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“In Search of Foreign Influences, other than French, in Nineteenth-Century Belgian Court Decisions”

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[p. 155] Introduction¹

According to Belgian law, judges have to motivate their decisions. This principle was introduced in the *Neuf Départements Réunis*, i.e. the former Southern Netherlands under French occupation, and it became a constitutional² obligation when, in 1831, the Belgian fundamental law was adopted. Although Belgium, from 1830 on, was an independent state, this does not mean that the Belgian juridical system developed independently. It is common knowledge that, in many senses, legal Belgium, in the nineteenth and large part of the twentieth century, was actually nothing more than a province of legal France.³ The short period of the United Kingdom [p. 156] of the Netherlands under the rule of King William I, between 1815 and 1830, has left only a few legal traces: best known exceptions are two short statutes, dated January 10, 1824, on the rights of ‘erfpacht’ (Dutch) / ‘emphythéose’ (French) (some kind of long lease) and ‘opstal’ (Dutch) / ‘droit de superficie’ (French) (a type of right to erect buildings or plants on land owned by another party). Although new ‘Dutch’ codes had

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² Today article 149 of the Belgian Constitution (art. 97 in the original version of 1831).

³ D. Heirbaut, M. Storme, The Belgian legal tradition: from a long quest for legal independence to a longing for dependence?, E. Dirix, Y.-H. Leleu (ed.), The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law. Rapports belges au congrès de l’académie internationale de droit comparé à Utrecht. De Belgische rapporten voor het Congres van de « Académie internationale de droit comparé » te Utrecht, Brussels 2006, p. 3-43; D. Heirbaut, The Belgian Legal Tradition: Does it Exist?, in: H. Bocken, W. De Bondt (ed.), Introduction to Belgian Law, Antwerp 2000, 1 – 22. Especially on the judicial system: D. Heirbaut, The Revolution betrayed: the Evolution of the Judicial System in France, Belgium and the Netherlands since the French Revolution, in A. Uzelac, R. Van Rhee (ed.), Public and Private Justice. Dispute resolution in modern societies, Antwerp 2007, p. 55 – 85; E. Holthöfer, Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert, in: Rechtsprechung. Materialien und Studien. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, VI, Frankfurt am Main 1993, p. 54 – 87; For a general introduction to the Belgian legal system in English, see H. Bocken, W. De Bondt (ed.), Introduction to Belgian Law, Antwerp 2000, and C. Bevernage, Belgium (the legal system), in: M. Sheridan, J. Cameron (ed.), EC Legal Systems, London 1992. For what concerns the legal profession: G. Martyn, Evolutes en revolutes in de Belgische advocatuur, in: D. Heirbaut, X. Rousseaux, K. Velle (ed.), Politieke en sociale geschiedenis in justitie in België van 1830 tot heden. Histoire politique et sociale de la justice en Belgique de 1830 à nos jours, Bruges 2004, p. 227 – 255; G. Martyn, B. Quintelier, L’introduction des barreaux de modèle napoléonien dans les Neuf Départements et leur évolution au XIXe siècle, in: H. Leuwers (ed.), Juges, avocats et notaires de l’espace Franco-Belge (XVIIIe – XIXe siècles). Expériences spécifiques ou partagées, forthcoming.

been elaborated during the fifteen years of union between the Northern and the Southern Dutch provinces, these never came into force. On the other hand, there was not any effort to return to the old ‘proper’ Ancien Régime law either. In 1830, a new state, Belgium, was created. However, it continued to use the French judicial and administrative institutions as well as the Napoleonic codes.

The young Belgian state also continued to use French legal reasoning and interpretative methods, especially in court decisions.⁴ A lot has been written on this ‘French-Belgian’⁵ legal culture.⁶ French was the language of the legal profession and French books and periodicals⁷ were used at the Belgian universities, bars and [p. 157] courts. Things only started to change in the twentieth century. Changes came piecemeal after the First World War, when, for instance, an official commission was established to translate the French codes and laws into Dutch⁸, the official language of the majority of the (Flemish) Belgian citizens. More profound

⁴ Reference materials on ‘French-Belgian’ *ratio decidendi* can be found in the former contribution to the ratio decidendi project, *G. Martyn*, The Judge and the Formal Sources of Law in the Low Countries (19th – 20th Centuries): From ‘Slave’ to ‘Master’?, W.H. Bryson, S. Dauchy (ed.), *Ratio decidendi. Guiding Principles of Judicial Decisions*, in *Comparative Studies in Continental and Anglo-American Legal History*, XXV(1), Berlin 2006, p. 201 – 222. Since the writing of this article can be added: *B. Frydman*, Le sens des lois. Histoire de l’interprétation et la raison juridique, Brussels 2005. *G. De Maeseneire*, Motivering van rechterlijke beslissingen, in *Nieuw Juridisch Weekblad* 2007, p. 194 – 197, concludes that the Belgian Court of Cassation does not easily annul a court decision because of a problem with its motivation. Whereas most authors describe the methods of interpretation and motivation in civil and administrative matters, *B. Maes*, De motiveringsverplichting van de rechter, Antwerp 1990, only deals with the motivation of criminal decisions.

