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1 Law Reports of the Parliament of Flanders and their Authority in the Parliament's Practice

Géraldine Cazals, Sabrina Michel and Alain Wijffels

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A. CONTEXT

The Parliament of Flanders was a French provincial sovereign court, initially created in order to act as the supreme judicature for the territories of the Habsburg Netherlands conquered by Louis XIV (or perhaps, from the French vantage point, reunited with the French Crown):¹ those territories comprised mainly large tracts of the southern part of the county of Flanders,

1 For a more detailed historical survey, see V Demars-Sion, "Le Parlement de Flandre: une institution originale dans le paysage judiciaire français de l'Ancien Régime" (2009) 91/382 *Revue du Nord. Histoire Nord de la France, Belgique, Pays-Bas*, 698–725; for the view of a contemporary witness and participant: Matthieu Pinault, *Histoire du Parlement de Tournay. Contenant l'Etablissement et les Progrès de ce Tribunal avec un détail des Édits, Ordonnances et Reglements concernants la Justice y envoyez*, Valenciennes: Gabriel François Henry, 1701.

but also the territory of Tournai and the Tournaisis, and parts of the county of Hainaut. The territorial jurisdiction of the court at first benefited from the military and diplomatic successes of the French Crown, but it was strongly reduced as a result of the outcome of the Spanish War of Succession. The court was first established as a sovereign court (*conseil souverain*) in 1668, at the end of the War of Devolution. In 1686, the court was elevated to the rank of parliament. Its original seat was in Tournai. In 1709, Louis XIV's military setbacks forced the court to withdraw to Cambrai. In 1714, it was permanently established in Douai. Except for the years 1771–1774, when it was replaced by a council under the reforms attempted by Maupeou, it continued to adjudicate as a parliament until the revolutionary lawmaker abolished the *Ancien Régime* jurisdictions and created a new system of courts in 1790.

The Flemish towns and regions conquered by Louis XIV were granted the right to retain their laws and many of their institutions. The legal landscape in those regions was in many respects similar to that in the Northern French *pays de coutume*, where many different local rural and urban customs prevailed. Statute law, both local and general, remained in force. The latter had been issued since medieval times by local authorities or by the sovereign (nominally always as the sovereign prince for each individual territory of the personal union in the Netherlands since the Burgundian, later Habsburg, rule). When the territories came under French rule, French royal legislation was introduced. To some degree over time this led to fostering French legal and institutional culture: a development today often referred to in French historiography as “*francisation*”. At the same time, these were considered peripheral regions to both the French realm and the Habsburg dominions. The traditional French-Habsburg rivalry on the European scene, which only abated in the second half of the eighteenth century, entailed that the population and local authorities were confronted with changing borders resulting from recurrent warfare in their region and diplomatic negotiations establishing new borderlines in the wake of peace treaties. Such considerations, together with the strong legal particularism which prevailed in the Southern Netherlands until the end of the *Ancien Régime*, may to some extent explain why the local authorities in the jurisdiction of the Flemish Parliament on the whole insisted on retaining their traditional customs and laws. Characteristically, an author such as Georges de Ghewiet (1651–1745),² would publish (among several other, mostly

2 G Van Dievoet, sv “Ghewiet, Georges de”, in *Nationaal biografisch woordenboek*, VI, Brussels: Paleis der Academiën, 1974, col 340–347.

unpublished, practice-oriented works related to French Flanders and surrounding territories) a systematic treatise on “Belgian” law, drawing much from the legal tradition in the Habsburg Netherlands, while he pursued an advocate’s career first in Tournai, then in Lille and Douai (i.e. in the territories ruled by the French Crown). De Ghewiet’s work, as most writings by other late seventeenth and eighteenth-century lawyers who worked in the parts of Flanders under French rule, continued to refer extensively to statutes, customs and legal literature of the Southern (and occasionally also Northern) Netherlands, especially (although not exclusively) predating the French rule.

As a sovereign court, the *conseil souverain* (and later *Parlement*) replaced for the territories annexed by the French Crown the Council of Flanders, which remained the superior appellate court in Habsburg Flanders with its seat in Ghent. The Council of Flanders, however, was not a sovereign court; its decisions could be challenged by appeal to the Great Council of Mechlin. In that sense, the sovereign French Parliament of Flanders took over the role of both the Council of Flanders and of the Great Council. Similarly, decisions of the superior court of Tournai could also (until 1782) be challenged in appeal before the Great Council. The latter’s procedural style and precedents played a significant part in the practice of the French-Flemish *Parlement*. (The provincial court in Mons for the county of Hainaut, in contrast, acted since the early sixteenth century, at the latest, as a sovereign court, not subordinated to the Great Council). Thus, a substantial number of cases which had for centuries been handled (mostly in appeal) by the Great Council, and which were sometimes referred to in legal literature, had originated in the territories of French Flanders (including other areas, such as Tournai), often raising issues of local customary or statute law. In addition, many cases dealing with the implementation and interpretation of general statutes in the Habsburg Netherlands, and the literature discussing such cases, were deemed relevant in the practice of the Parliament of Flanders, in particular for enactments prior to the advent of French rule.

B. THE PARLIAMENT'S LAW REPORTS

(1) Typology of sources produced by practitioners on the Parliament's practice

In the jurisdiction of the *Parlement de Flandre*, the increasing importance of law reports reflects the practical concerns of the *Ancien Régime* lawyers.³ For most reporters, whether judges or counsel, the aim was to facilitate their daily business, which was significantly hampered by the complex intertwining of legal authorities. In Flanders, the difficulty was exacerbated because the court's territorial jurisdiction depended on the vicissitudes of the French Crown's foreign policy. The majority of law reports remained in manuscript form. They were to be used privately, or at least remain within the circle of the court's practitioners. During the first decades of the court's existence, while the court's business kept growing, and its case law still had to be developed from the very beginning, law reports were relatively plentiful. It was the golden age of the French-Flemish "arrestography" – "*arrestographie*" being the phrase conventionally used for referring to (French) law reporting during the last centuries of the *Ancien Régime*. After the transfer of the court's seat to Cambrai in 1709, the territorial arrangements of the Treaty of Utrecht (1713) resulted in a limitation of the amount of litigation the court had to deal with and of the court's staff. When the seat was finally established in Douai (1714), the staff was once again cut down. In the history of the court and of its reports, an era had ended. In the following years, few new reports were initiated: some of those have not survived and most were never printed. On the other hand, the reports dating from the end of the seventeenth century and from the early years of the eighteenth century continued to circulate, both in the *Parlement* and in the lower courts of its jurisdiction.

3 On the Flemish law reports, see especially P Godding, "L'origine et l'autorité des recueils de jurisprudence dans les Pays-Bas méridionaux (XIIIe–XVIIIe 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 Foriers (eds), *Motivation des décisions de justice*, Bruxelles: Bruylant, 1978, 37–67; S Dauchy and V Demars-Sion (eds), *Les recueils d'arrêts et dictionnaires de jurisprudence (XVIe–XVIIIe siècles)*, Paris: La mémoire du droit, 2005; S Dauchy, "L'arrestographie science fort douteuse?" (2010) 23 *Sartoriana*, 87–99; Id, "L'arrestographie genre littéraire" (2011) 31 *Revue d'histoire des facultés de droit*, 41–53; G Cazals, *L'arrestographie flamande. Jurisprudence et littérature juridique à la fin de l'Ancien Régime (1668–1789)*, Genève: Droz, 2018. On the different types of report, see again G Cazals, "Les arrêts notables et la pensée juridique de la Renaissance", in G Cazals and S Geonget (eds), *Des arrêts parlans. Les arrêts notables à la Renaissance*, Genève: Droz, 2014.

They were used by judges and advocates alike. Manuscript versions supplemented the printed copies as a matter of course. Those that were published are among the most informative reports, providing the best insight into the legal culture and legal reasoning of the judges at the Flemish Parliament. Pinault's and Pollet's reports were the first to appear in print, those by de Blye, Baralle, Flines and Dubois d'Hermaville were only published at a much later stage, in 1773.⁴

(2) Handwritten sources

Among the first generations of judges at the sovereign council of Tournai (from 1668 onwards) – *Parlement de Flandre* since 1686 – some members of the court were keen law reporters. During the early years of the court, the judges were appointed among the best legal minds in the conquered territories. They were recruited from the provincial court of Artois, the bailiwick of Tournai, the councillors acting as legal counsel in the cities of Douai, Lille and Tournai, and during their earlier career they usually had already acquired some experience in law reporting. In the same vein as their colleagues at the sovereign court in Mons, many of the judges at Tournai appear to have started drafting reports soon after taking up their new office. In doing so, they usually made notes in a private capacity on those decisions that caught their attention.

Jean-Baptiste de Blye, who was appointed First President by the king in June 1668, was the first to write a report of cases decided by the sovereign council in Tournai. From the inception of his office onwards, de Blye⁵ started collecting notes on the court's decisions which seemed particularly interesting. His work resulted in two series of reports, which occur both in the printed edition of 1773 and in a manuscript now in the City Library of Lille. The first series includes decisions of the sovereign court in Tournai in cases where the court reached a "final judgment" ("*dans les causes sur lesquelles sont intervenus des arrêts de la Cour*"). The second series consists of decrees ("*arrêtés*") of the court on different sections of the criminal ordinance of August 1670.⁶ The whole collection is not particularly extensive:

4 For a more detailed survey of all those reports, see Cazals, *L'arrestographie flamande*.

5 On this author see P Arabeyre, J-L Halpérin, J Krynen, *avec la collaboration de G Cazals* (eds), *Dictionnaire historique des juristes français*, Paris: Presses universitaires de France, 2007, 91–92 (S Castelain).

