tradition of complex unions, see the by now classical analysis of Murray Forsyth, *Unions of States, The Theory and Practice of Confederation*, Leicester and New York, Leicester University Press and Holmes & Meier Publications, 1981.

⁷ Throughout the Second Middle Ages and Early-Modern Times (and also later, especially in non-Western societies), the development can be followed not only in domestic public law, as the expression of ‘internal sovereignty’, but also in international public law, since the autonomous actors often also appeared in international relations, and could therefore claim a degree of ‘external sovereignty’.

one body, usually (but not necessarily) a monarch⁸. Towards the end of the eighteenth and by the beginning of the nineteenth century, that paradigm of exclusive sovereignty was maintained, but it was notionally transferred to the people or the nation⁹. Finally, during the last decades of the twentieth century, it has become apparent that the paradigm of exclusive sovereignty is making way for a return to a paradigm of competing sovereignties – not of course, a return to the medieval political actors, but a fresh and continuously evolving combination of public and private actors who, both in domestic and international affairs, are more or less legitimately exercising in various ways some of the attributions which had before been identified with powers and attributes of the sovereign national state¹⁰.

One would expect that such a very general scheme expressing the development of sovereign power in European history would be reflected in the history of courts. However, it appears that that assumption is only partly true. Judicial powers, in the Western tradition, tend to be somewhat out of step with the developments of political powers. The divergence is certainly not complete, but it is nonetheless sufficiently significant so as to warrant a distinct historical narrative, which shows to what degree courts expressed the prevailing concept of political sovereignty in their time, and also to what extent they have challenged the distribution or concentration of political powers of their era. That approach may be illustrated through three distinct epochs of our legal history: (i) The challenge of early-modern courts to the paradigm of exclusive sovereignty; (ii) Modern courts: the paradigm of exclusive sovereignty subverted; and (iii) Today's Judiciaries: a peripheral 'state power' at odds with the principle of democracy?

1. The challenge of early-modern courts to the paradigm of exclusive sovereignty

⁸ Even in some complex polities where the 'sovereign' was not a physical monarch, the early-modern sovereign's attributes can be recognised in the rulers of the entities of such complex polities. Perhaps one of the most telling illustrations is the position of the territorial princes in Holy Roman Empire. Even the staging of their quasi-sovereignty, for example the Versailles-like palaces (though built on a smaller scale) reflected in many cases the French model of exclusive (and absolutist) sovereignty within their territory.

⁹ Some earlier examples can be found. Perhaps the most famous in constitutional history is the English Bill of Rights of 1689, in which – with some of the inevitable ambivalence characteristic of a transitional stage –, repeated reference is made to "the people" or "the Nation" represented by Parliament. These references did not amount to establishing the realm as a democracy (in the sense of that phrase in the at the time prevailing political theory). Rather, it may be said that the Bill established the realm more firmly as an oligarchy (*viz.* of the interest groups represented in Parliament) than (as the Stuarts would have had it) as a monarchy. The ensuing doctrine of parliamentary supremacy or even parliamentary sovereignty shows that the early-modern theoretical model of an exclusive sovereignty (albeit with significant adjustments) was largely upheld, though transferred (with some qualifications) from the monarch to Parliament. Thus, even an early-modern Parliament could express exclusive (and absolutist) sovereignty.

¹⁰ One may distinguish between those powers and attributions traditionally linked with public authority, and those which are not necessarily associated with the *regalia*. The devolution of legislative and executive powers to regions, which has occurred over the past decades even in some countries with a strong tradition (over the last two centuries) of centralised government, is an example of the erosion of the national state's public authority. On the other hand, the privatisation of many services which had often come into the hands of the state or state-related companies (e.g. utilities of energy, water-supply, communications, post...) and were in some countries regarded as 'public services', has, especially since the 1980s, also contributed to erode, or at least modify, the image and understanding of the state in the eyes of public opinion.

Medieval legal pluralism (i.e. the diversity of legal laws based on territory, personal status, the nature of property etc.) was strengthened by a corresponding jurisdictional pluralism. Most interest groups which could avail themselves on a particular legal status and regime also benefited from a *privilegium fori*. Local and regional customs, for example, were in the first place implemented by a specific local or regional court.

During the early-modern period, political actors were neutralised or subordinated by the actor who succeeded in concentrating exclusive sovereignty in his hands. One would therefore expect that this political actor would also have controlled (if he had not abolished) the courts of the former concurrent actors in the polity. However, although the early-modern sovereign did establish or develop his own system of courts, these usually did not acquire a judicial monopoly within the polity: hence the characteristic « patchwork » of courts during the Ancien Régime, reflecting successive layers of interest groups which retained to some extent their particular laws, but also their particular courts – even if, nominally or effectively, those courts could be subordinated to the supreme judicial authority of the sovereign.

