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Title Exploring the law in medieval minds: the duty of the legal historian to write books of non-written law

Authors Dirk Heirbaut

In: Journal, Volume (Issue), pages, year.

Making Legal History, 2012

Optional: link to the article

To refer to or to cite this work, please use the citation to the published version:

Authors (year). Title. *journal Volume(Issue)* page-page. Doi

Exploring the law in medieval minds: the duty of the legal historian to write the books of non-written law

D. Heirbaut (University of Ghent)

A good start for any discussion on the methodology of legal history is Peter Landau's statement that there is no 'methodological king's road' for research in the field of legal history.¹ There may be colleagues who do not agree, but most legal historians will admit that several approaches are possible and that this methodological diversity is a strength, not a weakness. However, it also means that it is impossible to deal with all the methodologies of legal history² and that one has to limit oneself to a few. The choices one makes depend of one's personal interests and training, the relevant source material and so on. The following will present just one of the many possibilities and it should be understood here that there is no claim at all that this is the best or even worse, the only possible approach. Thinking differently would even be unwise, as, for reasons which will be made clear, what is sketched below is only valid for one type of legal history.

The growing importance of the study of medieval customary law

The success story of legal history in the recent past has been the study of the *ius commune* because it can be a model for the new common law of Europe we are now creating.³ Some enthusiasts reduced the argument to something like 'Europe had one law in the past, Roman law, and it will have one law once again, thus it is a good idea to let the old law serve as a source of inspiration for the new one'. This distorts the historical reality, as there was never one law for Europe, in the sense of one set of legal rules which was applied allover the continent. Lawyers just had a common toolbox, which included one language, Latin, common sources, the *Corpus iuris*, shared authoritative works, terminology, methodology and so on.⁴ Seeing that the focus of the creators of the new common law of Europe has now shifted to developing a 'common frame of

I would like to thank Prof. em. dr. R. van Caenegem, P. Carson and G. Sinnaeve, B. Van Dael and F. Dhondt who have read the draft of this text, for their comments. Needless to say any remaining errors are entirely my own.

¹ P. Landau, 'Bemerkungen zur Methode der Rechtsgeschichte', *Zeitschrift für neuere Rechtsgeschichte*, 2 (1980), 118.

² One can, of course, start by reading the other articles in this book.

³ About this, see R. Zimmermann, 'The present state of European private law', *American journal of comparative law*, 57 (2009), 479-512.

⁴ Cf. A. Wijffels, 'European private law: a new software-package for an outdated operating system?', in M. Van Hoecke and F. Ost (eds.), *The harmonisation of European private law* (Oxford: Hart, 2000), 101-116.

reference⁵ it seems that some specialists of current law now correctly understand the nature of the old *ius commune*.

However, there is another mistaken interpretation of the old *ius commune*, which also has great implications for the new common law of Europe, as many lawyers and even legal historians overestimate the European character of the *ius commune*. In the Middle Ages the *ius commune* was only European if one takes its canon law component into account, because the use of Roman law was mainly a Mediterranean phenomenon. This does not mean that one cannot find specialists of Roman law or references to it outside the Mediterranean, but their role remained limited compared to indigenous law and even when local customary law became more sophisticated this was not always or not solely due to the example of the *ius commune*, but more to a general development in society.⁶ In fact, the same mechanism was at work in the Mediterranean. The existing law remained in place, but it received an upgrade, as vulgar Roman law developed into the learned *ius commune*. In short, the Mediterranean opted for the *ius commune*, because it was already using its basic version. The story changes around 1500 because then several countries in Europe adopted the *ius commune* and even those which stuck more strongly to their indigenous law may have been more influenced by the learned law than was hitherto thought.⁷ Yet, this break-through of the *ius commune* goes hand in hand with a growing 'nationalisation' and the term *ius commune* itself may refer more to a common national than to a common European law.⁸ In fact, whether in the Middle Ages or in the Early Modern era, the *ius commune* was always a *Janus bifrons*, very much like the current Euro coins, which have a European, but also a national side. It would be ignoring historical

⁵ Study group on a European Civil Code and research group on existing EC private law, principles, *Definitions and model rules of European private law. Draft common frame of reference* (Munich: Sellier, 2009).