6 City Library Lille, MS 661; Jean-Baptiste de Blye, *Résolutions du conseil souverain de Tournai ... et Arrêtés du conseil souverain de Tournai sur différents articles de l'ordonnance criminelle*

the first series has fifty-eight decisions, the second only seventeen. The account of the decisions is fairly brief. The author reports the decisions in short and impersonal terms, such as “it has been decided that”, “it was adjudicated that”, “the Bench found that” (“*on a décidé que*”; “*on a jugé que*”; “*la compagnie a témoigné qu’il y avoit*”). The end result is somewhat vague. Sometimes, the author leaves out the name of the litigants, the date of the judgment, or even the statement of the facts on which the case rests. The reports therefore occasionally seem to express rather abstract maxims of the law without any contextual information. De Blye’s collection was obviously intended to be a working tool for private use, and that would explain the author’s approach.

Other members of the court also wrote reports. During the early years of the court, cases were reported by Guislain de Mullet, who was appointed a judge on 9 January 1671 and promoted to the rank of *président à mortier* on 2 October 1675. He was the father of Charles-Albert, author of *Préjugés*.⁷ Reports were also written by Jean Heindericx, appointed on 11 September 1673.⁸ De Mullet’s and Heindericx’s reports were probably drafted for their own private use. Neither of these reports has survived, which may suggest that in each case, only a single copy was drafted. Their memory has survived only because later reporters occasionally referred to them.⁹

After 1686, more law reports were written. No doubt the elevation of the court to the status of *Parlement* by Louis XIV in 1686 was a strong stimulus. At that time, the prerogatives and the jurisdiction of the court were augmented, and the court’s internal organisation was strengthened with the creation of a third division. The staff included three presidents, eighteen judges, a proctor general with a deputy, three registrars and honorary knights. The new generation of judges joining the court was obviously keen to collect its decisions. Among the newly appointed members of the court, several tried their hand at drafting law reports. Not all their works have survived. The collections and reports by Maximilien Hattu de Vehu, Adrien-Nicolas de Burges, Pierre-François Tordeau de Crupilly, and some members from the Odemaer family (maybe Bernard-François) are known only

du mois d’août 1670 . . ., in *Recueil d’arrêts du parlement de Flandres*, Lille: J-B Henry, 1773, T 2, 369–397 and 399–414.

⁷ On Guislain de Mullet, see P-A Plouvain, *Notes historiques relatives aux offices et aux officiers de la cour de parlement de Flandre*, Douai: Deregnaucourt, 1809, 65.

⁸ On Jean Heindericx, see *ibid.*, 54.

⁹ Jacques Pollet and Georges de Ghewiet refer to their works. Cazals, *L’arrestographie flamande*.

through references made to their work by later reporters.¹⁰ Yet, the reports by François Le Couvreur (appointed judge at the *Parlement* on 31 October 1689) show how useful such writings could be within the cenacle of the court. Le Couvreur's work only contains about forty reported cases, dating from 11 August 1690 until 20 January 1708, and the cases are mostly summarily dealt with. The reports were not printed, only two manuscript copies are known. The concept of the reports is markedly didactic. Throughout the work, in the form of a continuous dialogue, the author appeals repeatedly to his reader, in an effort to convey his personal experience of the court's workings and of the discussions in chambers leading to the decision. In some cases, he mentions by name his fellow judges and their particular opinions, or the vote count.¹¹ Le Couvreur's reports show that the manuscript circulated among the judges, thus contributing to the development of the court's own case law, explained through the direct experience of one of its judges.

Other contemporary reports, by Baralle, Flines and Dubois d'Hermaville show developments along the same lines. Ladislav de Baralle's reports, although written over a short period (from his appointment to the Parliament in 1688, until he was appointed Proctor General in 1691),¹² has been preserved in one manuscript at the City library of Lille, in several volumes at the City Library of Douai, and in the printed edition of Henry from 1773.¹³ The author discusses the cases fairly comprehensively. He introduces a case by stating, often in interrogative form, the legal issue at stake. In a few reports, he provides the date of the judgment and the names of the litigants. Although he recurrently notes general rulings devoid of any legal reasoning, especially on procedural matters, he nonetheless usually gives a careful and precise account of the facts, quoting if need be passages from key documents in the case at hand: for example, a term inserted in a contract or an

10 The reports by Adrien-Nicolas de Burges and Pierre-François Tordeau de Crupilly are mentioned by Georges de Ghewiet; Pollet refers to the collection by Odemaer; Maximilien Hattu de Vehu's work is mentioned by Henry, who in 1773 announced that he was planning to have it published. Cazals, *L'arrestographie flamande*. On those different authors, see Plouvain, *Notes historiques*.

11 City Library Douai, MSS 1223–1224. On Couvreur, see Plouvain, *Notes historiques*, 29.

12 On Baralle see *Dictionnaire historique des juristes français*, 34 (C Souyris-Aboucaya); C Fontaine, *Le ministère public au parlement de Flandre: étude sur l'activité de Ladislav de Baralle au cours de l'année 1691*, unpublished master's thesis in legal history (Master 2), Université de Lille 2, 2013; Id, *Histoire du parquet du parlement de Flandre. Ladislav de Baralle, Procureur général (1691–1714)*, unpublished doctoral dissertation, Université de Lille 2, 2019.

13 City Library Lille, MS God 111; City Library Douai, MS 628 and MS 664; Ladislav de Baralle, *Recueil d'arrêts . . .*, in *Recueil d'arrêts du parlement de Flandres*, Lille: J-B Henry, 1773, vol II, 1–261.

excerpt from a custom. He remains discreet about the personal opinions expressed by his colleagues, but nevertheless readily provides the reasoning followed by the court, to which he sometimes adds references to the authorities that he thought had been decisive.

Séraphin de Flines is another judge who started writing his reports after he had been appointed to the Parliament of Flanders in 1689. It is also a relatively small collection, with only seventy-one reported cases in the version published by Henry. The author continued reporting cases until the last years of his life (he died on 30 December 1703). The work has a more personal ring to it than Baralle's, but nowhere does it appear that its author had publication in mind. That is probably not a coincidence, for de Flines provides more information on his own opinions, and he also discusses at greater length the debates triggered by the cases before the court. Thus, he specifies in which cases the decision was reached *omnium votis*, but also what the individual opinions were of his colleagues, whether the president Hattu, or his fellow-judges Roubaix, Desnaux, Buissy or Le Couvreur, whom he all refers to by name. He gives the opinion which prevailed in the court's decision, but also discloses which arguments were put forward in dissenting opinions, or how the vote was split during the discussion of the case. His reports provide direct information on the court's ways to deal with cases: how judges may argue opposite views, how Bartolus' authority is weighed against that of Alciato,¹⁴ bringing debates within the court to life.

The reports by Antoine-Augustin Dubois d'Hermaville were written between August 1690 and 21 January 1692, starting after the author's appointment as a judge (in October 1689), but ending long before his promotion to *président à mortier* on 7 February 1695.¹⁵ His collection is far more extensive than the previous reports. In the printed version, Dubois d'Hermaville's collection includes 122 judgments, covering a total of 483 pages in-4°. Its length therefore exceeds that of the printed edition which contains the three collections already mentioned, drafted by Jean-Baptiste de Blye, Ladislas de Baralle and Séraphin de Flines: the total volume of those three works is 427 pages, but it also includes a commentary on the custom of the Salle de Lille by de Blye. Dubois d'Hermaville did not produce a work which was significantly different from his predecessors' reports, at least if one considers his approach in discussing cases (which, in any event, may vary

14 City Library Lille, MS 661; Séraphin de Flines, *Recueil d'arrêts . . .*, in *Recueil d'arrêts du parlement de Flandres*, ibid, vol II, 263–368. About the author, *Dictionnaire historique des juristes français*, 335 (S Humbert).

15 *Dictionnaire historique des juristes français*, 262–263 (T Le Marc'hadour).

from one case to another). What stands out in at least some of his reports is the author's efforts for raising the narrative quality of his work. Dubois d'Hermaville expresses a much broader culture than the former reporters, but he definitely also had a special talent and feel for building a narrative, especially when he dealt with striking cases.¹⁶ He also paid more attention to legal literature, and was anxious to ensure that the particular legal traditions within the jurisdiction of the court remained honoured, while at the same time he displayed a vast knowledge of European legal scholarship and civil law. The specific features of the cases and even the judgments themselves were not his main concern, as he preferred to focus on those fundamental "maxims" for which legal literature since the seventeenth century, not least the literature on landmark cases, had shown much interest.¹⁷

The growing number of law reports makes it clear that by the beginning of the eighteenth century, the time had come to achieve a synthesis. Mathieu Pinault and Jacques Pollet were the judges whose reports went in that sense.¹⁸ Each of their collected reports is even more extensive than the previous collections in manuscript form, and both were published. These two reports achieved success on the eve of a less prosperous era for the Parliament, and appear, with hindsight, to have heralded a period during which the court's judges became less inclined to write reports. The thriving and flourishing years of the court belonged to the past and a page was turned in the history of French-Flemish law reporting. After 1716, when the Parliament had settled in Douai, no judge appears to have continued the law reporting tradition or to have written any other legal work. Only a handful of advocates and less important court officials started more or less effectively a few new collections.