France is a good example. It was, after all, in many ways the model of the polity where the new paradigm of exclusive sovereignty of the King had triumphed: by the sixteenth century, the King of France had eliminated competing political rulers within the realm, and was emancipated from any rulers who might pretend to exercise universal authority, whether emperor or pope¹¹. Throughout his kingdom, a hierarchy of royal courts effectively took over the autonomous courts which had developed during the MA. Yet, the ordinary system of courts was not extended to a single integrated judiciary throughout the realm¹². By the fifteenth century, both for practical reasons and for the sake of political expediency, the territorial jurisdiction of the Parlement de Paris, which until then had by and large followed the extension of the royal domain, was rounded off and provinces which were newly attached to the political authority of the Crown were given their own sovereign Parlement. That policy was further implemented until the end of the Ancien Régime, even for newly acquired territories, whether in Europe or overseas, through the creation of new provincial Parlements, or the establishment of regional and overseas sovereign courts. Thus, from the fifteenth century onwards, the pattern of royal courts consisted in a large territory (perhaps half the kingdom) controlled by the Paris Parlement, and various 'peripheral' territorial jurisdictions each capped by their particular provincial

¹¹ It is not a coincidence, although the ideas had been maturing for a long time in several parts of Europe, that Jean Bodin's *Six livres de la République* (ed.pr. 1576) expressed a theoretical concept of sovereignty which seemed at the time to reflect the general trajectory of the French monarchy's long-term history, more particularly its success in neutralising both the territorial competitors within the realm and the rulers who had claimed universal, and therefore a superior political authority in Medieval political doctrines (the pope and the emperor). By the mid-sixteenth century, the incorporation of the duchy of Brittany appeared to confirm the King of France's policy in establishing his government over (almost) the whole kingdom. Even though the French kings never succeeded in turning their kingdom into a fully centralised state, their policies gradually paved the way towards such a state, and they consolidated the notion and the image of a supreme and central political power. The Revolution was quick to seize the benefits of that concept of sovereignty, and, having transferred it to the people, ruthlessly attempted to eradicate the various institutional forms of particularism which had subsisted.

¹² Albert Rigaudière, *Histoire du droit et des institutions dans la France médiévale et moderne* (Paris, Economica, 2010).

Parlement or sovereign court, but without a paramount, overarching ordinary appellate court for the whole realm.

Yet, following the principle which has been usually referred to in French historiography as *justice retenue*, which refers to the royal prerogative justice notwithstanding delegation of judicial tasks, the King and his council exercised from the early-modern royal court of government judicial and quasi-judicial powers which were partly competing with those of the ordinary royal superior courts of judicature, partly aiming at controlling the decisions of those courts¹³. The end result was, apart from the great diversity of courts and special-interest tribunals which co-existed at the lower levels of the Judiciary, a proliferation of distinct supreme courts in different territories (the Parlement de Paris and the provincial Parlements)¹⁴, which were in theory of equivalent status, even though the weight and the ascendancy of the Paris Parlement tended to overshadow the authority of its counterparts elsewhere in the country. Moreover, the King's prerogative justice underpinned the development of another type of supreme royal justice outside the system of those territorial sovereign courts. One may perhaps argue that this whole system, although it was not integrated into a single hierarchy, nevertheless came under the ultimate control of royal authority. On the other hand, the revolutionaries' early zeal to wipe out the whole system shows that although contemporaries may not have perceived the Ancien Régime system of court as a uniform, integrated or hierarchical structure, the revolutionary ideology viewed the very fragmentation of the old system as a protection of particular interests which ran against the Revolution's promise of equality¹⁵.

From a very different political perspective, the Holy Roman Empire leads in some ways to similar findings¹⁶. On the one hand, the duality of imperial power, shared by the emperor and the Estates of the Empire, led to the establishment of two competing supreme imperial courts, the Imperial Chamber of Justice (*Reichskammergericht*)¹⁷

¹³ The phrase and concept of *justice retenue* in French legal historiography has been criticised by Jacques Krynen in the first volume of his fundamental analysis of the relationship between the judicature and politics in France from the thirteenth until the twentieth century: *L'État de justice, France, XIIIe – XXe siècle*, vol I, *L'idéologie de la magistrature ancienne* (Paris, Gallimard, 2009); vol. I, *L'emprise contemporaine des juges* (Paris, Gallimard, 2012).