⁵ Even some French authors referred to Belgian doctrine and case law when elaborating on the proper French legislation, e.g. *R. Saleilles*, *Les accidents du travail et la responsabilité civile*, Paris 1897.

⁶ For the concept of ‘legal culture’ is relied on *M. Van Hoecke*, *M. Warrington*, Mark, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, in *The International and Comparative Law Quarterly* 1998, p. 495 – 536; for Belgium elaborated in *M. Van Hoecke*, *M. Elst*, Basic features of the legal system, in *Bocken/De Bondt*, Introduction, p. 23 – 48. If France and Belgium share the same ‘legal culture’, it is because they share common (unconscious) premises on three levels: the level of epistemology (mainly the question what sources create law), the one of methodology (a common set of interpretation rules and techniques and of argumentation theory) and the one of ideology (a common world view among jurists giving content to vague concepts like good faith, reasonableness, abuse of right, etc.). On the French character of Belgian private law: *D. Heirbaut*, L’émancipation tardive d’une pupille de la nation française. L’histoire du droit belge aux 19^{ème} et 20^{ème} siècles, in *A. Wijffels* (ed.), *Le Code civil entre ius commune et droit civil européen*, Brussels 2005, p. 611 – 642.

⁷ It is important to remark at this point, is that the Belgian nineteenth century legislation did not protect the copyright of foreign authors. Many French manuals were copied and cheaply sold on the Belgian market, *B. Dölemeyer*, Urheber- und Verlagsrecht, in *H. Coing* (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, III/3, München 1986, p. 3973 – 3976. This was not only the fact for books, but also for articles in periodicals. The *Revue des revues de droit* (1838 – 1852) published a selection of French articles selected from several French periodicals. For an overview of ‘Belgian French’ publications, see *Ch. Verbeke*, Belgian law: Bibliographic Guide to Reference Materials, 1803-1993, in *International Journal of Legal Information* 1991, p. 133 – 154; *H. Dopp*, La contrefaçon des livres français en Belgique, 1830 – 1852, Leuven 1932.

⁸ *G. Martyn*, Het Burgerlijk Wetboek en de evolutie van de ‘Vlaamse’ rechtstaal in België, in *D. Heirbaut*, *G. Martyn* (ed.), *Napoleons nalatenschap. Un héritage Napoléonien. Tweehonderd jaar Burgerlijk Wetboek in België. Bicentenaire du Code civil en Belgique*, Mechelen 2005, p. 271 – 300; *G. Van Dievoet*, Het Nederlands als wetstaal in België in de negentiende en de twintigste eeuw, in *Pro Memoria* 2003, p. 96 – 118; *G. Van Dievoet*, Historische beschouwingen over het Nederlands als taal voor de wetgeving in onze gewesten, in *Een boek van hen ... voor ons. Lustrumboek Jura Falconis*, Leuven 1974, p. 177 – 187; *H. Van Goethem*, De Nederlandse rechtstaal in België in de negentiende eeuw, in *F. Stevens*, *D. Van Den Auweele* (ed.), ‘Hout voet bij stuk.’ *Xenia iuris historiae G. van Dievoet oblata*, Leuven 1990, p. 587 – 599; *H. Van Goethem*, De taaltoestanden in het Vlaams-Belgisch gerecht, 1795 – 1935, Brussels 1990.

alterations followed after the Second World War and this, to a large extent, due to the influence of the European⁹ unification process. Meanwhile, Dutch had been introduced in university teaching, and it is my hypothesis that this educational aspect has been of paramount interest for the growing influence of foreign law, other than French. I shall come back to this point in my final conclusion.

I. Research on published court decisions

Based on the continuous use of the Napoleonic codes and the references to French case law and doctrine, most authors agree on the fact that nineteenth-century Belgian legal culture was French. Nevertheless, little research has been done on the actual use of French law, and a fortiori of other foreign law, by the Belgian [p. 158] courts. There are almost no publications on the factual use of the different sources of law by the judges.¹⁰ I have tried to fill up a little bit of this gap by sampling some five hundred court decisions.

Before drawing some conclusions from this research, some remarks have to be made on the research method used. I have only looked at published court decisions, and did not make use of judicial archives. This leads to, at least, two dangers of interpreting the data. First, one must always ask oneself why a certain court decision is published: is it because it is representative for what courts normally do, or is it, quite on the contrary, precisely because it is an odd decision? Sometimes, a note under the decision is explicit on this point, but this is only very rarely the case. Another difficulty with these published materials is that, again with only very rare exceptions, only the argumentation (often not complete) and decision of the court itself are given, not the pleadings of the parties. Although a diligent judge answers the arguments of the parties, when the court does not use arguments of foreign law, one cannot be certain that the parties did not use arguments based on foreign law.