⁶ See e.g. D. Heirbaut and J.-F. Gerkens, 'In the shadow of France. Legal acculturation and legal transplants in the Southern Netherlands/Belgium', in E. Dirix and Y.-H. Leleu (eds.), *Belgian reports at the congress of Utrecht of the International Academy of Comparative Law* (Brussels: Bruylant, 2010) (forthcoming).

⁷ See for example for the Southern Netherlands (now Belgium), B. Van Hofstraeten, *Juridisch humanisme en costumiere acculturatie. Inhouds- en vormbepalende factoren van de Antwerpse Consuetudines compilatae (1608) en het Gelderse Land- en Stadsrecht (1620)* (Maastricht: Universitaire pers, 2008); D. De ruyscher, *Handel en recht in de Antwerpse rechtbank (16de-17de eeuw)* (Heule: UGA, 2009).

⁸ P. Nève, 'Ius commune oftewel <<gemeen recht>>: traduttore traditore?', in O. Tellegen-Couperus e.a. (eds.), *Tertium datur. Drie opstellen aangeboden aan Prof. mr. J. Ankum* (Tilburg University press, 1995), 3-58; P. Nève, '(Europäisches) Ius Commune und nationales Gemeines Recht: Verwechslung von Begriffen?', in G. Köbler and H. Nehlsen (eds.), *Wirkungen zur europäischen Rechtskultur. Festschrift für Karl Kroeschell zum 70. Geburtstag* (Munich: Lang, 1997), 871-884; P. Nève, 'Enige opmerkingen over het voorkomen en de betekenis van de termen 'keizer(lijk)recht', 'gemeen recht' en 'geschreven recht' in Noordnederlandse bronnen, 1500-1600', in J.-F. Gerkens, H. Peter, P. Frenk-Hirtenberger and R. Vigneron (eds.), *Mélanges Fritz Sturm* (Université de Liège, 1999), I, 813-831.

reality if one denied the importance of the *ius commune*, but the same also holds for ignoring local, regional or national law and this has profound repercussions for current debates.⁹

Amending the argument of the return of the *ius commune*, it should be stressed that not only the common European law is making a come-back, but also regional law. One can point here to this author's native Belgium, in which the demise of French law has not resulted in the creation of a national Belgian law, but rather in the development of two distinct mentalities in each part of the country.¹⁰ However, many other examples can be given, like the fact that in Spain the region of Catalonia has its own civil code.¹¹ Given that not only Europe's past unity, but also its diversity is returning, it stands to reason that the latter should also be studied. Needless to say, this is no plea for a regional legal history which would try to support new myths of regional identities, but only for a legal history which would look to both sides, unity and diversity, of the old law, to understand it better and to cope with the current situation. Using legal history to forge a new regional identity in law would be doomed to failure in many cases anyway, as the old regions do, in many cases, not correspond to the new ones, with as the best example the disappearance of Prussia.¹² Even if an old name is used this may be misleading. For example, Flanders, the Dutch speaking part of today's Belgium, took its name from the medieval county of Flanders, but three of the five current provinces of Flanders never belonged to the historical Flanders, which did encompass, however, most of the French département du Nord, and also for some time, the Département du Pas-de-Calais.

The problem of studying customary law before the advent of authoritative books

Unfortunately, outside England, the *ius commune* takes a lion's share of the attention of those legal historians who do not study the nineteenth or twentieth centuries.¹³ After all, it is understandable that the Champions League of the *ius commune* will attract more fans than the regional series of indigenous law. The audience, and thus the acclaim one can receive for one's achievements, is bigger and the facilities are better. One has good surveys¹⁴ and reference works,¹⁵

⁹ See D. Heirbaut and M.E. Storme, 'Historical evolution of European private law', in C. Twigg-Flesner, *The Cambridge companion to European Union private law*, (Cambridge University press, 2010), 32.

¹⁰ D. Heirbaut and M.E. Storme, 'The Belgian legal tradition: from a long quest for legal independence to a longing for independence', *European Review of Private Law* (2006), 645-683.

¹¹ See more in general, H. Macqueen, A. Vaquer and S. Espiau Espiau (eds.), *Regional private laws and codification in Europe* (Cambridge University press, 2003).

¹² C. Clark, *Iron kingdom: the rise and fall of Prussia, 1600-1947* (London: Penguin, 2006).

¹³ For example, English legal historians are publishing a 13 volume *Oxford history of the laws of England*. German legal historians can just as proudly point to the 8 volume H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, (Munich: Beck, 1973-1988) and many other publications of Coing and his team, but these concern the *ius commune*, not just German legal history.