Some of those later works, in particular the collections compiled from the beginning of the eighteenth century onwards until the 1720s by members of the Malotau family (viz Henri-Philippe Maloteau de Millevoeye, king's counsel at the bailiwick of Tournai, and later Ferdinand-Ignace Malotau, lord of Villerode, admitted in 1722 as honorary judge at the Flemish Parliament), cannot stand the comparison with the earlier reports. These collections may well take monumental proportions (several thousands of pages covering hundreds of judgments), but they are no more than compilations of judgments copied from the Parliament's records. As such, they do not contain

16 City Library Lille, MS 767 ; Antoine-Augustin Dubois d'Hermaville, *Recueil d'arrêts . . .*, in *Recueil d'arrêts du parlement de Flandres*, Lille: J-B Henry, 1773, vol I.

17 Cazals, "Les arrêts notables", 203–224.

18 See, (3) Printed sources, this chapter.

any substantial legal annotations. Their purpose was obviously to form a source of documentation for private use, or alternatively also for use in the bailiwick. Beyond that limited area, they do not appear to have captured much attention.¹⁹

Conversely, the bulky volume written between 1724 and 1730 by the advocate Georges de Ghewiet (1651–1745) takes, together with the reports by Pollet and Pinault, a place of pride in French-Flemish law reporting. Georges de Ghewiet was a nephew-in-law of Jacques Pollet. Throughout his professional life, he collected an impressive documentation, both in printed and manuscript form, of which his library bears witness.²⁰ He was well-informed about the latest developments in legal literature and was probably influenced by the law reports of Brillon (of which he had a copy) when he ventured into his large-scale *Jurisprudence*, one of his practical works which was intended to guide him in his own legal practice. The *Jurisprudence* remained at the stage of a manuscript. It made the most of all the previous reporters' works, whether in printed or manuscript form. In de Ghewiet's mind, his reports were another contribution to his local jurisprudence. It has been acknowledged as "the last expression of Flemish law reporting".²¹ De Ghewiet's work is the only collection which deals in-depth with the case law both from the Flemish Parliament's golden age and from the court's practice when it was established in Douai, from 1714 onwards. Although de Ghewiet must have spent a substantial part of his time in writing the monumental *Jurisprudence*, in which he displays a broad legal culture, he apparently left it unfinished and started writing other works, which appeared in print. In 1727, he published in Lille a small *Précis des institutions du droit belge, par rapport principalement au ressort du parlement de Flandre* (Lille, C-L Prévost, 1727). Partly conceived as a primer, this book offers a general survey of the law applicable in the jurisdiction of the *Parlement* of Douai. It follows a conventional structure, in order to bring a synthesis according to the *summa divisio* of the Roman Law Institutes which had become popular in early modern legal scholarship. The book was well received and was soon reprinted (Brussels, Simon t'Serstevens, afterwards Fr t'Serstevens, 1732,

19 City Library Lille, MS 771–774; MS 775–777. On Ferdinand-Ignace Malotau, lord of Villerode, see Plouvain, *Notes historiques*, 61 ff.

20 On Georges de Ghewiet's library, of which G Cazals discovered the catalogue in the course of her research, see S Dauchy and V Demars-Sion, "La bibliothèque du juriste flamand Georges de Ghewiet", (2007) 48 *BCRALOB*, 277–320.

21 S Dauchy and V Demars-Sion, "Introduction", in G de Ghewiet, *Jurisprudence du parlement de Flandre*, Bruxelles: Service public fédéral Justice, Recueil de l'ancienne jurisprudence de la Belgique, 2008, XV.

1750). In 1736, de Ghewiet published a work which may be regarded as a synthesis of the *Jurisprudence* and the *Précis*, under the title *Institutions du droit belge par rapport tant aux XVII provinces qu'au pays de Liège* (Lille, C-M Cramé, 1736). Here, the author gave a systematic outline of the law in the Southern Netherlands: section after section, de Ghewiet states a number of rules of law, supported by more explicit and detailed references to statutes and customs, but also to legal literature and to case law which showed how those rules had been applied in practice. He thus overcame the twofold inconvenience of the dense and complex arrangement of topics in the *Jurisprudence*, and the terseness of the *Précis*. The *Institutions* reflected a self-confident author in command of his subject and method, effectively implementing his scholarship and ambitions.

It seems obvious that for the author himself, and probably in the mind of many readers, law reporting as it was still conceived and carried out in the *Jurisprudence* had become obsolete in the light of the growing emphasis on systematisation and codification as a reflection of the “triumph of legal rationalism”. The *Précis* and the *Institutions du droit belge* clearly met the demands of many provincial practitioners much better than the *Jurisprudence* would have done. Georges de Ghewiet must have been aware of those shifts, and that may have persuaded him to abandon the publication of the latter work. However, for legal historians interested in the legal culture and jurisprudence prevailing among eighteenth-century Flemish lawyers, the *Jurisprudence du parlement de Flandre* is of special interest. That explains why, almost three centuries after it was written, it was eventually published and has now joined the select group of printed Flemish law reports.²²

(3) Printed sources

During the *Ancien Régime*, printed law reports in French Flanders were not common. Those that were published in printed form aimed at meeting two distinct demands. First, at the beginning of the eighteenth century, practitioners felt a need to have a synthesis of the court's case law. Second, by the 1770s, publishers noticed the constant interest for Flemish law reports, at a

²² City Library Bergues, MS 65; City Library Douai, MS 662-1 ; G de Ghewiet, *Jurisprudence du parlement de Flandre*; S Dauchy and V Demars-Sion, “A propos d'un ‘recueil d'arrêts’ inédit: la *Jurisprudence du parlement de Flandre* de Georges de Ghewiet” (2009) 77 *Tijdschrift voor Rechtsgeschiedenis*, 157–189. For information about the author, see *Dictionnaire historique des juristes français*, 235–236 (S Dauchy).

time when provincial customs and the political role of the parliaments were drawing much attention.

The two best-known reports of the Flemish Parliament, by Mathieu Pinault and Jacques Pollet, were printed in 1702 and 1716. Mathieu Pinault († 1734) was born in Château-Gonthier, Anjou. He obtained a doctor of laws degree at the University of Douai, taught mathematics, and became a member of the Flemish *Parlement* in 1693. He published *Coutumes générales de la ville et duché de Cambrai*, Douai, M Mairesse, 1691; Valenciennes, Gabriel-François Henry, 1701. Today, his reputation still rests on his substantial *Recueil d'arrêts notables du parlement de Tournay*, published in 1702, and supplemented in 1715 by another volume: *Suite des arrêts notables du parlement de Flandres*.²³

The two printed volumes comprise almost 500 reported cases. Most of them were familiar to the author. Pinault would often act as *rapporteur* to the court before the discussion of the outcome. He had therefore plenty of opportunity for applying himself “to take in the spirit of the judgments, and to enter into the meaning of the judges who had formed the decision”. That appears clearly from the precision of the information Pinault gives about the cases he reports, from the initial facts of the case onwards, up to the final dictum of the judgment. As for previous reporters, the authorities cited by the litigants, the judges or ultimately by Pinault himself were of particular interest to him. More than in earlier Flemish reports, he gives a central role to Roman law. There is hardly a page without a quote – sometimes a fairly lengthy quotation – from the *corpus iuris civilis*, often indirectly through late medieval or early modern legal scholarship that Pinault was acquainted with. Because he had in mind the publication of his work, his reports do not contain revelations on the discussions of the court *in camera* or on the actual reasons of the decisions, in contrast to a common practice among earlier reporters whose collections were not meant to come out in print. However, he regularly adds a personal touch on behalf of his readership by including his personal opinion or by mentioning his role in the judgment, or sometimes the name of the *rapporteur* in a particular case. Otherwise, he simply refers his reader to additional authorities, or to the memoranda or personal collections of the said *rapporteurs*. In general, Pinault only rarely volunteers detailed information, which may sometimes be found in manuscript law

23 Mathieu Pinault, *Recueil d'arrêts notables du parlement de Tournay . . .*, Valenciennes: Gabriel-François Henry, 1702; Id, *Suite des arrêts notables . . .*, Douai : Michel Mairesse, 1715. For information about the author, see Plouvain, *Notes historiques*, 69; *Dictionnaire historique des juristes français*, 626 (J Lorgnier).

reports, with regard to the splitting of the vote, the lack of unanimous opinions or the referral of the case to a different division of the court. Nor is he prepared to explain the reasons given by the judges for their opinions, even when these reasons are based on general considerations of equity or justice.