Second, as matters such as criminal and fiscal law are very legalistic, obliging the judge to apply the legal rule in a strict sense, it is very doubtful whether a judge should also apply arguments of foreign law in these kind of cases. Other branches of public law are hardly elaborated in the nineteenth century. The administrative court of the Council of State was only installed in 1946 and the Constitutional Court, actually its predecessor the Court of Arbitration, was a creation of the 1980s, as a consequence of the 'defederalisation' of Belgium.¹¹ New branches like environmental, social security, medicine or sports law are of

⁹ Actually the 'European' process is two processes. On the one hand there are the European Communities and the European Union, with their primary treaty law and secondary statutory law, and on the other hand there is the fundamental rights approach of the European Convention for the Protection of Human Rights, secured by the Strasbourg European Court of Human Rights. On the first influences, see, e.g., *J. Wouters, D. Van Eeckhoutte* (ed.), *Doorwerking van internationaal recht in de Belgische rechtsorde*, Antwerp 2006; on the second influences, *G. Maes*, *De doorwerking van verdragsrechtelijk beschermde grondrechten in de Belgische rechtspraak*, in *Internationale aspecten in de verschillende taken van het recht*, Brussels 2005, p. 63 – 126. See also *M. Kiikerin*, *Comparative legal reasoning and European law*, in *Law and philosophy library*, L, Dordrecht 2001.

¹⁰ One important exception is *E. Van Dievoet*, *Het burgerlijk recht in België en in Nederland van 1800 tot 1940*. *De rechtsbronnen*, Antwerp 1943.

¹¹ In the decisions of these 'new' courts, the reasoning is stated more clearly than in the other old supreme court, the Court of Cassation. Part of the explanation for this difference is in the fact that being created more than a

course undiscovered in the oldest investigated periods. For this reasons, court decisions were examined for three issues of private law. The first topic is the real right of ‘servitude’ (easement or charge on real estate), ruled by the Napoleonic Code (today art. 637 – 710bis), almost unchanged at this point since its introduction in 1804; this means, of course, that one might expect an important influence of French case law and doctrine. A second topic is the right of long lease, aforementioned, introduced only in the post- and even anti-French period of the United Kingdom of the Netherlands. Does this bring along a possible influence of Dutch law? A third topic is neighbour nuisance (and abuse of rights¹²), a problem not legally regulated at all, [p. 159] but created by Belgian jurisprudence and, in the first place, by the Belgian Court of Cassation.¹³ Did this court get any inspiration from abroad?

For each of these topics, I searched for all relevant cases in the legal periodicals¹⁴, using the list of headwords at the end of each year. The most important source here is the *Pasicrisie*, a yearly collection of sentences. Until 1998 there were four volumes a year, containing case law of the Court of Cassation (I)¹⁵, of the courts of appeal (II), of the courts of first instance (III), and of the Council of State, as well as of the justices of the peace (IV).¹⁶ The *Pasicrisie* only publishes case law. On the other hand, there are several periodicals publishing doctrine as well as case law. I also sampled *La Belgique Judiciaire*¹⁷ (starting 1842) and the *Journal des Tribunaux* (starting 1881), two Belgian periodicals published in French. *Rechtskundig tijdschrift voor (Vlaamsch) België* (only starting 1897), the only nineteenth-century Flemish

century later, the French influence has been diminished. On the other hand, especially for what concerns the Constitutional Court, the aforementioned influence of the Strasbourg Human Rights Court is paramount.

¹² Abuse of right is what the court of appeal of Liège in its decision of February 9th 1888 (*Pasicrisie*, 1888, II, p. 154) is referring to, without, at that moment, a general principle on the matter being accepted: “Commet un acte illicite et peut être passible de dommages-intérêts celui qui n’use de son droit que pour nuire à un tiers, sans aucun profit personnel et en violation du droit de ce tiers.”

¹³ *W. van Gerven*, Honderdvijftig jaar rechtsleven: het Belgisch burgerlijk recht, in E. Spanoghe, R. Feenstra (ed.), Honderdvijftig jaar rechtsleven in België en Nederland 1830 – 1980. Preadviezen uitgebracht voor een colloquium georganiseerd door de juridische faculteiten van de universiteiten van Gent en Leiden, Gent, 5 – 7 november 1980, Leiden 1981, p. 35 – 52; *S. Stijns, H. Vuye*, Zakenrecht. 4. Burenhinder, in *Beginselen van Belgisch privaatrecht*, V, Antwerp, 2000, especially the pages 1 to 119 for the historical part.

¹⁴ “The history of law reviews can be seen as a part of the history of science in general, or of legal science, in particular. However, in Belgium they serve very practical goals, the publication of cases”, *D. Heirbaut*, Law reviews in Belgium (1763 – 2004): instruments of legal practice and linguistic conflicts, in M. Stolleis, Th. Simon (ed.), *Juristische Zeitschriften in Europa*, Frankfurt am Main 2006, p. 343 – 367. Heirbaut talks about “the French pattern: the law review as the instrument of the practitioner”, again a feature of the ‘Belgian-French’ legal culture.

