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Fifteen Years of Recent Historiography on Public and Constitutional Law in the Low Countries

Abstract

The text is an overview of research activity about the history of public law in the different law faculties of the Low Countries. To the main fields of research belong especially: research on sovereign courts and case law; history of constitutional law and legislation; public *ius commune* and human rights; history of international law; history of penal law and transitional law; history of the relations of Church and State. As a general conclusion it has been assumed, that In the Low Countries legal history is in a quite healthy state, and so are the history of public law and constitutional law.

Keywords: legal history, constitutional history, constitution, public law, Belgium, Netherlands, Low Countries.

Słowa kluczowe: historia prawa, historia ustroju, konstytucja, prawo publiczne, Belgia, Holandia.

Since the beginning of the new millennium, the law faculties of the Low Countries implemented the Bologna-reform, introducing bachelor and master degrees. Due to programme changes, legal history lost many chairs and courses. Some law faculties kept only one general course of legal history. The courses on history of Belgium, history of the Netherlands or history of political ideas disappeared from the list of compulsory courses.¹ Today the law faculties in the Low Countries hire fewer historians who are not jurists and the legal historians deal less with institutional history. Their science is more focused on legal doctrine. A series of law faculties, however, still have specific courses, seminars and research about legal history of public law. This is the case for Leyden, Tilburg, Ghent, Antwerp, VU Brussels and Leuven. All law faculties together still supervise more than a hundred bachelor papers or master theses on the history of public law each year. In the Low Countries we have two or three new PhD's in legal history each year and one out of four deals with public law. What were all these legal historians of public law working on for the last fifteen years? It makes no sense to list all the publications of this period, of which most are in Dutch, but let us give some overview and quote at least the important monographs.

¹ The introductory course for history of public law in Ghent, however, also refers to political history: G. Martyn, *Geschiedenis van de politiek en het publiekrecht*, Bruges 2011.

1. Research on sovereign courts and case law

A generation ago, the history of public law was conditioned by the study of parliamentary councils, estates and popular representation. Research was mainly focused on the decisions of the sovereign councils of the Early Modern and Modern Times. Let us for instance bring to mind the project of Thomas de Smidt (Amsterdam-Leyden) about the Great Council of Mechlin, which employed four researchers for twenty years, in order to study the case law of the Great Council from 1465 until 1580. The project was closed in 1988. In the Netherlands the Foundation for the Editing of the Old Dutch Legal Sources studied the archives of court records and in Belgium the Royal Commission for Old Law and Ordinances of Belgium did the same.² Studies about the sovereign courts were important at the law faculties until the end of the twentieth century. In Belgium Philippe Godding closed the era in 1999, publishing his fundamental study on the Council of Brabant.³ That same year three researchers from the Groningen law faculty still published a study on the records of the court of Friesland.⁴ In the last fifteen years, the jurists and the institutes of legal history abandoned these archives and historians picked up the baton. In the Netherlands as well as in Belgium the national and regional archivists continue to open and describe judicial records. At university as well, History departments took over this matter which used to be studied by jurists. In Belgium master students and PhD-students in History are working on the jurisdiction of councils and estates. A good example is the recent book by An Verscuren about the last centuries of the Great Council of Mechlin, which is the commercial publication of her doctoral history thesis presented in Ghent in 2014.⁵ Another example is a study by Marie van Eeckenrode, published in 2011, about the, until now fairly unknown, states of Hainaut.⁶ A special event for Flanders has been the edition of the comments of Georges de Ghewiet (1651–1745) on the jurisprudence of the Flemish Parliament in the territories of the Low Countries occupied by Louis XIV of France.⁷

The move with which the jurists turned away from the study of the councils and estates is striking. In fact, legal historians hired by law faculties defend the living interests of their faculty. In the first half of the nineteenth century legal historians started to publish old law to affirm the old eminence of their nation, which in 1815 came out of the reshuffling by the Congress of Vienna. The method of their intervention was historical, but the

² On this commission see our *The Royal Commission for Old Law and Ordinances of Belgium at the Service of Legal Historians*, “Kraakowskie Studia z Historii Państwa i Prawa” 2014, vol. 7, issue 3, pp. 457–564.

³ Ph. Godding, *Le Conseil de Brabant sous le règne de Philippe le Bon*, Académie de Belgique, Brussels 1999.

⁴ J.H.A. Lokin, C.J.H. Jansen, F. Brandsma, *Het Rooms-Friese recht, De civiele rechtspraak van het Hof van Friesland in de 17^e en 18^e eeuw*, Hilversum–Leeuwarden 1999.

⁵ A. Verscuren, *The Great Council of Malines in the 18th century, An aging court in a changing world?*, Cham 2015.

⁶ M. van Eeckenrode, *Les états de Hainaut: servir le prince, représenter le pays, Une assemblée dans les allées du pouvoir (ca. 1400–1550)*, PhD dissertation, Louvain-la-Neuve 2015.