¹⁴ Jacques Poumarède et Jack Thomas (eds.), *Les Parlements de Province. Pouvoirs, justice et société du XVe au XVIIIe siècle* (Toulouse, Framespa, 1996). Since then, for several Parlements and sovereign courts, both in the French metropolitan provinces and overseas, much research has been done, leading to several publications, but (to my knowledge), no new attempt at such an overall state of the art. See the website <http://bibliparl.huma-num.fr/bibliographie/>. The 'peripheral' Parlements of Roussillon and Flanders have been recently discussed in the context of complex jurisdictions in: Seán Patrick Donlan and Dirk Heirbaut (eds.), *The Laws' Many Bodies, Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* [Comparative Studies in Continental and Anglo-American Legal History 32], Berlin, Duncker & Humblot, 2015.

¹⁵ Jean-Pierre Royer, Jean-Paul Jean, Bernard Durand, Nicolas Derasse, Bruno Dubois, *Histoire de la justice en France* (4th edn., Paris, Presses Universitaires de France, 2010) ; Jean-Claude Farcy, *L'Histoire de la justice française de la Révolution à nos jours* (Paris, Presses Universitaires de France, 2001).

¹⁶ For an overview of the German developments, with comparative perspectives, Peter Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren*, Cologne etc., Böhlau Verlag, 2015.

¹⁷ Cf. the volumes in, the series *Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich* (Cologne etc., Böhlau Verlag).

and the Court of the Emperor's Council (*Reichshofrat*)¹⁸. On the other hand, the growing autonomy and political weight of the Estates in the Empire (especially the territorial rulers), was reflected in an increasingly autonomous judicial system within each territory, further strengthened by the granting of privileges *de non appellando* (the granting of which often required the creation of an appellate court within the territory which benefited from the privilege)¹⁹. Thus, in the Holy Roman Empire, not unlike in France (but of course in an entirely different political context), various territories co-existed which largely enjoyed judicial autonomy and (quasi-) sovereignty, but nevertheless, at the overarching level of the Empire, the imperial courts continued to function, not least through the procedural remedies of so-called extraordinary ways for challenging a judicial decision by the supreme courts of the territories.

One could object that, apart from political reasons, the extension of the Kingdom of France and of the Empire would have made it impractical to impose a uniform, integrated system of courts. But the Low Countries show that jurisdictional diversity also prevailed in smaller complex polities. In the Southern Netherlands, the Great Council of Mechlin originally evolved as a supra-territorial court for the whole of the dukes of Burgundy's (and later, the Hapsburg rulers') personal union in the Netherlands²⁰. However, from the early sixteenth century onwards, some provincial courts succeeded in being recognised as sovereign courts, implying that their judgments could not be challenged before the court in Mechlin²¹. By the end of the Ancien Régime, the Mechlin court could hear appeals from only three territories in the Austrian Netherlands: in the other principalities of the Hapsburg Netherlands, the provincial court acted as the supreme appellate court²². Here again, however, the full picture is even more complex, for the Privy Council, which was primarily a

¹⁸ For a state of the art of research and bibliography on the council: www.reichshofratsakten.de; see also Wolfgang Sellert (ed.), *Reichshofrat und Reichskammergericht. Ein Konkurrenzverhältnis* [Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 34] (Cologne etc., Böhlau Verlag, 1999).

¹⁹ Ulrich Eisenhardt, *Die kaiserlichen privilegia de non appellando* [Quellen und Forschungen zur höchsten Gerichtsbarkeit im alten Reich 7] (Cologne etc., Böhlau Verlag, 1980).

²⁰ Jan Van Rompaey, *De Grote Raad van de hertogen van Boergondië en het Parlement van Mechelen* [Verhandelingen van de Koninklijke Academie voor wetenschappen, letteren en schone kunsten van België, Klasse der Letteren 73] (Brussels, Koninklijke Academie voor wetenschappen, letteren en schone kunsten van België, 1973).

²¹ The conventional definition of a sovereign court, and therefore in most cases a supreme court within its own jurisdiction, at least in early-modern times, considers whether or not it is possible to appeal against its decisions. The test is not entirely satisfactory, for in many jurisdictions, extraordinary procedural remedies were available to challenge a judgement given by a sovereign court. Moreover, the test may not be carried out in all cases exclusively along procedural references. The decisions of the Great Council of Mechlin, for instance, were not subject to further appeals, but its final judgements could be challenged in review proceedings (*revisio*). That review procedure, however, took place before the Great Council, albeit in a different setting, as judges from other provincial courts (and occasionally, the Privy Council) sat on an ad hoc basis during the revision proceedings. With regard to the Privy Council, it seems that the latter could decide to take a case pending before the Great Council, and perhaps it could also reconsider a case adjudicated by the Great Council, but so far, too little is known about such procedures or quasi-procedures.