¹⁵ Compared to today’s judicial activity, there are few cassation decisions relating to civil matters in the nineteenth century, *Van Dievoet*, *De rechtsbronnen*, p. 307.

¹⁶ While in France the justices of the peace were suppressed in 1958, in Belgium they still exist and their competences grew larger, *S. Dauchy, S. Humbert, J.-P. Royer* (ed.), *Le juge de paix. Actes de la table ronde tenue à Lille le 22 mars 1992*, Villeneuve d’Asq 1995; *J.-P. Nandrin*, Justice de conciliation, proximité et carte judiciaire de 1830 à nos jours. Une comparaison franco-belge, in *Revue interdisciplinaire d’études juridiques* 1997, p. 85 – 102; *J.-P. Nandrin*, La justice de paix à l’aube de l’indépendance de la Belgique (1832 – 1848). La professionnalisation d’une fonction judiciaire, Brussels 1998; *K. Velle*, *Het Vredegerecht en de Politie rechtbanken in België (1795 – 1995)*. Organisatie, bevoegdheden en archiefvorming, Brussels 1995.

¹⁷ Although the subtitle of this review was ‘Gazette des tribunaux belges et étrangers’, mainly Belgian and French cases were published. The editors claimed they would also publish case law from the Netherlands and Germany, but the foreign cases actually were limited to Swiss, Italian and Luxemburg, namely three countries where the French codes were used.

periodical¹⁸, was of no use, as it only published decisions of lower criminal courts. There was no rule, at that time, obliging parties or judges to use Dutch in the lower and higher civil courts. In the court decisions published in these periodicals and addressing one of the subjects mentioned, I sought refer-[p. 160]ences to foreign law. It might, of course, be possible that a judge was implicitly influenced by foreign law, but this is impossible to prove. On this very point, it must be noted that, “following the French tradition, the reasons stated in Belgian judicial decisions are rather limited”.¹⁹

Finally, it has to be pointed out that, if I sought explicit references to foreign law in Belgian cases, these cases are really ‘national’. This excludes, on the one hand, cases of international private law, where foreign law is anyhow applicable, and, on the other hand, ‘old’ cases, dating from before 1830, which by a correct temporal application of the law, have to be solved by old rules. This ‘old’ law very often is customary law or, in case of absence of a customary rule, Roman law. At this last point a very interesting evolution has been described by Georges Macours.²⁰ He has discovered that, during the nineteenth century, Roman law was very often quoted in court decisions, most of the time as some kind of doctrinal authority and linked with an argument of equity. If, on the other hand, old law had to be applied, because of the principle of non retroactivity of the Napoleonic Code, then Roman law comes into the picture, because most codified customs declare that Roman law is to be used for all problems not handled by the custom itself. What Macours discovered is that in the first decades of the Belgian independence, Roman law played this subsidiary role immediately, whereas, after the middle of the nineteenth century, it degraded to a sub-subsidiary system, applied only when the common general custom of the region, as a subsidiary system, did not supply any solution. To a large extent, this evolution is demonstrated by the fact that at university a new course on the old customary law was introduced in 1835²¹ and that some legal history writings, especially the magnum opus of Defacqz²², drew the attention of the jurists to the existence of some kind of old ‘national’ law.²³ In the same period, the Royal Commission for the edition of the old laws and ordi-[p. 163]nances of Belgium, in which several higher magistrates played an important role, was founded. Let us not forget that at that very moment the young independent state of Belgium was looking for its own identity!

¹⁸ *Heirbaut*, Law reviews, p. 356.

¹⁹ *Van Hoecke, Elst*, Basic features, p. 28. “Giving reasons for a judgment is considered to be a formality, rather than an attempt to persuade the losing party that (s)he was wrong (...) Argumentation in the first place aims at linking the decision with the authority of the legislator”, *B. Bouckaert*, Hoe gemotiveerd is Cassatie? Pleidooi voor een waarachtig precedentenhof en een hernieuwde motiveringscultuur, in *Thorbeckecolleges*, XXI, Antwerp 1997, p. 3. The supreme court never refers to doctrine or precedents, *eod.*, p. 23-24.

²⁰ *G. Macours*, De visie van de Belgische 19de-eeuwse rechtspraak op de subsidiare rol van het oude Romeinse recht. Een verkennend onderzoek, in *Stevens, Van Den Auweele*, ‘Houd voet bij stuk’, p. 253 – 289.

²¹ *R. Versteegen*, L’enseignement du droit en Belgique. Evolution de la législation aux XIX^e et XX^e siècle, in *Stevens, Van Den Auweele*, ‘Hout voet bij stuk’, p. 182. Compare this with the contrary position of the old ‘Flemish’ law in the jurisdiction of the Parlement de Flandre after the introduction of the 1679 decree of Louis XIV on the compulsory teaching of French law in his whole realm, described by Serge Dauchy and Véronique Demars-Sion in their contribution to this book.

²² *E. Defacqz*, *Ancien droit Belgique*, Brussels 1946.