⁷ [Georges de Ghewiet,] *Jurisprudence du Parlement de Flandre de Georges de Ghewiet*, ed. S. Dauchy, V. Demars-Sion, [Recueils de l’ancienne jurisprudence de la Belgique, 2], Brussels 2008.

scope was to serve the public lawyers of the law faculties, who had to sustain the new nations and to mark the new borders of their jurisdictions. This was the role of book series as the “*Monumenta Germaniae Historica*”, the French “*Recueils des Anciennes lois françaises*”, in England the “*Statutes of the Realm*” or in Belgium the “*recueils*” of the Royal Commission for Old Law and Ordinances. Once the new borders were set, the attention of the jurists for old laws and ordinances declined. Researchers from History departments continued the book series. The same phenomenon can be observed in the second half of the 20th century. University jurists worked on the new EU-law. A major challenge of the new institutions was a certain loss of national identity. The legal historians accentuated the legal identity of their countries in studies about the old sovereign courts, in order to prove that parliamentarianism and rule of law were old, clear and their own. But fifteen years ago the structures of the EU were fixed and studies about the origin of representation were no longer urgent. Nevertheless, until today these elements are present in the courses on history of public law lectured in Louvain, Ghent, Leiden or Tilburg. It is also remarkable that in the Low Countries the jurists studied the sovereign courts prior to 1648. The Netherlands and Belgium separated in 1648 and from then on we both had our own supreme courts. In the European Union, however, we prefer to appear not as different small countries, but as the Benelux bloc. This explains the major interest of the jurists for institutions in the united Low Countries before 1648. The archivists and historians who took over the study of the central courts, are now focusing on national institutions of the 17th and 18th centuries. They do not worry about our position in Europe.

One topic of the old councils has continued to be studied at the law faculties during the last fifteen years: the procedure of the old lawsuits. Some legal historians published important studies about the procedure of the old courts.⁸ The comparative history of lawsuits is still topical in the development of the European institutions and in the adaptation of national institutions to the European Union. I presume the history of procedure still fascinates jurists, because they are looking for the historical foundations of future European procedure law in the courts.

Two special projects of research on recent case law deal with the legal history of the Late Modern Era and contemporary history. Jozef Monballyu discovered the archives of

⁸ In the last quarter of the 20th century the main scholar to publish on procedure was Jozef Monballyu (KU Leuven). Previously he was the main legal historian of his generation to study the old case law of the Early Modern Era. However, he wrote consistently in Dutch. See his ample bibliography about case law and sovereign courts on <https://lirias.kuleuven.be/cv?u=U0012461>. In the 21st century C.H. van Rhee (Maastricht University) combined actual process law with legal history of procedure in his publications. In the Netherlands, a series of studies on the procedure of the former sovereign courts was published by the Foundation for the Editing of the Old Dutch Legal Sources: E.J.M.F.C. Broers, B.C.M. Jacobs, *Procesgids Staatse Raad van Brabant*, Hilversum 2000; B.S. Hempenius-van Dijk, *Hof van Friesland, De hoofdlijnen van het procederen in civiele zaken voor het Hof van Friesland zowel in eerste instantie als in appel*, Hilversum 2004; H.G.G. Becker, *De Eistoel van Drente*, Hilversum 2004; P. Brood, E. Schut, *Hoofdmannenkamer, Sinds 1749 Hoge Justitiekamer van Stad en Lande van Groningen*, Hilversum 2004; M.-Ch. Le Bailly, C.M.O. Verhas, *Hoge Raad van Holland, Zeeland en West-Friesland*, Hilversum 2006; M.-Ch. Le Bailly, *Staatse Raad van Vlaanderen te Middelburg (1599–1795). De hoofdlijnen van het procederen in civiele zaken voor de Staatse Raad van Vlaanderen, zowel in eerste instantie als in hoger beroep*, Hilversum 2007; *idem*, *Hof van Holland, Zeeland en West-Friesland*, Hilversum 2008; P. Brood, F. Van der Ven, *Het Klaring van Overijssel te Zwolle*, Verloren, Hilversum 2010; A.M.J.A. Berkvens, *De Soevereine Raad te Roermond, het Justiz Collegium te Geldern en het Staatse Hof van Gelre te Venlo*, Hilversum 2011.

the military court during World War I and analysed them thoroughly.⁹ The other project is sponsored by the Belgian Ministry of Justice: *The sociopolitical history of Justice administration in Belgium, 1795-2005*. Its studies combine legal history, sociology and criminology.¹⁰ Françoise Mueller has given us a more classical analysis of the supreme jurisdiction in Belgium in the 19th and 20th century.¹¹