²² An Verscuren, *The Great Council of Malines in the 18th century. An Aging Court in a Changing World?* (Cham etc., Springer, 2015).

government body, also acted as a quasi-judisdictional institution, and its jurisdiction covered the whole of the Hapsburg territories in the Netherlands²³.

In the United Provinces, a very comparable result was reached from a completely different starting point. When the Northern Provinces became independent, they maintained their own provincial judicial system. However, proposals were made to create a supra-provincial appellate court, which, for the newly independent provinces, would have replaced the Great Council of Mechlin. Those proposals met with strong resistance. A 'High Council' (*Hoge Raad*) was established in 1582, but originally, its jurisdiction did not reach beyond the province of Holland. A few years later, Zeeland was persuaded to join the scheme, but the Hoge Raad, until the very end of the Ancien Régime, only acted as a supreme appellate court for those two provinces, while the other provinces of the confederation retained their judicial sovereignty²⁴.

The eighteenth-century rationalist ideals, often expressed *more geometrico*, sometimes found their way into judicial reforms. One such example is the attempt of Joseph II in 1784 to introduce a complete new judicial system in the Austrian Netherlands. The reform would have done *tabula rasa* with the complex system of courts developed since the Middle Ages, and replaced it with a typical pyramidal system: one supreme court of revision, two courts of appeal, and 63 first-instance courts²⁵. The system²⁶ failed due to the violent conservative opposition against the emperor's reforms on various issues. For the Belgian conservative interest groups, it was only a temporary triumph: merely ten years later, when Belgium was annexed by the revolutionary French republic, the latter's pyramidal system was introduced and imposed on the Belgian population. The French system looked very similar, in its rationalist design, to what Joseph II had intended to introduce, only now the supreme court was in Paris, no longer within the former Belgian territories²⁷. The French system was also introduced in other territories conquered by the French armies, or in its satellite states, and ultimately also in countries which had managed to escape French rule, but which after Napoleon's defeat nevertheless sought to modernise their state system, including their system of courts.

²³ Hugo de Schepper, *De Geheime Raad als hoogste rechtscollege in de Nederlanden (1504-1580)*, in : Rob Huijbrecht, *Handelingen van het Tweede Hof van Holland Symposium gehouden op 14 november 1997 in de Treveszaal te Den Haag* (The Hague, Algemeen Rijksarchief, 1998), 39-48.

²⁴ Christel Verhas, *De beginjaren van de Hoge Raad van Holland, Zeeland en West-Friesland* (The Hague, Algemeen Rijksarchief, 1997).

²⁵ Marie-Eve Tesch, *La réforme de la justice de l'empereur Joseph II dans les Pays-Bas autrichiens. Le séjour à Bruxelles du baron Karl Anton von Martini, 29 novembre 1786-31 mai 1787*, in : Bruno Bernard (ed.), *Bruxellois à Vienne, Viennois à Bruxelles* (Brussels, Université de Bruxelles, 2004), 113-161.

²⁶ The judicial reforms of Joseph II were carried out, with different success, in various territories of the Austrian Habsburgs. See in general Humbert Fink, *Joseph II., Kaiser König und Reformier*, Düsseldorf, Droemer Knauer, 1993; Derek Beales, *Joseph II: In the Shadow of Maria Theresa, 1741-1780*, Cambridge, Cambridge University Press, 1987 [= vol. 1]; the same, *Joseph II: Against the World, 1780-1790*, Cambridge, Cambridge University Press, 2008 [= vol. 2]; in Italy, where the *Leopoldina* and the reform of criminal justice have been extensively researched, see a.o. Francesco Ricci (ed.), *Regolamento giudiziario di Giuseppe II* (reprint of 1781), Milano, Giuffrè, 1999.

²⁷ Dirk Heirbaut, Enkele themata uit de geschiedenis van de gerechtelijke organisatie, in: C.H. van Rhee, D. Heirbaut, M. Storme (eds.), *The French Code of civil procedure after 200 years, The civil procedure tradition in France and abroad. Le bicentenaire du Code de procédure civile (1806), La tradition de la procédure civile en France et à l'étranger. De Code de procédure civile (1806) na 200 jaar. De traditie van het Frans civiel procesrecht in vergelijkend perspectief* (Mechelen, Kluwer, 2008), 159-192.