Jacques Pollet (1645–1714) started his legal career at the bailiwick of Tournai as a contemporary of Charles-Albert de Mullet and Séraphin de Flines. He was appointed a judge at the *Parlement de Flandre* on 31 October 1689, at the same time as Flines, Le Couvreur and Dubois d’Hermaville. In parallel to his peers, he soon started reporting cases of the Parliament and continued writing reports until his death. His friend Grenet took it upon himself to “collect the various parts of the author’s manuscript, which were not in a state easily disentangled”. He then prepared the reports’ publication, in 1716, under the title *Arrêts du parlement de Flandre sur diverses questions de droit, de coutume et de pratique*.²⁴ Grenet presented those printed reports in the wider context of a movement towards the unification of French customary law. In the foreword which he included in the published version, he explains that in writing his reports, Pollet was pursuing three goals or at least “three views”. First, to report cases on the basis of a selection of important issues. Second, in order to examine the decisions given on any section of his province’s custom, so as to establish, so to speak, its interpretation. And third, but least importantly, to state simple rulings on general issues, whether on questions of usage, procedure or practice.²⁵ Here as well, a vast legal culture was required. On every page of the volume, late medieval commentators of the civil law rub shoulders with early modern legal writers. Pollet appears to have had a profound knowledge of their works and was exceedingly well informed on the manuscript legal literature produced by Flemish lawyers. Beyond the specifics of the reported cases, Pollet also sought above all to trace the reasons of the court’s decisions, the foundation of its case law. He therefore does not conceal the internal divisions of opinions among the judges. But for the *rapporteurs*, he does not refer to his colleagues by name, and uses general phrases so as to preserve their anonymity, such as “those in favour of his opinions agreed that” (“*ceux*

24 Jacques Pollet, *Arrests du parlement de Flandre sur diverses questions de droit, de coutume, et de pratique* . . ., Lille: Liévin Danel, 1716. For information about the author, see *Dictionnaire historique des juristes français*, 632 (N Derasse).

25 Grenet, “Préface”, in Jacques Pollet, *Arrests du parlement de Flandre*, fol. [*°1v]: “La I.ere de rapporter les questions choisies et importantes. La 2.e d’observer les arrêts qui interviendroient sur chaque article des coütumes de cette province, pour en fixer, pour ainsi dire, l’interpretation. Et la 3.e. qui est la moins considérable, de donner de simples arrêtez sur des points generaux, soit d’usage, de procédure, ou de pratique.”

qui étoient de son avis convenoient que”), or “the contrary opinion prevailed” (*l’avis contraire a prévalu*”). He also tried to formulate the general principles based on reason and equity, which he believed had inspired the court’s decisions. This way, he offers a remarkable synthesis of the local law reporting’s jurisprudence, which is brilliantly topped by his own reasoning and opinions.

After the publication of Pinault’s and Pollet’s reports, in which practitioners were able to find answers to some of the essential questions that they encountered in their day-to-day legal practice, and in spite of the disaffection of the new generations of judges towards pursuing the practice of law reporting, the interest for the existing law reports remained very strong. Throughout the eighteenth century, these law reports continued to be held in great esteem by local practitioners. The printed copies were easily available, but they also sought out manuscript copies, which they sometimes consulted at a registrar’s office or in libraries where they were made available. Some were copied and discussed. Flanders may not have played “any part” in the publication of customs at the height of the trend between 1711 and 1750,²⁶ but that was clearly because the main works which dealt with local laws circulated abundantly in manuscript form. In the “ancient world of jurists”²⁷ where transmission within a family played an important part, those legal manuscripts were regarded as an especially valuable heritage. Manuscript and printed version continued all the more easily to be used on a daily basis, because the costs of producing a manuscript remained very competitive in comparison to the pricing of printed volumes. The handwritten form of communication was still “one of the important gateways to building the public spirit during the century of the Enlightenment”.²⁸

The continuing interest for the genre of homegrown law reports and the relative scarcity of manuscript reports may to some extent explain why, during the 1770s, printers based in Lille took the initiative to publish a collective edition of some of the old manuscript law reports on cases decided by the Flemish Parliament. The Lille librarian Jean-Baptiste Henry started that ambitious editorial enterprise “in the public interest”, in order to allow

26 A Gouron, “Coutumes et commentateurs, essai d’analyse quantitative”, in *Droit privé et institutions régionales: études historiques offertes à Jean Yver*, Paris: Presses universitaires de France, 1976, 326.

27 The phrase is borrowed from the title of the journal *Droits. Le monde ancien des juristes* (2004) 40.

28 F Moureau, *La plume et le plomb. Espaces de l’imprimé et du manuscrit au siècle des Lumières*, Paris: Presses de l’université Paris-Sorbonne, 2006.

young men keen to embark on a “profound” study of the law, or advocates who were confronted with issues “which encompass all the countries” to find in those newly printed volumes “decisions founded on authorities and all the reasons put forward by the litigants and weighed on the scales of justice”. In 1773, under the general title *Recueil d’arrêts du parlement de Flandre*, he published the law reports collected between 1671 and 1702 by Jean-Baptiste de Blye, Séraphin de Flines, Ladislas de Baralle and Antoine-Augustin Dubois d’Hermaville.²⁹

It seems that the edition was a success. The publisher may even have sold out of his stock within a short period. In any event, in 1777, another librarian, Charles-François-Joseph Lehoucq, took over the editorial project on an even larger scale. The *Arrêts recueillis par MM. Dubois d’Hermanville, de Baralle, de Blye et de Flines* were only an instalment of the series *Jurisprudence de Flandres*, which now also comprised a *Commentaire sur la coutume de la Salle de Lille* (attributed to Jean-Baptiste de Blye), the *Arrêts* of the Great Council of Mechlin represented by the reports of Claude de Humayn, Nicolas Du Fief, Pierre de Cuvelier and Guillaume de Grysperre, the collection of opinions and advices by the Advocate General Waymel Du Parc (already published by Henry in 1775), and also the *Commentaire sur le titre premier de la coutume “de la jurisdiction des droits & autorités des hauts-justiciers, seigneurs vicomtiers & fonciers”*, a total of six volumes.³⁰

On the eve of the French Revolution, the French-Flemish law reports, as many other works written by Flemish lawyers, were at long last more generally available in printed book form.

C. THE USE OF LAW REPORTS IN THE PRACTICE OF THE FLEMISH PARLIAMENT

Two examples of legal proceedings before the *Parlement de Flandre* may illustrate various aspects of how, in practice, legal authorities were used both in the course of arguments adduced in court and in law reporting.

29 *Recueil d’arrêts du parlement de Flandres* . . . , 2 vols, Lille: J-B Henry, 1773.

30 *Jurisprudence de Flandres* . . . , 6 vols, Lille: C F Lehoucq, 1777.

(1) Case I: the legal capacity of the separated wife³¹

A couple had agreed to separate by common agreement, officialised by the ecclesiastical judge and ratified by the secular authorities. The sources often refer to their “divorce”, but that must be understood as a *divortium a mensa et thoro*. It was common ground that separation could not end marriage as a sacrament. Ten years later, the couple was reunited, and the husband claimed that the conveyances of real property owned by his wife and sold during their separation without his consent had to be invalidated. The case was first brought before the local jurisdiction of Sint-Winoksbergen (Flanders), which dismissed the husband’s claim (15 December 1702). In appeal before the court of the bailiwick of Ypres, the decision of the lower court was overruled and the litigants were allowed to produce evidence (29 October 1703). The purchasers of the property (related to the wife) appealed to the Parliament in Tournai, followed by the original claimant who appealed *a minima*. The Parliament, in its decision of 14 March 1704, restored the judgment of Sint-Winoksbergen. The husband then initiated *cassation* proceedings before the Council of State, which in 1717 eventually decided to dismiss the appeal in *cassation*.

The central issue was whether the custom of Sint-Winoksbergen required the authorisation of the husband for acts of conveyance by his wife with respect to her own goods, while husband and wife were formally separated. The written custom, however, did not address specifically the question. It included a general section (Rub XVII, art 21) which stated that a wife could not enter a contract, acknowledge a debt or take up an obligation, or pursue any action in court, without the knowledge and authorisation of her husband (except in the case of a wife acting as a public merchant).³² In this particular case, the husband relied on the general terms of that article, while the purchasers claimed that the general principle did not apply in the case of formally separated spouses: in such a situation they claimed, the woman,

31 In future, the case will be studied more in detail by Mrs S Michel: additional investigation will be needed in the records of Bergues Saint-Winoc, Ypres and Paris.

32 The custom of Sint-Winoksbergen (in Flemish) has been checked in the two editions mentioned by A Gouron and O Terrin, *Bibliographie des coutumes de France. Editions antérieures à la Révolution*, Geneva: Droz, 1975, 54. Also in the editions *Costumen der stede, casselrye ende vassalryen van Berghen S. Winocx*, Ghent: Maximiliaen Graet, 1664; *Costumen der stede, casselrye ende vassalryen van Berghen S. Winocx*, Ghent: Petrus de Goesin, 1777. The Dutch version is printed with a French translation in *Les coutumes et loix des villes et des chastellenies du comté de Flandre traduites en François . . .*, vol II (1719), Cambrai: Nicolas-Joseph Douillez, sv Bergh S. Winocx, 59.

although still married, would recover the full capacity to dispose of, or pledge, her own property.³³

The records of the Parliament of Flanders contain lawyers' memoranda presented during the proceedings preceding the appeal at Tournai.³⁴ These memoranda show that the counsel had adduced essential authorities to customs and legal literature already at that stage of the proceedings. In addition, both Matthieu Pinault³⁵ and Jacques Pollet³⁶ have included a section on the case (as decided by the *Parlement*) in their law reports. The case is also included in Georges de Ghewiet's *Jurisprudence du Parlement de Flandre*.³⁷ The decision by the State Council (on 2 October 1717) was published in a series of official acts and statutes related to the jurisdiction of the Flemish Parliament.³⁸ A few years before the French Revolution, the case, and in its wake several of the legal authorities referred to in the earlier law reports (which in turn took their cue from the opinions in the case file), was discussed in J-N Guyot's repertory³⁹ and repeated in Merlin's continuation of that repertory.⁴⁰

The two printed reports on the case reflect different approaches by the reporters. Pinault's report states the facts and proceedings, and then some of the main arguments put forward by the litigants or their counsel. For the main appellants at the Parliament (the purchasers), Pinault reports the names of some of the legal authors that they referred to, a case from 1666 decided by the local court of Tournai, and a handful of French customs, all adduced in favour of the capacity of the separated wife. None of these

33 On the (controversial) status of the separated wife in the Southern Netherlands, see P Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, Brussels: Palais des Académies, 1987, 81 and 290.