¹⁴ H. Coing, *Europäisches Privatrecht*, I (Munich: Beck, 1985); H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter* (Munich: Beck, 1997-2007), 2 vol.

the sources are in Latin and many of them are available in good editions, or at least one can easily find a manuscript. Specialists of customary law can sometimes profit from this because the *ius commune* and customary law were in many ways complementary. It was not unusual for an author influenced by the *ius commune* to describe regional law using the terminology and techniques of the learned law. English¹⁶ law was precocious in that this already happened in the thirteenth century, but sometimes the process could take much longer. For example, in the Low Countries the first great local author to use the benefits of Roman law only appeared at the end of the fifteenth century.¹⁷ However, sometimes local lawyers had already written their own books without any benefit of formal schooling.¹⁸ Thus, whether written by these semi-professionals or by their university trained brethren, from a certain point in time the legal historian has an authority from the past at his disposal. He will expand upon it and criticise it, but he always has a starting point and a safety net and its importance cannot be overrated, though it has been in at least one case. Susan Reynolds links the origins of the feudalism to specialised authors, more in particular the learned lawyers of the *ius commune*.¹⁹ In this view, feudal law cannot exist without a doctrine.

However, there is no doubt that law flourished in Europe before books described it, unless of course one would use a definition of what constitutes law which no lawyer today would accept.²⁰ The problem is only that, unlike the *ius commune*, it was not a product of legal scholarship, but of legal practice, which means that ‘theoretical’ sources are lacking. For example one can take feudal law in the medieval county of Flanders from 1000 to 1300. There are almost no contemporary sources describing what Flemish feudalism should have been in that period. Feudal legislation in Flanders is a phenomenon of the later middle ages,²¹ with only a few earlier traces during the high middle ages.

¹⁵ See note 13.

¹⁶ J. Barton, ‘Bracton as a civilian’, *Tulane law review*, 42 (1967-1968), 555-583. See also, J. Barton, ‘The authorship of *Bracton*: again’, *Journal of legal history* 30 (2009), 117-174. It should be remarked here that Eike von Repgow was also acquainted with some elements of the *ius commune* (P. Landau, ‘Der Entstehungsort des Sachsenspiegels. Eike von Repgow, Altzelle und die anglo-normannische Kanonistik’, *Deutsches Archiv für Erforschung des Mittelalters*, 61 (2005), 73-101.

¹⁷ Willem van der Tanerijen *Boec van der lopender practijken der raidtcameren van Brabant*, ed. E. Strubbe (Brussels: Commission royale pour la publication des anciennes lois et ordonnances de la Belgique, 1952), 2 vol

¹⁸ E.g. the fourteenth century *Leenrechten van Vlaanderen*, ed. L. Gilliodts-Van Severen, L., in *Coutume du Bourg de Bruges*, III (Brussels: Commission royale pour la publication des anciennes lois et ordonnances de la Belgique) 1885), 193-310.

¹⁹ S. Reynolds, *Fiefs and vassals. The medieval evidence reinterpreted* (Oxford University press), 1994.

²⁰ See about the nature of medieval law and modern legal theory M. Pilch, *Der Rahmen der Rechtsgewohnheiten. Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte* (Vienna: Böhlau: 2009) and the papers of a two day workshop using this book as a starting point (*Rechtsgeschichte*, 2010 (forthcoming)).

²¹ R. Opsommer, ‘Leenwetgeving en overdrachtsocctrooien in het graafschap Vlaanderen (13de-15de eeuw)’, in F. Stevens and D. Van den Auweele (eds.), *Uuytwysens d’archiven. Handelingen van de XIe Belgisch-Nederlandse rechtshistorische dagen* (K.U. Leuven Faculteit rechtsgeleerdheid, 1992), 157-183. See also D. Heirbaut, ‘Thirteenth-century legislation on mortmain alienations in Flanders and its influence upon France and England’,

Some accounts of Flemish feudal customs exist, but their value is limited: they appear only at the end of the thirteenth century and only in three places: Lille,²² Cassel²³ and Scheldewindeke.²⁴ Moreover they are still very primitive, chaotic and most of all incomplete. They mainly concern themselves with issues which had led to court disputes, not with other practices. In fact, they are more interesting for studying how local feudal courts and the semi-professionals active in them functioned than for studying substantive feudal law.²⁵ As far as the distinction of law in the books and law in action is concerned only the former exists.