²³ It is this same influence of legal teaching, I have also met in my own investigation; “D’un monopole du droit romain à une suprématie contestée du droit civil”, *Versteegen*, *L’enseignement*, p. 176 – 183.

II. References to foreign law, other than French, are non-existent

A first conclusion after having looked into several hundreds of court decisions is that, regardless the subject of the decision and regardless the fact that this subject might be regulated by the (Napoleonic) civil code, any reference to ‘foreign’ law, if existing, is a reference to French law.

There is, however, quite an evolution in this use of French law.²⁴ In the first years of Belgian independence, judges were rather curt in motivating their decisions. From the 1850s onwards, court decisions were more broadly motivated, with many references to the preparatory works, for instance, but there was not yet any influence of the upcoming Exegetical School. The influence of the Exegetical School may already be felt in the pleadings of the parties, but not yet among the judges of the 1830s to 1850s.²⁵ If the court felt the need to link its decision to tradition, references were made to Roman law²⁶, but above all to French case law and French authors, especially to Merlin de Douai.²⁷

In the last decades of the nineteenth century, the influence of the Exegetical school became more important, for example advocates and judges tried to avoid the use of general principles, like good faith and equity. The manual of François Laurent, Belgium’s shining star of the Exegetical School, was on every advocate and magistrate’s desk. Still, the most cited authors were Pothier, Merlin and Dalloz. In short, the influence of French doctrine remained paramount. Nevertheless, in [p. 162] decisions of the Court of Cassation, no explicit reference was made to other sources than the Belgian legislation.²⁸ Judgments of lower courts on the other hand cited French and Belgian case law and doctrine, although also in a rather scarce quantity. Anyhow, if the edition committee of the *Pasicrisie* can be relied on, Belgian judges were inspired by French case law.

²⁴ At this point I fully confirm the findings of *Van Dievoet*, *De rechtsbronnen*, published in the 1940s.

²⁵ *D. Heirbaut*, *Les juges belges face au Code civil aux 19^{ème} et 20^{ème} siècles: l’exemple des troubles de voisinage*, in *B. Dölemeyer, H. Mohnhaupt, A. Somma* (ed.), *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs*, Frankfurt am Main 2006, p. 263.

²⁶ This means that I cannot agree with *Heirbaut, Storme*, *The Belgian Legal Tradition*, p. 11, when they write: “around 1830, in a second generation, things changed. The old law was still quoted, but it had lost its prestige. In the next generation, from the 1860s, references to the old law disappear almost completely.” Also *Van Dievoet*, *De rechtsbronnen*, p. 297, pointed out that in the 1830’s, with still some elder judges educated in the Ancien Régime, references to the Napoleonic codes were illuminated with comparisons to the proper old legal order.

²⁷ *Van Dievoet*, *De rechtsbronnen*, p. 309; on Merlin and his works, see *H. Leuwers*, *Merlin de Douai (1754 – 1838). Un juriste en politique*, Paris 1996 and *J.-J. Clère*, *Merlin Philippe-Antoine, dit Merlin de Douai*, in *P. Arabeyre, J.-L. Halpérin, J. Krynen* (ed.), *Dictionnaire historique des juristes français, XII^e – XX^e siècle*, Paris 2007, p. 559-561.

²⁸ Only in his third period of investigation, 1931 – 35, *Van Dievoet*, *De rechtsbronnen*, p. 341, found out that judges give more references to former decisions and doctrine.

Although French law was indeed quoted frequently, not all French interpretations were accepted.²⁹ Regarding ‘servitudes’, charges on real estate, the Belgian judges seemed to apply the Napoleonic rules more freely than their French colleagues, especially by trying to rely as much as possible on old customary rules. The right to step on a neighbour’s land to use a ladder to work on one’s own house, for instance, is an old customary rule, not mentioned in the *Code civil*. According to French jurisprudence it was abolished, but in Belgium, it survives. As the inspiration for this matter is found in the proper national legal history and not one reference to foreign law was made in seventy years (1830 – 1900) of published case law, one must conclude that, concerning ‘servitudes’, foreign influences, other than French, were non-existent in the motivation of the nineteenth-century judges.

Let us then turn to the subject of neighbour nuisance. The actual theory of the balance of property rights was ‘eventually’ established, only in 1960, by the Belgian Court of Cassation. In the nineteenth century, the Belgian supreme court, first tried to solve the problem of the hiatus in the *Code civil* by continuing to apply the Ancien Régime law. This was, on the one hand, a variety of customary rules on neighbour rights and duties, and on the other, mainly the general prohibition of ‘*immissiones*’, derived from the Digest rule D.8.5.8.5: *in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat*.³⁰ The rule was regarded as a general principle and acceptable as argument in court as some kind of written ratio.

[p. 163] In the middle of the nineteenth century, judges did their best to frame this ancient law within the *Code civil* framework. In the judge’s view, it was not prohibited to use this old law, because, although not explicitly mentioned in the Napoleonic code, it was in conformity with it. More exactly, the Roman law prohibition of *immissiones* was accepted to be in harmony with articles 544 and 1382.³¹ It is highly likely that the attention given to the code may be seen as an expression of the growing influence of the Exegetical School.