34 Lille, Archives Départementales du Nord (hereafter, ADN), 8B1/14873 and PF 27495. The individual documents are not calendared.

35 M Pinault, *Suite des arrests notables du Parlement de Flandres*, vol III, Douai: Michel Mairesse, n LVI, 1715, 177–182.

36 J Pollet, *Arrests du Parlement de Flandre sur diverses questions de droit, de coutume, et de pratique*, Lille: Lievin Daniel, 1716 (note the sub-title of the volume: *Ouvrage utile pour l'intelligence des Coutumes et des Usages du País*), n XXVIII, 75–80.

37 That work was only published in the twenty-first century: De Ghewiet, *Jurisprudence du parlement de Flandre*, 91–92. The same author also refers to the case in his *Institutes: G de Ghewiet, Institutions du droit belge par rapport tant aux XVII. provinces qu'au Pays de Liège. Avec une Méthode pour étudier la Profession d'Avocat*, Lille: Charles-Maurice Cramé, 1736, 364 and 516.

38 *Recueil des édits, déclarations, arrests, et réglemens, Qui sont propres et particuliers aux Provinces du Ressort du Parlement de Flandres*, Douai: Jacq Fr Willerval, 1730, 714–719.

39 *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale*, ed [J-N] Guyot, vol XVI, Paris: Visse, 1785, sv "Séparation de biens", 223–224.

40 P A Merlin, *Répertoire universel et raisonné de jurisprudence*, Cinquième édition (1828), vol XIII, Bruxelles: H Tarlier, sv "Séparation de biens", 401.

authorities is specified by any detailed reference to the author's works or by any specific section of the customs mentioned. On the other hand, the same reporter emphasises the policy considerations proffered by the litigants: on behalf of the husband, moral and religious considerations on the ascendancy of the man in a marital relationship, and the inconvenience for the husband if, during a period of separation, the wife would be allowed to dispose of her patrimony at will, only to fall back on her husband's estate once her profligacy has exceeded her means. On behalf of the purchasers, the emphasis is on the need to protect the wife (and her estate) from the ill treatment by a cruel husband, while they dismissed the risk of a wife squandering her patrimony, as women are (their counsel submitted) notoriously avaricious. Pinault ends by briefly reporting the decision of the court without stating or suggesting any reasons for the decision.

Pollet's presentation differs in that, after stating briefly the facts, he discusses the contrasting legal arguments on the central legal issue. The way of introducing these legal arguments does not tell the reader whether these were arguments and authorities actually put forward by the litigants: the contrasting arguments are discussed as diverging opinions with regard to the legal issue, much in the same way as they might be in a work of legal doctrine, independently from any particular case. Yet, the general *pro et contra* discussion of the arguments tends to establish that the reasoning in favour of the eventual outcome of the case was the better one. On the other hand, most of the authorities referred to are detailed in footnotes, with specific references (according to the prevailing *modus citandi* of the time in legal works).⁴¹ The whole of Pollet's discussion is far more focused on the legal authorities and their reasoning with regard to the legal issues.

Neither Pinault nor Pollet tells the reader explicitly whether the contrasting arguments were put forward or discussed during the proceedings at the Parliament. What remains of the case file in the Parliament's records shows that all the arguments and authorities brought forward – which may well have been included in the arguments before the Parliament – had already been articulated before the lower courts. The archival evidence available so far does not make it possible to assess whether such a use of authorities before lower courts was common or not before these lower courts, or was in this particular case perhaps stimulated by the fact that some of the litigants (certainly on the side of the wife's relatives) held official and legal offices,

41 References in the following footnotes are not meant to identify the editions used by the practitioners or law reporters, which in most cases would not be possible.

and were therefore more likely to be acquainted with legal authorities and literature.

Comparing the extant records and the two printed reports on this case, it appears that the litigants were referring to different types of authority and legal literature. It also appears from the records that some controversy arose around a few of the authorities, to which the litigants' counsel attributed different importance. Two categories of authority appear prominently: on the one hand, references to legal literature from the Netherlands, and on the other, references to French customs and French commentaries on customs. The two categories complement each other in the present case: when read in favour of the capacity of the married woman, the Netherlandish literature supports the principle that the separated woman, although her marriage as a religious institution still stands, is no longer subjected to the authorisation of her husband for disposing of her property. Older authors from the Southern Netherlands, and through them references to customary practice and judicial precedents, serve to establish that by common usage and acceptance, confirmed by legal practice, the incapacity of married women no longer applies when they are separated.⁴² More recent authors from the Northern

42 The authors from the Southern Netherlands are Petrus Peckius, *Tractatus de testamentis conjugum, in quinque libros distinctus*, in Id, *Opera Omnia*, Antverpiae: Apud Hieronymum Verdussen, 1679, IV 12, n 1–2, 606–607: “Quia separatio matrimonii facta . . . adeo ut libere ea obligare, alienare, et dividere possit, nisi statuto impediatur, id quod nuper in hoc Magno Senatu decretum fuit”; Johannes Wamesius, *Responsorum sive consiliorum ad ius forumque civile pertinentium Centuria quinta*, Antverpiae: apud Henricum Aertssens, 1641, Cons 99, 312–313 (Separatio tori inter coniuges), n 5; Id, *Responsorum sive consiliorum de iure pontificio*, vol II, Lovanii: Typis Jacobi Zegers, 1643, Cons 551, 555–556 (very much in the same words as in his civil *consilium*: it is against reason and law to argue that the husband would retain his authority and power, and even in such a case, the judge's authority can replace the husband's); Paulus Christinaeus (1625), *In leges municipales civium Mechliniensium . . . notae seu commentationes*, Antverpiae: Apud Martinum Nutium, IX 4, additamenta, lxxii (the married woman is not able to enter contracts or make gifts, unless she is a merchant or separated as to property); Antonius Perez, *Praelectiones in duodecim libros Codicis Justiniani imp.*, Amstelædami: Apud Ludovicum & Danielem Elzevirios, 1661, ad C 5.12, 372, sv Hodiernis moribus; Robert de Flines (who was a contemporary author, ob 1703, and whose commentary on the custom of Tournai was not published but circulated in manuscript form). Two manuscripts are mentioned by R Dekkers, *Bibliotheca Belgica Juridica. Een bio-bibliographisch overzicht der rechtsgeleerdheid in de Nederlanden van de vroegste tijden af tot 1800*, Brussels: Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België, 1951, 57: MS Kortrijk 288 (now at the Archives of the Realm in Kortrijk), which contains only part of the commentary, but not the one here referred to; and Mons 755 (now in the Library of UMons under 315/262 R 2/C). De Flines discusses the controversy with respect to the separated wife, first referring to Louet et al for the opinion against the power of the wife to dispose without the consent of her husband, but then expresses approvingly the opposite opinion (“Contrarium tamen et melius tenant . . .”), referring to several of the works also quoted in the case (viz P Peck, P van Christijnen, Baldus, J Wamèse, R Choppin, Ch Dumoulin and A Tiraqueau). He then goes on referring to the Tournai

Netherlands were also emphatically referred to,⁴³ partly probably because they offered a systematic survey of the opinions on the issue, partly because even by the end of the seventeenth century, the assumption of a general “Belgian” legal tradition encompassing both the Catholic and the Protestant Netherlands was apparently still widespread. The French customary and judicial tradition seems to have been more restrictive, allowing the separated woman only the mere administration of her property (i.e. without disposing of her goods) or minor forms of disposal when these proved necessary in her interest.⁴⁴ However, the same line of argument also highlights that some French customs⁴⁵ also explicitly provided that separated wives could enter

judgment indirectly mentioned in Pinault’s report: “Et sic iudicatum fuit 13 novembris 1666 inter viduam N. Le Clercq donatariam uxoris Marci Crespeel, et viduam Petri Cuvelier et consortem, quia per separationem tollitur viro dominium, et administratio bonorum uxoris a consuetudine tributa, quorum causa necessaria erat autoritas, nec consistit amplius matrimonium in suo proprio et pleno significato, et quoad effectus civiles, quos praesertim attendit consuetudo, sed solum spirituale vinculum, quod enim contrariae opinionis authores dicunt separationem inductam ad evitandam donandi libertatem, satis solvitur ex eo, quod etiamsi separatio fiat ex causa vitandae dilapidationis a marito fiendae, tamen ad consequentiam dictae separationis, mulier eximitur dominio, et fit sui juris, consequiturque libertatem, ut ipsa disponat, quemadmodum cessante mariti potestate, et competit ex consuetudine tit. de ceux qui sont tenus pour agés, idem tenet Pirr. Angleb. ad cons. Aurel. tit. 9 cap. 5 n.7 de societate vide Pap. lib. 7 tit. 1 arr. 10” (fols 170v–171r).