The task of the legal historian: to write a restatement of legal customs

In the context of sources which only contain the law in action, the legal historian faces other challenges than his colleagues who dispose of authoritative contemporary works. He cannot, for example, study the life of law professors or analyse their manuscripts. Most of all, he cannot check whether a book is accurate in describing contemporary law. However, does this mean that he just has to stay with his charters and narrative sources, only recounting what they tell, so that his colleagues might just as well take a shortcut and read the sources themselves? The legal historian should be aware here that he is not the only one confronted by this problem. Specialists of contemporary law in countries without codifications are, *mutatis mutandis*, confronted with the same problem. They can work with individual cases, but they can also try to distil general principles from the body of case law. In the United States the latter has even taken the form of restatements of the law by the American Law Institute,²⁶ which have become quasi codifications. European lawyers have followed this approach, with several commissions of lawyers trying to write down the 'principles' of a field, with the principles of contract law by the so-called Lando commission as the best example.²⁷

Likewise, one can think of the task of the legal historian confronted with a law without books, to write such a restatement, though his activity would be very different from that of his colleagues of the American Law Institute or the commissions in Europe. For example, both today's restatements

in A. Lewis, P. Brand P. Mitchell (eds.), *Law in the city*, (Dublin-Portland: Four courts press, 2007), 54-71.

²² *Les lois, enquêtes et jugements des pairs du castel de Lille. Recueil des coutumes, conseils et jugements du tribunal de la Salle de Lille, 1283-1406*, ed. R. Monier (Lille: Raoust, 1937).

²³ 'Loy et jugemens des hommes de le baillie de Cassel', ed. E. Decoussemaker, *Sources du droit public et coutumier de la Flandre maritime, Annales du comité flamand de France*, 11 (1873), 204-219.

²⁴ 'Coutume de Scheldewindeke', ed. D. Berten, *Bulletin de la Commission royale pour la publication des anciennes lois et ordonnances de Belgique*, 7 (1906), 249-277.

²⁵ See D. Heirbaut, 'The precursors of the earliest law reports on the continent as sources about the spokesmen, the forgotten makers of customary law' (forthcoming).

²⁶ About the restatements, see the website of the American Law Institute, www.ali.org.

²⁷ O. Lando, E. Clive, A. Prüm and R. Zimmermann, *Principles of European Contract Law* (The Hague: Kluwer, 2003), 2 vol.

and the legal historian's books are theoretical constructs, but the latter will always remain just that, whereas the former, if successful, will move beyond that stage. If the law practitioners accept them as an authority, it will be law instead of just a description of it,²⁸ whereas the legal historian's work will never be more than his theoretical construct. However extensive the research into the sources, it will never be or become the historical reality.

For better understanding this construct, it would be good to work with two concepts, one from comparative law, one from general legal history and since recently also legal theory. In the late 1960's German legal historians started a debate on the concept of law in the middle ages, which is still going on. One point on which agreement has been reached is, that better to indicate that the middle ages were different one should not use the concept of *Gewohnheitsrecht* (customary law), but of *Rechtsgewohnheiten* ('legal customs'). The foreign researcher wanting a concise and clear definition will, however, be bewildered.²⁹ There is consensus about some aspects, most of all that *Rechtsgewohnheiten* belong to a different context in which state activity was lacking and in which people had another, non-normative, understanding of law, which was not completely distinguished from religion, practice, morals and language and transmitted orally. Beyond that, every legal historian has fleshed out the concept of *Rechtsgewohnheiten* according to his views. The reason for these variations on the common theme will be explained below, but they cannot be studied here. For now, it is important just to note that a restatement of a non-Roman law during the high middle ages will not contain principles, but *Rechtsgewohnheiten*, with the generally accepted connotations entailed.

Comparative law, or rather the comparative lawyer Ewald, offers a second useful concept, 'law in minds'.³⁰ The pair law in the books - law in action fails as an analytical tool, as there is also the 'law in minds', the framework lawyers use. This concept should be used in conjunction with the *Rechtsgewohnheiten*, as the latter should not be studied on their own, but as building blocks of the larger framework. The restatement of the legal historian is in this view not a quasi codification of legal principles, but a reconstruction of the common framework of *Rechtsgewohnheiten* contemporary lawyers had in mind.