2. Modern courts: the paradigm of exclusive sovereignty subverted

From the start, the establishment of a uniform system of courts raised objections. Some differentiations could not be overcome through universal rationalist principles, nor through revolutionary ideology. Thus, different proceedings, largely before different courts, seemed necessary for the age-old distinction between civil and criminal cases. In the area of private law, a justification was often acknowledged for a separate set of courts dealing with merchants in commercial cases, and following their own proceedings. Since the late eighteenth-century and early nineteenth-century reforms, the ordinary courts' system has undergone a further diversification, including typically, for example, industrial courts and family courts.

Whenever that diversification takes place within the original pyramidal structure, a degree of uniformity and homogeneity is maintained. The diversification usually takes place at the level of first-instance courts, and it is sometimes carried on at the level of the courts of appeal, but it remains capped (at least, in theory) by a single supreme court, such as a *cour de cassation*.

However, diversification has gone much further. Since the nineteenth century, most jurisdictions have witnessed a multiplication of special-interest courts, often in the area of public and administrative law. Usually without a clear overall design, administrative tribunals (sometimes seconded by a specialised appellate tribunal) have been created in the wake of the ever-increasing extension of tasks directly or indirectly taken up by the state. In some countries, the decisions of these administrative tribunals have been subjected to judicial review. In such cases, the strict structure of the judicial system *more geometrico* has largely been lost, but in theory and practice, all those tribunals fall within the general courts' organisation, or under their control. In other jurisdictions, however, jurisdictional unity has been abandoned. In countries where a French-style Council of State was established, it is normally the latter which will act as the supreme court for the lower administrative jurisdictional institutions. Such a system leads to a functional division of the supreme judiciary, for example between a *cour de cassation* and a *conseil d'Etat* ²⁸.

In some jurisdictions, the notion of a supreme court has been further blurred by other superior courts which are not subordinated to any paramount supreme court within the national system: for example when, in addition to a *cour de cassation* and a council of state, a separate constitutional court has been created²⁹. As a result, the diversification of courts' systems within the same country at various levels of judicial or quasi-judicial hierarchies has created a new jurisdictional complexity which, albeit based on different interest groups and principles, is nevertheless reminiscent of the jurisdictional complexity of the *Ancien Régime*.

²⁸ For a general overview, and some of the different 'models' adopted in different polities: C.H. van Rhee et al. (eds.), *European Supreme Courts. A Portrait Through History, o.c.*, the contributions discussing nineteenth-century developments.

²⁹ Armin von Bogdandy, Christoph Grabenwarter, Peter Michael Huber (eds.), *Verfassungsgesetzliche Verfassungsgerichtsbarkeit in Europa: Institutionen* [Ius Publicum Europaeum 6] (Heidelberg, C.F. Müller Verlag, 2016).

In other areas of the law also, including substantive law, the rationalist ideals advocated in the eighteenth century and often implemented around 1800 have not proven as resilient as their authors expected. Admittedly, the heritage of that era – whether through institutions, constitutions, codification, or even many general principles and rules of law, is often still present in our legal systems, but in most cases fundamentally altered by new ramifications which no longer follow the rationalist ideal of general coherence which was meant to be a hallmark of the *Vernunftrecht* and its implementation in an integrated institutional system and codifications³⁰.

The jurisdictional complexity which has re-emerged during the past two centuries is not the same as that which prevailed during the *Ancien Régime* – just as the re-emergence of competing political actors at the expense of exclusive sovereignty is not a re-appearance of the late-Medieval political concurrent political actors. The similarity lies in the diversity of courts which develop in order to adjudicate on rules linked to a particular corporate status, aimed at governing special-interest groups. The diversity of special-interest courts, especially when different networks of tribunals are capped by different appellate and supreme courts, creates a courts' system which has no central apex, and where there is therefore no homogenous hierarchy of peripheries.

3. Today's Judiciaries: a peripheral 'state power' at odds with the principle of democracy?

In Western Europe, the ideal of public governance has been traditionally closely associated with Justice. The association appears prominently in the history of art. One of the most famous medieval examples is the fourteenth-century fresco of the *Allegoria del buon governo* by Lorenzetti, in the town hall of Siena³¹. In the main

³⁰ Alain Wijffels, Rationalisation and Derationalisation of Legal Capacity in Historical Perspective: Some General Caveats, in: S. Deakin and A. Supiot (eds.), *Capacitas. Contract Law and the Institutional Preconditions of a Market Economy* (Oxford and Portland, Oregon, Hart, 2009), 49-62.