After the 1860’s, explicit references to Roman law became very scarce and, if there were still any reference to older authors, this was commonly nothing more than a single reference to the French author Pothier. Courts sufficed by referring to their own and especially Cassation case

²⁹ Van Dievoet, De rechtsbronnen, p. 377-391. In some cases identical legal provisions are interpreted divergently in France and Belgium, like the problem of strict liability (art. 1384 Code civil) or that of the seller’s warranty for hidden defects (art. 1648 Cc), ULB Faculté de droit (ed.), Obligations en droit français et en droit belge. Convergences et divergences, Brussels 1993.

³⁰ Aristo cerellio vitali respondit non putare se ex taberna casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit. idemque ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. alfenum denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. dicit igitur aristo eum, qui tabernam casiariam a minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere. ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum videtur aristo probare. sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti.

³¹ Heirbaut, Les juges belges, p. 263.

law. Even contemporary authors were not cited. References to foreign legal systems were completely non-existent.³²

For all three topics investigated, we clearly can conclude that there was a complete lack of non-French foreign influence on nineteenth-century Belgian court decisions. Any other foreign influences cannot be found.

III. Not only case law, but a general ‘legal culture’

Many other sources confirm the trend revealed in the published case law. In their well-known manual for lawyers, Duchaine and Picard³³, for instance, give advice on what young lawyers should learn: general repertories like the French Dalloz (adapted for Belgium), Belgian series of case law and “*après avoir épuisé la jurisprudence belge, on passe à la jurisprudence française*”.³⁴ And even in the 1990s, an elementary bibliographical guide to Belgian law, still refers to “French classical manuals of civil law, still useful in the Belgian legal system”.³⁵ ‘Genetically’ [p. 164] speaking, references to French law were of course very normal in Belgium, given the paramount influence of the French legislation and organization introduced between 1795 and 1815. But how can one explain the kind of fear Belgian nineteenth-century judges had for taking elements of foreign law into account when motivating their decisions?

As I mentioned earlier, it seems that the main reason has to be found in legal education.³⁶ The judicial magistrates in the 1830 newborn state of Belgium, had, with only some rare exceptions, all been taught the French Napoleonic legislation in the Brussels law school, established in 1806. During the nineteenth century the prominent role of Roman law in legal education was substituted by the civil law as laid down in the Napoleonic monument of 1804. The Exegetical School considered it to be an exclusive source of law.

Concerning nineteenth-century legal education, it must be stressed that there was absolutely no place for (an introduction to) comparative law in the university program. The proposal to

³² At the end of the nineteenth century, Belgian case law on neighbour nuisance really lacked any legal basis, *Heirbaut*, *Les juges belges*. It was from the 1930s onwards that, in interaction between doctrine and courts, the ‘balance theory’ was constructed, to be finally approved by the Court of cassation in 1960. On this cooperation, see *E. Cerexhe*, *La mission des revues juridiques. Réflexions sur le rôle de la jurisprudence et de la doctrine dans l’évolution du droit*, in *Revue régionale de droit* 1992, p. 5 – 7.

³³ Edmond Picard has rather pompously been called ‘le colosse du barreau belge’ and his importance, as a founding father of legal periodicals and of a huge encyclopaedia of Belgian law, as well as a practising ‘avocat’ and member of parliament, can indeed not be underestimated, *B. Coppein*, *Edmond Picard (1836 – 1924), avocat bruxellois et belge par excellence de la deuxième moitié du XIX^e siècle*, in *V. Bernaudeau, J.-P. Nandrin, B. Rochet, X. Rousseaux, A. Tixhon (ed.), Les praticiens du droit du Moyen Âge à l’époque contemporaine. Approches prosopographiques (Belgique, Canada, France, Italie, Prusse)*, Rennes 2008, p. 225 – 237.

³⁴ *G. Duchaine, E. Picard*, *Manuel pratique de la profession d’avocat en Belgique*, Brussels 1869, p. 366, n° 77.

³⁵ *Ch. Malliet*, *Elementaire bibliografie Belgisch recht*, Gent 1995, p. 19.

³⁶ *Verstegen*, *L’enseignement*, p. 149 – 192; *F. Stevens*, *Het rechtsonderwijs in België in de 19e eeuw*, in *J.Th. De Smidt (ed.), Handelingen IXe Nederlands-Belgisch Rechtshistorisch Congres “Rondom Feenstra”*, Leiden 1986, p. 57 – 71.

create a course of comparative law had been debated in 1889, but was rejected by parliament.³⁷

And there are more reasons. If foreign influences had a chance, it was to a great extent via comparing authors. In the nineteenth century though, not only the role of foreign law, but also the influence of doctrine as a whole, was very weak. In his thesis on the Exegetical School, Bouckaert concludes that there was some kind of “divorce” between doctrine and case law.³⁸