Anyone reading medieval charters may be forgiven for thinking that no such framework existed because no clear pattern seems to emerge from our sources. For example, there are many

²⁸ In one famous case an anthropologist wrote a book about local customs in New Guinea. Years later he found out that his own book had become the norm (L. Pospisil, 'Legally influenced culture change in New Guinea', in: S. Burman and B. Harell-Bond (eds.), *The imposition of law* (New York: Academic press, 1979), 127-146).

²⁹ One can find a good survey of the history of this concept in Pilch, *Rahmen*. For the debate in general, see B. Kannowski, 'Rechtsbegriffe im Mittelalter. Stand der Diskussion', in A. Cordes and B. Kannowski (eds.), *Rechtsbegriffe im Mittelalter* (Frankfurt: Lang, 2002), 1-29. See also the texts from the 2010 Frankfurt workshop mentioned in note 20.

³⁰ W. Ewald, 'Legal history and comparative law', *Zeitschrift für Europäisches Privatrecht*, 3 (1999), 556-557; W. Ewald, 'Comparative jurisprudence (I): What was it like to try a rat?', *University of Pennsylvania law review*, 143 (1995), 1889-2149; W. Ewald, 'The jurisprudential approach to comparative law: a field guide to 'rats'', *American journal of comparative law*, 46 (1998), 701-707; C. Valcke, 'Comparative law as comparative jurisprudence - the comparability of legal systems', *American journal of comparative law*, 52 (2004), 713-740.

texts describing the procedures followed when alienating a fief, but they are extremely bewildering in their variety. Nevertheless, it would be wrong to think that the confusion in the sources means that contemporary lawyers were just as confused as we, as there are good explanations for the variations we find. First of all, the charters and narrative sources we use come from clergymen, outsiders. Generally, this is seen in terms of the distinction between laymen and clerics, but that would not be apt here. A monk may have been an outsider in the world of lords and vassals, but that was equally true for a merchant or a farmer. The best way to describe the situation is by using the concept of semi-autonomous social field which Sally Falk Moore developed for anthropological studies in Africa:³¹ between the state and the individual there are several social fields with their customs and rules. The society of lord and vassals is one such semi-autonomous field with its own specific elements. For any outsider it would have been hard fully to grasp the framework used in the field of feudal law, but it was even harder for clerics as they used texts to describe procedures which consisted of gestures and words. Moreover, for doing so their language was Latin which was foreign to the field of feudal law. In fact, a comparison of terminology in the vernacular shows how much of the chaos of the sources is due to a 'translation' in a framework alien to feudal law. In Middle Dutch and Ancient French clarity reigns. For example, there is one word for homage: *oumage* (French) or *manscepe* (Dutch), whereas the Latin scribes use several words.³² Add to this the transposition from gestures and oral proceedings to written text and even more possibilities for distortion of the original events arise.³³

That these followed a scenario is made clear by texts mentioning that the proceedings took place '*ordine iudiciario*'³⁴ or '*more curie*'.³⁵ Actually, the final element of the procedure before the feudal court was the court's judgement that everything had happened in good order.³⁶ Thereafter, it was impossible to attack the transfer of a fief because of deficiencies in the procedure. This means that the descriptions in our sources were irrelevant for contemporary lawyers. The only thing which counted was the judgement at the end and it is a sign of the ignorance of the scribes that they either did not mention this or paid attention to a lot of details which no longer mattered (even though at

³¹ S.F. Moore, 'Law and social change: the semi-autonomous field as an appropriate object of study', *Law & society review*, 7 (1973), 719-746.

³² For example, in the twelfth century Flemish charters: *hominium* (F. Vercauteren, *Actes des comtes de Flandre (1071-1128)*, Brussels 1938, nr. 111, p. 254-257), *homagium* (T. De Hemptinne and A. Verhulst, with L. De Mey), *De oorkonden der graven van Vlaanderen (juli 1128-1191)*, II/2/1 (Brussels: Commission royale d'histoire, 2001), nr. 95, p. 155-157), *hominagium* (Ibid., nr. 202, p. 313-315).

³³ D. Heirbaut, 'Rituale und Rechtsgewohnheiten im flämischen Lehnrecht des hohen Mittelalters', *Frühmittelalterliche Studien*, (2007), 351-361.