³¹ Among the many studies in the history of art and political theory which analyse Lorenzetti's work : Patrick Boucheron, *Conjurer la peur. Sienne, 1338. Essai sur la force politique des images* (Paris, Seuil, 2013) ; for a systematic synthesis of the main readings which scholars have proposed : Alois Riklin, *Ambrogio Lorenzetti's politische Summe* (Bern, Stämpfli+Cie, and Vienna, Manzschke Verlags- und Universitätsbuchhandlung, 1996). Nicolai Rubinstein, Political Ideas in Sienese Art : The Frescoes by Ambrogio Lorenzetti and Taddei di Bartolo in the Palazzo Pubblico, *Journal of the Warburg and Courtauld Institutes* 21 (1958), 179-207 ; Quentin Skinner : Ambrogio Lorenzetti and the portrayal of virtuous government ; Ambrogio Lorenzetti on the power and glory of republics, both articles now reprinted in : Quentin Skinner, *Visions of Politics. Volume 2 : Renaissance Virtues* (Cambridge, Cambridge University Press, 2002), 39-117. New readings based on recent archeological and scientific analysis of the fresco are incorporated in Rosa Maria Dessì, Il bene comune nella comunicazione verbale e visiva. In dagini sugli affreschi del « Buon Governo », in : *Il bene comune : forme di governo e gerarchie sociali nel basso medioevo. Atti del XLVIII Convegno storico internazionale* (Spoleto, Fondazione Centro italiano di studi sull'alto medioevo, 2012), 89-146. The *buon governo* fresco has some good reproductions offered on various internet sites. In book format : Maria Luisa Meoni, *Utopia e realtà nel buon governo di Ambrogio Lorenzetti. Tipologie formali nella rappresentazione dell'agire dell'uomo. Un'analisi antropologica* (Firenze, Edizioni IFI, 2001); and especially : Chiara Frugoni (ed.), *Pietro e Ambrogio Lorenzetti* (Firenze, Le Lettere, 2010); see in particular the contribution by Maria Monica Donato, Il pittore del *Buon Governo* : le opere 'politiche' di Ambrogio in Palazzo pubblico, *loc. cit.*, pp. 202-255.

fresco, Justice appears twice, framing on both sides the representation of good governance. In Renaissance Italy and Germany, the tradition was further developed. In the sixteenth century, for example, Venice would represent itself as a figure of Justice, as the main feature of the Republic's governance³². Similarly, in Regensburg, a painting of 1592 which hung in the council room of the town hall and representing the *gutes Regiment*, staged Justice as the central virtue of the polity, assisted by other virtues and qualities³³. In the Hanseatic city of Gdańsk, the council room in the newly built town hall at the end of the sixteenth century was adorned with a series of seven paintings by Hans Vredeman de Vries, all showing a distinct quality of the good public governance. On each of those paintings, Justice plays a role – as for example on the representation of the 'Republic's Council', where Justice appears (as the only woman) among the circle of councillors³⁴.

Arguably, it was that strong association between '*Polizey*' and '*Justiz*', which implied that public governance could not be envisaged without justice, which contributes to explain why eighteenth-century political criticism by authors of the Enlightenment directed against absolutism emphasised so strongly the formula of separation of powers, and thus by inference the presence of justice in the *trias politica* of the executive branch, the legislative branch, and the judicial branch of the state. Yet, the shift of sovereignty, already mentioned, from the early-modern sovereign to the people would affect the articulation of justice as a feature of public governance³⁵.

Good governance – *buon governo*, *gutes Regiment* – has traditionally required two elements: efficiency and justice. Until modern times, efficiency was deemed to be achieved if the traditional classical and Christian virtues – many of which are depicted in the allegories of public governance, such as those that have just been referred to – were observed. Any ruler or councillor could acquire an insight in those virtues through a thorough education in classical studies and Christian religion. An educated jurist, whether acting as a judge or as a political counsel, was expected to have cultivated that insight. The second element, justice, referred to both the substantive justice which public policies were supposed to tend to, and the administration of justice in the more narrow sense of adjudicating in cases of litigation³⁶. Here, the university-educated lawyer (on the continent) was regarded as the specialist in the *ars boni et aequi*, and was therefore credited with a unique expertise because of his professional training.

³² See for example (among many others), Venice, Gallerie dell'Accademia, La Giustizia in trono tra gli arcangeli Gabriele e Michele (Trittico della Giustizia), by Jacobello del Fiore, <http://www.gallerieaccademia.it/sala/sala-i>.