At this point, the exemplary role of the supreme court, the *Cour de Cassation*³⁹, must be underlined. Its decisions were very briefly motivated and only refer to [p. 165] legislation. If the Court did not refer to foreign law in its decisions, as today, it often does so in its annual reports, where the public ministry of the court dedicates a chapter to proposals *de lege ferenda*. To understand the (briefly motivated) decisions better, one should also always consult the more detailed advices of the proctor- or advocate-general. The, often very extensive, conclusions of the public ministry contain many references to Belgian and French case law and doctrine.⁴⁰

Moreover, there was a strong general influence of French culture outside the legal and judicial environment. The nineteenth-century Belgian elite is French-speaking and even Francophile. Jurists, especially advocates and magistrates were part of this elite and regarded the French culture as the sovereign one. Let us not forget that in the nineteenth century the struggle for self-determination of the Flemish people was just starting. It was only through article 49 of the law of April 10, 1890, sixty years after the independence, that certain categories of magistrates were supposed to have some rudimentary knowledge of the Dutch language. And it was also just in the last decade of the nineteenth century that the first Flemish law review saw the light of day.

³⁷ *Verstegen*, L'enseignement, p. 180. Was there, anyhow, any need of foreign inspiration, other than French? It is to be admitted that the aspects of private law investigated are a rather stable part of the legal order. Faced with the problems of industrialization, social law for instance was challenged to be much more creative, although also in this matter explicit references to foreign sources are very scarce.

³⁸ *B. Bouckaert*, De exegetische school. Een kritische studie van de rechtsbronnen- en interpretatieleer bij de 19^{de} eeuwse commentatoren van de Code Civil, Antwerp 1981, p. 365 – 372.

³⁹ Although the Belgian Court of Cassation was created, to French model, in 1832, it was only in 1954 that the proceeding of decision by the general assembly (in order to avoid antagonisms in the decisions of the different chambers of the court, especially between the Dutch and the French speaking ones) was introduced. *J. Du Jardin*, Voltallige zittingen voor een eenduidige interpretatie van het recht, in *Rechtskundig Weekblad* 2001 – 02, p. 649 – 676, calls it the ‘meta-legislative’ power of the court in case of hiatus or vagueness of the law. The abovementioned decisions of 1960 on neighbour nuisance were taken by the general assembly. Similar to the Court of Cassation, the Council of State, the highest administrative court of the country, has a general assembly to decide controversies between the interpretations of the Dutch and French chambers, e.g. *R. Houben*, De verplichte vermelding van de beroepsmogelijkheden, vormvoorschriften en termijnen bij de Raad van State (art. 19, tweede lid, R.v.St.-Wet), in *Rechtskundig Weekblad* 2005 – 06, p. 147 – 150; *J. Goris*, De intrekking van een onwettige rechtsverlenende bestuurshandeling, in: *Rechtskundig Weekblad* 2005 – 06, p. 665 – 666.

⁴⁰ And only very scarcely also references to other foreign law; several examples in *J. Du Jardin*, Voltallige zittingen. On the creative role of the Court of cassation, see also *E. Krings*, Aspecten van de bijdrage van het Hof van Cassatie tot de rechtsvorming, in *Rechtskundig Weekblad* 1990 – 91, p. 313 – 325 and p. 345 – 359; *R. Janssens*, Het Hof van Cassatie van België. Enkele hoofdmomenten van zijn ontwikkeling, in: *Tijdschrift voor Rechtsgeschiedenis* 1977, p. 95 – 116.

Finally, one must remember that, until the end of the nineteenth century, there was no real theory of the formal sources of law. National legislation was to be applied, that was all. Could a judge refer to foreign law when he was confronted with a hiatus in national law? For the nineteenth century this seems certainly not to have been the case (keeping well in mind that, for the Belgian jurist, French law was not foreign). Even in the French system it is admitted that the law can not foresee every material problem in detail. Very often, referring to the *discours préliminaire* of Portalis, the existence of a hiatus in the law was admitted.⁴¹ To fill it, one can refer to customs and usages, to case law, to writings of scholars, or to legal [p. 166] maxims.⁴² Before the Second World War, Belgian scholars never admitted that foreign (other than French) law could be instructive.⁴³

IV. Change after the Second World War

After the War everything changes drastically,⁴⁴ especially due to the European (and Benelux) context. Lots of ‘foreign’ rules were first of all introduced from a supranational or international level but with direct effect on the member states’ citizens. The globalization of trade and everyday life brought along many ‘clashes’ with foreign legal systems and these underlined the need to get to know the other systems better. After the Second World War, thanks to specifically the Belgian-American Educational Foundation, many scholars studied for some period abroad. From the 1980s onwards, the exchange of law students has increased enormously thanks to the European Union Erasmus and Socrates programs.