43 Christianus Rodenburgius, *Tractatus de jure conjugum. In quo de viri in uxorem potestate, eorumque obligationibus, iudiciis, mutuis gratificationibus, bonorum communionem, pactisque dotalibus, illustriores controversiae, ad usum fori patrii, vicinarumque regionum expendantur, cum tractatione praeliminari de jure, quod oritur ex statutorum, vel consuetudinum discrepantium conflictu*, Trajecti ad Rhenum: Apud Gisbertum Zylhium, et Theodorum ab Ackerdijck, 1653, Tit III, cap 1, n 14, 327–330, starting with a survey of the controversies among legal scholars; Abraham a Wesel, *De conubiali bonorum societate*, in *Opera omnia*, Amstelodami: apud Henricum, & Viduam Theodori Boom, 1701, 218–219, n 35 ff.

44 A key reference, also often referred to by the later authors from the Southern and Northern Netherlands who wrote on the topic, is Georges Louet, *Recueil d’aucuns notables arrests, donnez en la cour de Parlement de Paris . . .*, Nouvelle et dernière edition, *Reveuë, corrigée, et augmentée de plusieurs Arrests intervenus depuis les Impressions precedentes, et d’autres notables Decisions, Par Me Julien Brodeau, Advocat au Parlement*, Paris: P Rocolet and Iean Guignard, 1650, Letter F, art 30 (Femme séparée de biens, si elle peut aliener sans estre autorisée de son mary), 439–441.

45 Pollet’s references include: *Le coustumier du pays de Bourbonnois. Avec le Proces Verbal. Corrigé et annoté de plusieurs Decisions et Arrests, par M. Charles du Molin . . .*, Lyon: pour Georges Vernoy Libraire de Molins, 1599, 54, art 170 (with in the margin an annotation by Charles Dumoulin: whereas article 170 states that “Femme mariée est en la puissance de son mary”, Dumoulin notes: “Indistincte, etiamsi non sint communes in bonis, secus facta separatione”); *Les loix municipales, et coutumes generales du balliage de Chaulmont en Bassigny et ancien ressort d’iceluy, corrigées, interpretées et annotées fidellement de plusieurs decisions, sentences, arrests, et autres raisons y convenables: et concordées à plusieurs autres coutumes de ce Royaume de France: Par M. Iean Gousset . . .*, Espinal: Pierre Hovion, 1623, 43–47, art 66, at 45, n 7 (Sans l’authorité): the husband’s authority and power applies “. . . N’estoit qu’elle fust separée par sentence de juge competent; et partage fait et executé sans fraude . . .”; *Commentaire sur les coutumes de la prevosté et vicomté de Paris, divisé en trois livres, Composé par M. René Choppin . . .*, vol III, Paris: Louis Billaine, 1662, Liv II, Tit I, n 14, 132–133; *Coutumes de la cite*

into contracts without the authority of their husbands. The argument may also be understood to make the point that, whereas the practice was controversial or divided in French customary law, the more general practice in the “Flemish” customs was in favour of the married wife.

The authorities referred to were therefore drawn from several centuries, although mostly from the sixteenth century and the advent of printed legal literature onwards. The authorities were also drawn from both the customary *iura propria* and from the civil law tradition.⁴⁶ It seems clear that the religious divide in the Low Countries does not seem to have inhibited the French practitioners from quoting Protestant authors, even on a religion-sensitive topic such as marriage. Beyond the customary traditions of the Low Countries, a civil author from the North who was a popular authority throughout Europe, such as Vinnius, was also referred to.⁴⁷ In this particular case, legal literature from beyond France and the Low Countries was largely ignored⁴⁸ with few exceptions – such as a spurious reference to António da Gama (1520–1595): an advocate of the courts below repeated A Wesel’s reference to the Portuguese practice, but the case discussed by Gamma deals with a different issue.⁴⁹

et ville de Rheims ville et villages regis selon icelles, avec le commentaire . . . Par M. Iean Baptiste de Buridan . . ., Paris: Louis Billaine, 1665, art 13, n 12, 32–33: where the commentator mentions the opinion stating the husband’s continuing authority in the case of separation, but that opinion is rejected by de Buridan; *Coustume du bailliage de Troyes, avec les commentaires de M^r Louis Le Grand . . .*, Nouvelle Edition, Paris: Jean Guignard, 1681, Tit V, art 80, n 47–48: relying on the custom of Paris and cases decided by the Paris Parliament, the author argues that even the separated wife requires authorisation of her husband in order to dispose of her property. Of these authors, Pinault only mentions Dumoulin on the custom of the Bourbonnois; however, he also mentions (referring to the counsel’s arguments) the customs of the Dunois and Montargis (A Gouron and O Terrin, *Bibliographie des coutumes de France*, 124 and 145–147, esp n 1123–1124). The latter was also mentioned in the memoranda submitted at Sint-Winoksbergen.

46 Pinault includes in his report a reference to Antoine Mornac, *Observationes In viginti quatuor priores Libros Digestorum. Ad usum Fori Gallici*. Nova editio locupletior et auctior, vol I, Paris: Franc. Montalant, 1721, ad D 24.2.2.1, col 1426, mentioning restrictive circumstances of necessity when the separated wife may validly dispose of her property: such restrictions may be relevant to explain the purchasers’ insistence on the cogent reasons why the wife had conveyed her property at the time of her separation.

47 Arnoldus Vinnius, *In quatuor libros Institutionum imperialium Commentarius Academicus et Forensis*, Lyon: Anisson & Joan. Pasuel, 1700, ad I. 2.8, 309.

48 Pinault reports counsels’ arguments debating the relevance of some Roman and canon law authorities (oc, 79), along which Thomas Sanchez’ treatise on marriage (Thomas Sanchez, *De Sancto matrimonii sacramento . . .*, Viterbo, Venice: Apud Nicolaum Pezzana, 1754, vol I, 94, 103–106).

49 The quote in the counsel’s memorandum (ADN 8B1/27495) is copied from Abramam Wesel, *Opera omnia*, vol II. *De Connubiali Bonorum Societate, & Pactis Dotalibus*, Amstelodami: Apud Henricum, & Viduam Theodori Boom, 1701, Tr II, C IV, n 36, 219, referring to ao Antonius de Gamma, *Decisionum Supremi Senatus Lusitaniae Centuriae IV*, Antwerp: Apud Viduam et filium Joannis Baptistae Verdussen, 1699, Dec 357, 475, n 2 (“Hinc dubitatio orta est, an matrimonio sic separato requiratur mandatum uxoris in lite mota super immobilibus? Ut in processu Fernandi Paez & Gasparis Lopez Godinho, ubi iudicatum extitit non requiri mandatum, nec

Case law (always through the medium of legal literature) is instrumental in different argumentative strategies. On behalf of the purchasers, the unidentified reference to a (sixteenth-century) case decided by the Great Council and mentioned by Peckius was controversial, but the purchasers' counsel argued that it was relevant because the Great Council had been for centuries the supreme appellate court for the Flemish regions and because Peckius' standing, who had been a judge at the Great Council, vouched for the accuracy of his reference to a judgment by that court. In any case, counsel argued, that precedent was not necessary in order to establish the usage in Flanders.⁵⁰ On behalf of the husband, the references to the restrictive decisions of the *Parlement de Paris*⁵¹ forced the opponents to emphasise the particular laws of Flanders, buttressed by policy considerations: the Paris cases had been inspired, counsel submitted, by the concern over a rising tide of divorces (i.e. separations), a tendency which had not affected the Flemish regions. Surprisingly, the reporters did not pick up any references to the Flemish *Parlement's* own precedents. Yet, De Blye's reports on cases decided by the sovereign council of Tournai included a brief section on precisely the same legal issue, with a summary of the reasoning attributed to the court for having validated disposals of property by a separated wife.⁵²

consensus in venditione rerum immobilium facta per maritum, matrimonio separato propter saevitias mariti. Et idem iudicatum extitit in hoc senatu in processu Baccalaurii de Celrico contra Georgium Fiz anno 1543. Per Christophorum de Lucena, Mendum de Saa, & Sebastianum de Matos." The main theme of the *decisio* is "Utrum acquisita ab altero conjugum, si matrimonium separatum est iudicio Ecclesiae, communia effecta sint". In the advocate's manuscript, the reference is to Dec 357, whereas in the edition of Wesel mentioned *supra*, another Decision is mentioned (also on a different issue), probably due to a typographical error (Dec 257, 329–330: "Utrum maritus nullo interveniente consensus uxoris, possit acceptando emphyteusin se ipsum obligare perpetuo ad annuam pensionem").