³³ For a good reproduction, see the exhibition catalogue : Ingrid Scheurmann (ed.), *Frieden durch Recht. Das Reichskammergericht von 1495 bis 1806* (Mainz, Philipp von Zabern, 1994). The same composition, but in a different style, adorns the title-page of the statute-book of Frankfurt-am-Main published in: [J. Fichard], *Der Statt Franckenfurt am Mayn erneuverte Reformation* (Frankfurt, S. Feyerabend für G. Rab, 1578).

³⁴ Alain Wijffels, Justitie en behoorlijk bestuur. Hans Vredeman de Vries' schilderijen in het stadhuis van Danzig (Gdańsk), *Pro Memoria* 13.1 (2011), 103-116.

³⁵ On the 'new separation of powers': Martin Loughlin, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, pp. 452-456.

³⁶ Alain Wijffels, Justiz und Gutes Regiment. Die Gemälde von Hans Vredeman de Vries für das Rathaus von Danzig (1593-1596), forthcoming, in: Eva Schumann (ed.) [Contributions in honour of Prof. Dr. Wolfgang Sellert].

On both counts, lawyers have lost ground as experts of public governance since the nineteenth century. For assessing the efficiency of public governance, the classical and Christian values are no longer the yardstick. Government will rather rely on the social sciences than on the ideals expressed in classical Greek-Roman literature or in the Bible. The lawyers' expertise in social sciences is now far less perceived to contribute to the political decision-making process³⁷. Hence the tendency of marginalising lawyers to the more technical task of translating the policies decided by the rulers and their advisors from the social sciences into legal texts such as statutes and regulations.

Moreover, justice in its political dimension has now also largely eluded the lawyers' expertise, because it is much less than before regarded as a matter of expertise, but instead as a matter of policy³⁸. And in polities where the people have become sovereign, only the people's representatives have the legitimacy to decide what is just, and what policies are most adequate in order to achieve substantive justice. The *ars boni et aequi* has been replaced in our days by the democratic legitimacy to decide how justice should be achieved in seeking the general interest. That leaves the administration of justice in its more narrow sense, i.e. the judicial task of handling litigation and deciding cases. That is still the province where professional lawyers enjoy in most Western jurisdictions a quasi-monopoly of expertise. It only contributes in a modest way in the shaping of the major policies which characterise public governance. In most legal systems, judges have no or little democratic legitimacy. On politically sensitive issues, their decisions are likely to be challenged by their detractors as opinions of a judicial oligarchy – at odds with the by now exclusive democratic foundation of the polity³⁹. Thus, from occupying a *central* position in public governance because of their expertise in justice, lawyers have been driven to a more *peripheral* area of state power, because in the classical analysis of political systems combining elements of monarchy, oligarchy and democracy, only the latter henceforth enjoys legitimacy.

That may seem a grim prospect for young lawyers and law students. So far, law faculties and law schools, and the legal profession in general, have done little to stem the tide and enable law graduates to regain some of the lost ground. A more convincing command of the social sciences would be a start. Yet, during the same period that the social sciences' ascendancy in public governance became more obvious, a new development has become increasingly important, re-asserting the lawyers' role at the heart of public governance. Until a generation or two ago, human

³⁷ Alain Supiot, *La gouvernance par les nombres* (Paris, Fayard, 2015).

³⁸ This is of course less true in the realm of constitutional courts or courts which will uphold constitutional principles and values: cf. the chapters 38-40 in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012.

³⁹ On several occasions, that issue has been addressed, specifically in the context of the United States, by US Supreme Court justice Stephen Breyer, *Making Our Democracy Work. A judge's view*, New York, Knopf, 2010); the same, *Active Liberty, Interpreting Our Democratic Constitution*, New York, Vintage Books, 2006; see also his transatlantic dialogue with the former French Minister of Justice and President of the Constitutional Council: Robert Badinter and Stephen Breyer, *Judges in Contemporary Democracy. An International Dialogue* (New York, New York University Press, 2004). And a collection of comparative essays: Simone Gaboriau and Hélène Pauliat, *Justice et Démocratie*, Limoges, Pulim, 2003). A former president of the Dutch supreme court has also published a readable introduction for a wider public: Geert Corstens, *De rechtstaat moet je leren. De president van de Hoge Raad over de rol van de rechter*, Amsterdam, Prometheus – Bert Bakker, 2014.

rights were mostly regarded in legal science as a marginal – i.e. peripheral – branch of the law, a side-line of constitutional law, an updated version of the nineteenth-century lists or catalogues of liberal rights and liberties enshrined in the new written constitutions or bills of rights. Since then, human rights have become an essential – ‘central’ – part of legal thinking, pervading all branches of the law, both public and private.