³⁴ E. De Marneffe, *Cartulaire de l'abbaye d'Afflighem et des monastères qui en dépendaient* (Leuven, 1894-1901), nr. 113, p. 173-174 (1161).

³⁵ J.-F. Nieuw, *Les chartes des comtes de Saint-Pol (XIe-XIII siècles)* (Turnhout, Brepols, 2008), nr. 8, p. 91-92 (1145).

³⁶ T. Luykx, *Johanna van Constantinopel. Gravin van Vlaanderen en Henegouwen. Haar leven (1199/1200-1244). Haar regering (1205-1244), vooral in Vlaanderen* (Brussels : KVAB, 1946), nr. 52, 579-580 (1238).

least one feudal court helpfully indicated it was not necessary to give a detailed description).³⁷ To make their judgement the members of the court, of course, needed to have some shared opinion of what constituted the proper procedure, so that they could use it as a stick. There was indeed a common framework of *Rechtsgewohnheiten* contemporary lawyers had in mind and it is possible to reconstruct it.

The need to explain the limits of a restatement to historians

Writing a restatement of legal customs solves at least one problem for a legal historian in a law faculty: it ensures that his work is in a form that his colleagues can understand. Yet, for historians works of this kind can be even more useful. After all, most historians do not want a book about regional legal practices to be just as confused as the reality of the past. If it is, they are better off reading the sources for themselves. What they want is a book they can rely on to explain to them in a clear way what the common legal framework was, so that they can spend their time researching other aspects of past societies or elaborating the results of the studies of legal historians by looking at them with other eyes.

However, legal historians have to explain clearly the limits of their approach to historians. The upshot of what is described above is not the holy statute book of the -medieval law of a certain region, which was slavishly followed by everyone whatever the circumstances. Any lawyer knows that even today, when statute-law has become so important, it is sometimes more of a guideline than a reality and that in the world of the practitioner anything is possible. The problem is that to legal historians, as lawyers, this is so evident that they do not always mention it, because even if their students did not notice this during their studies, they will soon do so when they are apprentices. Unfortunately, historians do not have this benefit (it is always strange to meet historians who work about courts and law, and who have never seen real lawyers and real courts in action) and many of them presume to know how lawyers think: there is a rule and that rule is blindly followed and applied by courts. Thus, they like to point out that the reality was very different from the handbooks of the legal historians, whereas to the latter this is so evident that it goes without saying. Many of the differences between Ganshof's and Reynolds's views of feudalism can easily be explained by taking this into account. This failure in communication, at times leads to odd results. For example, some historians of the Middle Ages are convinced that mediation and conciliation are very medieval,³⁸ which must sound strange in the ears of today's lawyers who are promoting alternative dispute resolution. In short, it may seem superfluous to legal historians, but it is never a waste of paper to explain the limitations of their constructs.

³⁷ F. d'Hoop, *Recueil des chartes du prieuré de Saint-Bertin à Poperinghe, et de ses dépendances à Bas-Warneston et à Couckelaere* (Bruges : Société d'émulation, 1870), nr. 85, 89-91 (1249).

³⁸ See e.g. H. Teunis, *The appeal to the original status, Social justice in Anjou in the eleventh century* (Hilversum: Verloren, 2006).

The restatement as a contextual and integral legal history

A restatement of a customary law uses legal customs as building-blocks and puts them in the shared framework of the lawyers, who worked in the context of the semi-autonomous field to which these customs belonged. Therefore, the legal historian should write a contextual history. However, this does not mean a legal history which takes all social, economic, political, cultural, religious and other elements into account, but one which looks for the peculiarities imposed by the legal context in the semi-autonomous field one studied. The best example one can give of this is the so-called impoverishment of the nobility in the late middle ages. In Flanders, for example, one can already find nobles selling their fiefs because of poverty in the early twelfth century³⁹ and they were still doing so when the French Revolution finally abolished feudalism.⁴⁰ One wonders how this impoverished nobility managed to hang on for centuries. The answer is that there is a difference between a chronicle which mentions that a noble had to sell his fiefs because of poverty⁴¹ and a charter, as the latter was written in the context of the feudal court which handled sales of fiefs. Flemish feudal law wanted to protect the interests of the family. To a certain extent, a vassal did not really own a fief, but held it in trust for the next generations. Thus, he could not give it away or even sell it without his heir's consent. As usual, some exceptions existed, the main one being that a fief could be sold if the vassal was poor and had nothing else to sell.⁴² Needless to say, coming before the feudal court many a vassal suddenly claimed poverty and it could happen that his colleagues sitting on the court let him get away with it. After all, next time it could be their turn. Add to this, that there was a second justification for a sale without the heir's consent: the profit one could make on the transaction, e.g. because the buyer offered a price higher than normal.⁴³ Scribes did not always distinguish a sale because of poverty from one for profit and it could happen that the 'impoverished noble' actually became richer.⁴⁴ Legal poverty could be very different from the real thing and could even turn into its opposite, but one becomes aware of this only if one takes the legal context into account.