- 50 The argument is worked out in the *quadruple* on behalf of the purchasers during the original proceedings before the aldermen of Sint-Winoksbergen (AND 8B1/14873), art 31 ss (where counsel confutes the purport of the opinions attributed by his opponent to the authors of the Southern Netherlands Peckius, Wamesius and Christinaeus), and artt 84–86 ("... Aussi les deffendeurs ne sont pas destitué d'un jugement en cet esgard, puisque le docte Peckius rapporte que la question a esté jugée ainsy de son tems au Grand Conseil de Malines et quoy qu'il ne cite point l'arrest ni ne declare entre quelles personnes il ait esté rendu cela ne doit en rien diminuer la preud'homie de cet autheur qui estoit membre du Grand Conseil. Et ledit conseil qui a esté depuis plusieurs siecles entiers le juge d'appel en dernier ressort de cette ville et chastellenie estoit asse celebre pour confirmer ledit usage et faire en sorte que personne n'en eust plus douté apres ce jugement...").
- 51 In that light, it is not surprising that at the stage of the *cassation* proceedings, the husband had requested that the case should be referred to the Paris Parliament for a new trial (*Recueil des édits* . . . , cit, 715).
- 52 Jean-Baptiste de Blye, *Résolutions du Conseil Souverain de Tournai, Dans les causes sur lesquelles sont intervenues des Arrêts de la Cour*, Lille: J B Henry, 1773, 373, art I. Art I does not refer to any litigants or give any date; if art II (ibid, 373–374) is to be read as a continuation on the same case, the date of the judgment would be 10 December 1670. On De Blye's reports:

Perhaps less surprisingly, it is noteworthy (in the light of the controversy over Peckius' reference to the Great Council) that Paulus Christinaeus' commentary on the Mechlin municipal laws is quoted, but not his reports.⁵³

(2) Case II: the perfection of *fideicommissa*

The available records on the case which serves here as a second illustration of references to case law in the practice of the Flemish Parliament are too fragmentary for a full reconstruction of the factual context.⁵⁴ By the end of the seventeenth century, and during the 1720s, litigation before the Parliament opposed the descendants of someone who had established a *fideicommissum* in his will (in 1625), and their creditors. The Parliament eventually delivered a judgment on 8 August 1729 in favour of the heirs, but that judgment was challenged in *cassation* proceedings. The main records available are the address and a memorandum by the Proctor General of the Parliament and, as a result of the *cassation* challenge, a reasoned version of the Parliament's judgment.⁵⁵

Cazals, *L'arrestographie flamande*, 33–40. De Blye's report on the issue of the separated wife is mentioned by De Ghewiet in his annotations of *Jurisprudence du Parlement de Flandre*, cit, 94, n 5. De Ghewiet also mentions that he learned from a judge who was a member of the court at the time of the case decided in 1704, that the court hesitated over the outcome because the French authorities were against the capacity of the separated wife. He also suggests that the Flemish *Parlement* should issue an *arrêt de règlement* along the lines of that of the Parliament of Rouen in 1600, which would only allow the separated wife to dispose of property under restrictive conditions (*ibid*, n 8–9).

53 With regard to non-legal authorities, the *quadruple* of 1702, mentioned above, also includes a refutation of the opponent's argument based on the use of the phrase "jouir" ("to enjoy") in the separation contract, and for which the opponent had apparently relied on the dictionary of the French Academy: "Aussy il semble que le demandeur et son conseil ayent oublié leur principes de la philosophie quand ils insistent tellement sur la prétendue signification dudit mot *jouir* et qu'on en devoit chercher la vraie intelligence et etymologie dans l'accademie françoise a Paris, ils doivent se représenter que les voix et mots sont des signes vrayment arbitraires que tel mot peut estre d'une telle signification en telle ville ou province, qui soit d'une signification differente ou contraire dans une autre, l'on pourroit rapporter une infinité d'exemples sur ce sujet, et mesme dans la ville de Paris telle peut estre la signification d'un mot suivant l'esprit et stile des notaires qui soit tout autre suivant l'intelligence de l'accademie. Il n'y a donc rien de plus frivole ni de plus impertinent que de vouloir tant insister sur l'intelligence dudit mot *jouir* et rien ne peut estre de plus ridicule que de vouloir emprunter cette intelligence de l'accademie a Paris, cette academie n'est pas autorisée a decider souverainement de la fortune d'une famille sur la pretendue signification et etymologie d'un mot."

54 A case study on the litigation and legal issues was published by A Wijffels, "La loi dans le discours judiciaire: l'article 15 de l'Édit Perpétuel de 1611 dans le ressort du Parlement de Flandre", in É Bousmar, P Desmette and N Simon (eds), *Légiférer, gouverner et juger. Mélanges d'histoire du droit et des institutions (IXe–XXIe siècle) offerts à Jean-Marie-Cauchies à l'occasion de ses 65 ans*, Brussels: Presses de l'Université Saint-Louis, 2016, 317–335.

55 ADN 8B1/2383, 8B2/560, 8B2/2019 and 8B2/9.

The main legal issue around which the extant records focus is whether the duty imposed by statutes according to which, in order to assert a *fideicommissum* against creditors, perfection of the *fideicommissum* had to take place, was enforceable or not.⁵⁶ In the Netherlands, such a statute had been issued in 1586 (under Philip II) and, because the central government in Brussels had found that the statute had been poorly enforced, again as section 15 of the Archdukes' Perpetual Edict of 1611.⁵⁷ On behalf of the descendants whose ancestor had settled the *fideicommissum*, it was argued that those statutes had never been implemented or applied in Douai (in the county of Artois), and therefore had no legal force on the grounds of desuetude. The Proctor General (and, perhaps at his instigation, the creditors) strongly denied such desuetude or contrary usage, or even, as the Proctor General emphatically argued as a matter of principle and policy, the admissibility of such a contrary use in the case of a statutory provision of public interest. The reasons provided *ex post* by the Parliament for justifying their judgment in the *cassation* proceedings assert the opposite view, but not as their main theme: the Parliament's argument focuses on the evidence with regard to the enforcement of the statutes. The non-application of the statutes is inferred mainly from three findings: (a) the admission by the lawmakers themselves that the provisions on registration of *fideicommissa* had not been implemented; (b) a close examination of official records in Douai and Artois, from which the court concluded that they did not reflect any sustained practice of such registration; and (c) a limited number of judicial authorities, which in the court's view did not amount to prove that *fideicommissa* had been registered according to the statutory prescriptions.

As is so often the case when an (unwritten) custom or usage had to be established in litigation, judicial precedents also play a substantial part in the proof of what the practice was. Thus, three cases decided by the Flemish Parliament, and which had probably been cited by counsel during the litigation before the Parliament, were targeted in the Proctor General's address in order to be dismissed, but they also appeared in the court's *ex post* reasoning of the judgment. The three precedents were comparatively recent, more or

56 On the legal issue in general, H F W D Fischer, "De publicatie van fideicommissen" (1953) 16 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 159–239 and (1954) 17, 45–81; Godding, *Le droit privé dans les Pays-Bas méridionaux*, 388–389 and 292; G Martyn *Het Eeuwig Edict van 12 juli 1611. Zijn genese en zijn rol in de verschriftelijking van het privaatrecht*, Brussels: Algemeen Rijksarchief, 2000, 261–309.

57 See the text of art 15 (both in Dutch and in French) in the reprint: G Martyn, *Het Eeuwig Edict van 12 juli 1611. Facsimile uitgave van een originele druk . . .*, Antwerp: Berghmans Uitgevers, 1997.

less contemporary to the protracted proceedings in the litigation at hand. The first referred to a case of 1698, about a *fideicommissum* on a house in Douai. The Proctor General objected to the authority of that case on several grounds: (a) the Proctor General's office (*gens du roi*) had not been involved, even though public interests had been at stake; (b) the litigation had opposed heirs and other beneficiaries of the estate, but not creditors as third parties; and (c) conflicting decisions in that litigation had been reached by the courts of Douai and the *gouvernance* of Douai.⁵⁸

The second precedent was very recent: it dated from 1726.⁵⁹ The Proctor General again objected that the case had been decided without his office being heard and that a judgment reached by a simple majority of the justices could not prevail over an enactment passed by the sovereign.⁶⁰

The third precedent dated back to 1697. In the course of that litigation, the Proctor General's predecessor was said to have strongly opposed the argument of desuetude, but the court had not followed his objections. In 1729, the Proctor General referred to his predecessor's arguments, but

58 ADN 8B1/2383, 3 (reasoned justification by the Parliament), and address of the Proctor General (on the latter's argument against the authority of the precedent: ". . . enfin l'arrest qui dans le sens de ceux qui l'employent auroit preferé le pretendu non usage à l'edit, ne pouvoit pas se soutenir d'autant plus qu'il a esté rendu sans les conclusions des gens du Roy puisqu'on ne peut disconvenir que la disposition de l'edit perpetuel a cet egard ne soit une loy qui appartienne au droit public, à la sureté et à la bonne foy dans les contracts de la société civile, en effet la province de Flandres par sa constitution fondamentale est un pays de nampissement ou l'on ne peut acquerir au prejudice d'un tiers aucunes realisations sans les oeuvres de loy, ainsy cette question n'a pu étre vallablement jugée sans conclusions des gens du Roy, suivant les maximes generales de tous les parlemens et en particulier suivant la disposition du reglement donné au Conseil d'Etat le 6 may 1681 pour les fonctions du remontrant, qui ordonne la communication des procès dans les matieres qui regardent le publicq et qui requierent des conclusions, même lors qu'il ne s'agit que de concilier un article avec un autre article des ordonnances, a plus forte raison lorsqu'il s'agit d'aneantir pour le tout l'autorité de la loy du Prince, ce default de forme emporte la nullité des arrests et donne lieu a se pourvoir contre iceux suivant l'edit du mois de mars 1674, art 26 concernant les requetes civiles.").

59 ADN 8B1/2383, 3 (reasoned justification by the Parliament), and address of the Proctor General. The court's reasons mention that the division among the judges in that case had not been on the issue of the non-usage of art 15 of the Perpetual Edict ("Il est vray qu'il y a eu un arrest de partage en cette affaire mais cela ne doit en rien diminuer les merites de l'arrest. Les juges qui avoient été du jugement ont assuré la chambre pendant l'examen de ce proces que le partage n'avoit pas regardé le default de l'enregistrement, mais deux autres questions, scavoir s'yly avoit fideicommiss et si les trois degrés auxquelles sont bornez les fideicommiss par l'edit perpetuel n'étoient pas epuisez.").