The change reflects a wider shift in mentalities in Western societies, which owes much to various groups involved in human rights activism, but also to legal methods and a growing body of general and specialist legal literature which has carried human rights right into the different branches of the law. In Europe, that literature, which has by now become mainstream legal doctrine, owes itself much to legal practice, not least the practice of the European Court of Human Rights in Strasbourg⁴⁰. In spite of its high standing from the beginning, it may be argued that at first, the Strasbourg court was still regarded as peripheral. In European legal education, most outlines and diagrams of the national courts’ systems may well have shown that beyond the decisions of the national jurisdiction’s supreme court, there was possibly still a remedy before the Court of Human Rights, but that court was never seen as some kind of supra-national « supreme court » (no more than the European Court of Justice in Luxembourg). It took a few decades before the impact of the court’s decisions in all areas of the national legal systems was fully perceived and acknowledged.

Through the combined influence of human rights scholars and activists, and of the case law developed in Strasbourg, human rights have become an issue which affects most public policies. In that way, although social scientists have taken over the role from lawyers as experts on issues of how to ensure that public governance is efficient, and although democratically elected representatives have acquired the exclusive legitimacy to determine what are just and fair public policies, human rights bring the lawyers back upstream into the political decision-making process, because those political decisions need to take into account the impact of those political decisions on human rights. Human rights have become an essential feature of the ‘justice’ of public governance⁴¹, they are the new face of the Justitia-figure featuring in the medieval and early-modern paintings of *buon governo* or *gutes Regiment*. In our approach to public governance, human rights have replaced – or, one might also say: they rephrase and update – the former classical and Christian values and virtues which had to foster the right public governance. Their essential role in public governance ensures that, marginalisation notwithstanding, some ground has been recovered for lawyers as professional experts on human rights. Through human rights, lawyers meet the need to provide justice in today’s public policies⁴².

⁴⁰ See (e.g.) several separate articles in : Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011); Karen Alter, *The European Court’s Political Power. Selected Essays* (Oxford, Oxford University Press, 2009).

⁴¹ Hans-Otto Sano, Gudmundur Alfredsson and Robin Clapp (eds.), *Human Rights and Good Governance. Building Bridges* [The Raoul Wallenberg Institute Human Rights Library 9] (Leiden, Brill – Nijhoff, 2002).

⁴² At the same time, there is a growing risk that the field of human rights becomes trivialised, partly because of a tendency among many lawyers to refer routinely to human rights as if they were positive law arguments which are part and parcel of the advocate’s standard toolkit, with perhaps for the time being a more potent effect. On the other hand, lawyers also often tend to place all human rights and

Legal historians have the task to remind present-day lawyers and policy makers that Justice has always been an essential component of public governance in our Western tradition. Formerly, the monarch as a sovereign could be seen as a ‘fountain of justice’, but that sovereign would still rely on the expertise of lawyers as professionals trained in the *ars boni et aequi* in order to work out his policies. The new sovereign, the people in Western democracies, may still have some use for that expertise, in particular by ensuring that the decisions of its representatives are duly informed by human rights issues. If lawyers want to recover the whole field of public governance, however, they will have to incorporate expertise of social sciences in their legal methods.

Conclusion

The long-term history of Western public governance – including the governance of courts – shows that the concept of a strict and exclusive hierarchy subordinated to a single central authority has only been a passing attempt at ‘rationalising’ governance. Before, and since the nineteenth century, the picture of public governance – including the administration of justice – shows a much more variegated landscape of institutions based on a large degree of self-rule by different types of interest groups. Today, we can see that the notion of an exclusive sovereign state power has been eroded, and this has also affected the structure of adjudicating bodies. Within that changing landscape of public governance, lawyers have lost their privileged position as key advisors of public policies and their implementation. Recent developments, in particular the increasing impact of human rights, show, however, that the age-old link between government policies and justice has not been entirely severed.

Alain Wijffels

*Professor of Legal History and Comparative Law
Universities of Leiden, Leuven, Louvain-la-Neuve
Senior Research Fellow CNRS (France)
European Chair Collège de France 2016-2017*

their applications on the same level of authority, as if principles which (e.g.) are primarily intended to strengthen the rule of law, and those which protect directly core features of individual human dignity, were all *eiusdem generis*. The ambivalence in today’s developments of human rights is somewhat reminiscent of the position in the past of other complexes of higher norms, such as divine law and natural law, which became partly encapsulated in a system and hierarchy of positive law and to such extent lost their normative value beyond and above the law.