Today, looking over the hedge has become a normal thing to do for a jurist. Both scholars and legislators seem to be very open to influences from abroad. Magistrates still, however, seem to be afraid to refer explicitly to foreign sources. They certainly never quote them as a direct source, neither as a guiding principle nor as *ratio decidendi*. And if courts do refer to foreign law, it is still, certainly in matters of private law, to the French system at first.⁴⁵ Even the recently created Constitutional Court, although there is some international tradition in the motivation of constitutional findings, is not fond of referring to other constitutional or

⁴¹ Ch. Huberlant, *Les mécanismes institués pour combler les lacunes de la loi*, in Ch. Perelman (ed.), *Le problème des lacunes en droit*, Brussels 1968, p. 31 – 66, especially 53; P. Foriers, *Les lacunes du droit*, *eod.*, p. 9 – 29. M. Somerhausen, *La motivation et la mission normative du juge*, in Ch. Perelman, P. Foriers (ed.), *La motivation des décisions de justice*, Brussels 1978, p. 23 – 36, investigated ‘gap-filling’ decisions by the Court of Cassation and the Council of State. Techniques used were: analogy with another legal rule, considerations of equity, adaptation to new social needs, common experience, but no foreign examples. R. Legros, *Considérations sur les motifs*, *eod.*, p. 7 – 22, enumerates (page 12): national law, preparatory works, doctrine, customary law, case law, tradition, morality, natural law, science, logic ... but no foreign examples either.

⁴² H. De Page, *Traité élémentaire de droit civil*, I, Brussels 1963, n° 214.

⁴³ Neither are resolute changes in the interpretation of a rule by the supreme court explicitly motivated by reference to foreign law, A. Vanwelkenhuyzen, *La motivation des revirements de jurisprudence*, in Perelman, Foriers, *La motivation*, p. 251 – 286.

⁴⁴ On influence of foreign law in Belgian case law in the twentieth century, see Heirbaut, Storme, *The Belgian Legal Tradition*, p. 27 – 28.

⁴⁵ E.g. the advice of the public ministry of the Court of Cassation in the case that led to the decision of May 25, 2007, about the appreciation of a conditional suspension clause, contains several references to the French Court of Cassation, in *Rechtskundig Weekblad*, 2007 – 08, p. 1034 – 1038.

international human rights courts.⁴⁶ However, Flemish courts – i.e. Belgian courts situated in the Flemish speaking region or in Brussels, the bilingual capital, and using Dutch in their procedures – seem to be more receptive to foreign inspiration. Due to the language, Dutch and, to a lesser extent, German law is referred to. Dutch legal [p. 167] figures like ‘*rechtsverwerking*’⁴⁷ or ‘*marginale toetsing*’⁴⁸ are used in Flemish court decisions. They are not at all, or at least to a much lesser extent, used by French speaking Belgian judges. This is an indication of the fact that the ‘Belgian’ legal culture is being split up into a Flemish and a French one.⁴⁹ The same statutory provisions are interpreted differently in the French speaking South than in the Flemish (officially ‘Dutch’) speaking North. Just one picturesque example: graffiti painting on the walls of private houses is punished by Flemish judges under a penal statute on ‘damage to fences’, whereas most Walloon judges do not construe this rule in the same broad sense, and thus, do not condemn for the same offence.

Conclusion

“If anything, the attitude of Belgian law practitioners towards foreign law is just one more proof of their pragmatism. Foreign law was at first dominant because there was not enough Belgian law to fall back on. This is clear for French law in the nineteenth century, but also for Dutch law in Flanders. As soon as more Belgian material became available foreign law was relegated to the sidelines. What foreign law is used may be determined by political factors, but most of all by language and availability. Belgian lawyers like to read what they can find in their own country and in a language they understand, French in the past, French or Dutch nowadays. So far their attitude is determined less by a ‘national legal tradition’, than by a pragmatic laziness, though it would be better to say that this is their national legal tradition.”⁵⁰ “For law practitioners, foreign law exists only in so far as it can be accessed in the publications of Belgian authors”.⁵¹ If this is still the case at the beginning of the twenty-first century, how much more is it true for the nineteenth, when the young Belgian state had to build up its own national system on French foundations!

⁴⁶ S. Sottiaux, Arbitragehof moet vaker over grens kijken, in De Juristenkrant, n° 141, January 17, 2007. In a reaction to this article, a professor constitutional law, confirmed that there are no explicit references to foreign decisions, but that there is quite some indirect inspiration. The fact that no explicit references are made is explained by the ‘style’ of motivation, that either does not refer tot doctrine, but only to the constitution, the legislation and case law. All this is still a result of the French influence, K. Lemmens, Arbitragehof kijkt wel over de grens, in De Juristenkrant, n° 142, January 31, 2007.

⁴⁷ The general principle of ‘*rechtsverwerking*’ holds that after a period of having given the impression to the debtor of no longer insisting on being paid, the creditor is no longer allowed to start a judicial action, R. Tjittes, *Rechtsverwerking*, Deventer 2007.

⁴⁸ I.e. marginal control, Van Hoecke, *Elst*, Basic features, p. 24.

⁴⁹ Van Hoecke, *Elst*, Basic features, p. 23.

⁵⁰ Heirbaut, Storme, *The Belgian Legal Tradition*, p. 19.

⁵¹ Heirbaut, Storme, *The Belgian Legal Tradition*, p. 18.