60 Ibid, address of the Proctor General: ". . . ces arrests on estez pareillement rendus sans les conclusions du remontrant, et n'ont pu vallablement decider que le pretendu non usage de la ville ou de la Gouvernance de Douay doit l'emporter sur l'edit perpetuel, le Procureur General croit étre en droit de soutenir au contraire qu'une pluralité acquise dans l'une des chambres (peut étre d'une seule voix) n'est pas capable d'aneantir l'autorité souveraine dans une ordonnance si respectable et si interessante, si juste et si necessaire au bien public, et bien moins encore sans l'entendre en ses conclusions".

he also argued that the case of 1697 had differed from the present case on essential points: the property was situated not in the city, but in the *gouvernance*, the *fideicommissum* had been established in 1601 (i.e. before the 1611 statute), the court's decision had been reached with a majority of a single vote and the victorious litigant had been dissuaded by a threat of *cassation* proceedings to have the judgment enforced.⁶¹

The Proctor General's conclusion went far beyond the pending case, for he argued that the first two judgments had to be declared void because his office had not been heard, and the third because it had erred. He called upon the court, all three chambers united, to state as a point of law that article 15 of the Perpetual Edict had to apply to all *fideicommissa* "for the past" and that such would also be the rule in future; the present case was to be referred to the second chamber to be tried according to that rule.⁶²

In a separate memorandum, the Proctor General argued that the sovereign courts (referring to the practice of the Flemish Parliament, the Great Council of Mechlin and the Paris Parliament) only admitted the validity of *fideicommissa* which had been duly registered.⁶³ The Proctor General also objected to a document produced in 1723 by the heirs, tending to prove the non-usage of the registration. The document was – one may infer from the Proctor General's counter-argumentation – a manuscript attributed to Dubois d'Hermaville, who had been advocate, judge and president at the Tournai *Parlement*.⁶⁴ On the issue of the non-usage, the manuscript

61 Ibid, 2 and 6. Additional marginal notes gainsay the assertion that the judgment was not enforced and insist that the decision reflected the general practice at the time.

62 The proposal would have been similar to issuing an *arrêt de règlement*. The Proctor General avoided the issue of how such an annulment of judgments rendered several decades earlier would have affected the family properties. That issue did not escape the attention of the author of marginal annotations (probably a judge of the Parliament at the stage of the *cassation*, when the reasons of the Parliament's judgment had to be drafted), who dryly remarked opposite that passage of the Proctor General's conclusion: "Cela ferait un bel effet dans cent et cent familles". The reasoned justification of the Parliament's decision criticised the Proctor General's demand: "Il est vray que M le procureur general s'est fort élevé. Il n'a pas moins pretendu que de faire annuller tous les fideicommis non enregistrez depuis un siecle entier, tous les arrests rendu depuis quarante huit ans en deça et toutes les sentences meme anterieurs qui avoient <eté> confirmées. Le parlement qui est assurément aussy zelé que luy pour faire observer les edits et les declarations du Roy et des roys ses predecesseurs pour lesquels il aura toujours infiniment de respect, a cru qu'en cette occasion le zele de M. le procureur general alloit trop loin qu'il ne le pouvoit pas suivre sans rendre la jurisprudence arbitraire, ce qui est tres pernicious, et sans s'ecarter entierement de l'esprit de ladite declaration et du Grand Roy qui l'avoit donnée."

63 For the Great Council, the Proctor General mentions a decision from 1664. The cases of the Parliament of Paris he refers to were appeals from the Council of Artois (ibid and 8B2/2019).

64 On Antoine-Augustin Dubois d'Hermaville and his reports, see Cazals, *L'arrestographie flamande*, 58–73.

appeared to confirm that it had been admitted by the Parliament in 1692.⁶⁵ The Proctor General cast doubt on the attribution of the manuscript and argued it was not reliable.⁶⁶

In this case, too, French law and legal literature supplement the argumentation primarily based on legal authorities of the Habsburg Netherlands and the practice in Artois and French Flanders. Belgian case law, rulings of the Privy Council in Brussels and legal practice showed that in many parts of the Southern Netherlands the registration of *fideicommissa* had been poorly implemented or neglected. Article 15 of the 1611 Edict, as well as other provisions of that statute, had been inspired by sixteenth-century French royal legislation, and French legal practice and case law could therefore be taken into consideration. In France, too, the implementation of royal legislation requiring the perfection of *fideicommissa* had proved at times an uphill struggle.⁶⁷ The most often cited statutes were the Ordinance of Saint-Germain-en-Laye of 1553 (art 5), and the Ordinance of Moulins of 1566, supplemented by a Declaration of 10 July 1566.⁶⁸ For documenting the practice in other French regions, counsel relied on (printed) law reports and treatises. The few surviving records in this case include references to law reports of the Parliament of Toulouse⁶⁹ and Jean Ricard's treatise on gifts and bequests.⁷⁰

65 The reference may have been to the reported case 119 in Dubois d'Hermaville's report, which was only printed in 1773 (and again in 1777).

66 The marginal annotator in the manuscript of the Proctor General's address (ADN 8B1/2383, 7), remarked "Le recueil de Mr d'Hermaville est en mains de tout le monde". The annotator also contradicted the Proctor General's doubts about the reporting judge in the same case. However, Cazals, *L'arrestographie flamande*, 272, mentions only one manuscript of Dubois d'Hermaville's report.

67 For a survey of the issue towards the end of the Ancien Régime: *Répertoire universel*. . . (1785), ed J-N Guyot, cit, vol XVI, sv "Substitution fidéicommissaire", 483–490.

68 *Recueil général des anciennes lois françaises, depuis l'an 420, jusqu'à la Révolution de 1789*, A F Isambert, A Decrusy and A J L Jourdan, eds, vol XIII, 1546–1559, Paris: Belin-Leprieur, 1828–1829, 314–321 (art 5 of the Ordinance of 3 May 1553 at 316–317); vol XIV, pt 1, *juillet 1559–mai 1574*, 189–212 (art 57 of the Ordinance of February 1566 at 204); *ibid*, 213–217 (on art 57 of the Moulins ordinance: 216). See also, 493–499, the Edict of Blois of June 1581.

69 Iean de Cambolas, *Decisions notables sur diverses questions du droit, jugées par plusieurs arrêts de la Cour de Parlement de Toulouse. Divisées en six livres*, Toulouse: Guillaume-Louis Colomiez & Ierosme Posvel, 1682, lib V, cap 46, 183; Simon d'Olive, Sr du Mesnil, *Questions notables du droit décidées par divers arrêts de la Cour de Parlement de Toulouse*. Nouvelle édition, Toulouse: Jean-Dominique Camusat, 1682, cap 4, 556. Both authors quoted as admitting that the registration requirements were not applied in the jurisdiction of the Toulouse Parliament, at least with regard to creditors.

70 Jean-Marie Ricard, *Traité des donations entre-vifs et testamentaires*, vol II, Paris: Rollin, 1754, 244, 484, 508, 510, 520, discussing the implementation of art 57 of the 1553 Ordinance in various regions, quoting Cambolas and d'Olive as above for Toulouse (and Maynard for a diverging opinion), and the provision is said not to be implemented at the Parliaments of Grenoble and Aix, but applied by the Parliament of Bordeaux.

D. CONCLUSION

In the context of peripheral regions such as the southern parts of Flanders and Hainaut, and the highly symbolic Tournai territory, where during the sixteenth and seventeenth centuries the borders between the French realm and the Habsburg dominions had fluctuated, contrasting influences played a role in moulding those regions' legal culture. A strong emphasis on particular laws and institutions was one strategy for securing a degree of continuity and security as, over time, a city or territory could be tossed from one sovereign to another and back again. In those territories which eventually remained under French rule, the French Crown pursued (as in other – peripheral – territories around France) a sustained yet cautious policy of pressing the legal and judicial system into a more general French mould. Such an influence appears more clearly when French royal institutions and laws were introduced and strengthened in French Flanders. On the other hand, the continuing reliance on particular customary laws, not unlike the attachment to regional and local customs in other parts of the French *pays de coutume*, apparently did not contribute much to the development of a “common customary law” of the realm, but applied occasionally rough techniques of comparative customary law if that suited a reasoning reinforcing the Flemish practitioners' own customary rules on a particular issue. By the beginning of the eighteenth century, an extensive use of commentaries on customs was a common feature of that comparative approach. The connections with Flemish and other Netherlandish customs in the territories which remained under Habsburg rule, but also in the provinces of the Dutch Republic, justified continuing comparative references to those customs and their commentaries. Such comparisons would inevitably weaken any effort towards incorporating Flemish customs into the construct of common French customary law. The use of law reports, both French and Netherlandish (and, by the end of the seventeenth century, to a much lesser extent to reports from other foreign jurisdictions) followed the same pattern, which is also a feature of many French-Flemish law reports from that period. In that context, the subsidiarity of the civil law, much differentiated from one area of the law to another, comes even more strongly to the foreground. By the time the *Parlement de Flandre* was established, the paradox is that within its jurisdiction, *ius commune* was often used as an instrument for reinforcing or consolidating the particular local or regional legal culture. The Parliament and its law reporters played an important part in combining their own particular legal culture with the civil law culture and a practical comparative method focused on customs and statutes from, mainly, France and the Low Countries.