This legal context should be the whole framework as the legal historian should take into account all the legal elements within a certain semi-autonomous field because they interact. Contextual legal history thus becomes an integral history, not in the sense that all aspects of a society are studied, but only in the sense that all legal customs of a semi-autonomous legal field are studied,

³⁹ F. Morand, *Appendice au cartulaire de l'abbaye de Saint-Bertin* (Paris: Imprimerie impériale, 1867), nr. 45, p. 36-38 (1124).

⁴⁰ Cf. E. Bellette, *La succession aux fiefs dans les coutumes flamandes* (Paris: PUF 1926), 107-112.

⁴¹ *Chronique de Baudouin d'Avesnes*, ed. J. Kervyn de Lettenhove, in *Istorie et croniques de Flandres*, I (Brussels: Commission royale d'histoire, 1879), 612.

⁴² D. Heirbaut, *Over lenen en families. Het zakelijk leenrecht in Vlaanderen, ca. 1000-1305. Een studie over de vroegste geschiedenis van het leenrecht in het graafschap Vlaanderen*, (Brussels: KVAB, 2000), 157-168.

⁴³ Heirbaut, *Lenen*, 165-167.

⁴⁴ For example, in 1249 Walter of Koekelare sells a fief arguing that he will get 12 lb. for each lb. of its yearly yield (d'Hoop, *Recueil*, nr. 85, 89-91). Given that the normal price would indeed have been lower (10 lb.; cf. Heirbaut, *Lenen*, 29-30) he made a profit of 20 percent over the normal price.

as it would be too easy to miss certain causes and effects. For example, it would not be hard to make a study of feudal successions only, but then one would not see that its development is entwined with the history of local feudal courts in Flanders. In the middle of the twelfth century Flemish feudal law changed by imposing upon the eldest son who inherited all the fiefs, the obligation to provide for his siblings. This contributed to a heavier workload for the central feudal court of the county, the count's *curia*, and led to the establishment of local comital feudal courts, who could relieve it of that burden. The local courts interpreted the original common custom in different ways, thus developing their own rules.⁴⁵ Thus, a change in the law of succession contributed to an overhaul of the judicial organisation, which in its turn resulted in new legal rules concerning successions.

A contextual, integral legal history of legal customs has to go further than its own 'semi'-autonomous field, as the latter is described so because it receives influences from other social fields. For example, in the thirteenth century the clerics tried to bring Roman law into the community of Flemish lords and vassals. They failed in their endeavour,⁴⁶ but the renunciations of rights awarded by Roman law need to be studied, if only because the reaction of the society of lords and vassals to this first intrusion can teach much about its nature and its resistance to outside influences. At least one charter, in which the parties renounce all exceptions 'invented or to be invented in the future', makes clear that very soon Flemish feudal law got fed up with interference by clerics.⁴⁷

Conclusion

One may think of the approach proposed here as being limited, because it sticks to the legal context. This is true, but if a legal historian tries to study the complete legal context as sketched above, he will already have enough on his plate. It would be nice if he could study a broader context, but before he encroaches upon the terrain of others he should do his own job. The rest can be left to specialists of other aspects of history, ideally in a team of which the legal historian is a cherished member. Last but not least, all of the above is only valid for scholars confronted with the same documentary situation as this author when he started to study Flemish feudal law during the High Middle Ages and even for that subject there are many other, and equally rewarding, approaches.

⁴⁵ Heirbaut, *Lenen*, 68-87.

⁴⁶ D. Heirbaut, 'De verzakingen aan de Romeinsrechtelijke excepties in Vlaanderen: vroeger dan gedacht' (forthcoming).

⁴⁷ d'Hoop, *Recueil*, nr. 72, 71-73 (1244).