2. History of constitutional law and legislation

Also in the last fifteen years, Belgium saw the edition of some legislative texts from the Middle Ages and Early Modern Times, namely an important edition of the customary law of Tournai¹² and different volumes of legislation of the Burgundian rulers.¹³

Since the beginning of this century, comparative history of constitutionalism has emerged in education and science of public legal history. The bicentennial of the French Revolution, which flooded many institutions in the Low Countries, was a trigger for studies on comparative history of constitutional law. This research was continued in the last fifteen years. In the Netherlands we find studies about the Batavian Republic created by the Dutch sympathisers of the French Revolution, about the French annexation of the Netherlands and the aftermath of the Revolution in the 19th century Dutch kingdom.¹⁴ In Belgium we find similar studies about this period.¹⁵ Fred Stevens studied the detailed genesis of the Belgian constitution of 1830, out of the French revolution and throughout the 1815–1830 period, when Belgium and Holland were provisionally reunited.¹⁶ Again,

⁹ E.g. J. Monballyu, *Inventaris van het archief van krijgsauditoraten en krijgswaarden te velde tijdens de Eerste Wereldoorlog (1914–1919)*, Brussels 2014; *idem*, *Deserteurs voor de Vlaamse zaak: over Vlaamsegezinde militairen die naar de vijand overliepen*, Bruges 2012.

¹⁰ The project is shared mainly by legal historians of UCL Louvain-la-Neuve (see <https://www.uclouvain.be/chdj.html>), Ghent (D. Heirbaut) and the Archives of the Realm. See <http://www.belspo.be/belspo/Fedra/proj.asp?l=en&COD=P6%2F01>.

¹¹ F. Mueller, *La cour de cassation belge à l'aune des rapports entre pouvoirs. De sa naissance dans le modèle classique de la séparation des pouvoirs à l'aube d'une extension de la fonction juridictionnelle*, Bruges 2011.

¹² *Coutumes de Tournais* [Coutumes de Tournai et du Tournais, 2], ed. G. Van Dievoet, Brussels 2006.

¹³ *Ordonnances de Jean sans Peur, 1405–1419* [Recueil des ordonnances des Pays-Bas, 1,1,3], ed. J.-M. Cauchies, Brussels 2001; *Ordonnances générales de Philippe le Bon, 1430–1467* [Recueil des ordonnances des Pays-Bas, 1,2,1], ed. J.-M. Cauchies, Brussels 2013; *Ordonnances de Philippe le Bon pour les duchés de Brabant et de Limbourg et les Pays d'Outre-Meuse, 1430–1467* [Recueil des ordonnances des Pays-Bas, 1,2,2], ed. Ph. Godding, Brussels 2005.

¹⁴ E.g. *Het Franse Nederland: de inlijving 1810–1813. De juridische en bestuurlijke gevolgen van de 'réunion' met Frankrijk*, ed. A.M.J.A. Berkvens, J. Hallebeek, A.J.B. Sirks, Hilversum 2012; *De staatsregeling voor het Bataafse volk van 1789*, ed. O. Moorman van Kappen, C. Coppens, Nijmegen 2001; C.M. Hogenstijn, *Het algemeen welzijn van het volk. Een politiek- en rechtshistorische studie van Deventer in de Patriottentijd*, Nijmegen 2005; R. Kubben, *Regeneration and hegemony. Franco-Batavian Relations in the Revolutionary Era. A Legal Approach, 1795–1803*, PhD dissertation, Tilburg 2009.

¹⁵ E.g. E. Witte, *De constructie van België, 1828–1847*, Tiel 2006; more technical: D. Heirbaut, M.E. Storme, *The Belgian legal tradition. From a long quest for legal independence to a longing for dependence?*, “European Review of Private Law” 2006, pp. 645–683.

¹⁶ F. Stevens, Ph. Poirier, P. van den Bergh, *Constitutional documents of Belgium, Luxembourg and the Netherlands from 1789 to 1848* [Constitutions of the world from the late 18th century to the middle of the 19th century, 7], Munich 2009.

one should take note of the fact that in this title the constitutions are presented as belonging to the common history of Belgium, the Netherlands and Luxemburg, although the Benelux was only created in 1945. In constitutional history, useful for Europe, we are again stronger together than when single. Placing the Belgian constitution within the history of the whole Netherlands, the jurist Stevens took a useful step for the European common project. During the discussions about the European constitution and the treaty of Lisbon, signed in 2007, comparative constitutional law was omnipresent.

Some constitutional rights and concepts were put in the limelight. An important topic was the study of sovereignty. What was sovereign power in a 19th-century state and what was sovereign jurisdiction in that century? We find recent studies about this topic in the Northern¹⁷ and the Southern Low Countries. The Flemish research council considers that the legal history of the 19th-century public law is an essential part of the current science of public law.¹⁸ Other constitutional matters of the 19th century which have been studied recently are press freedom¹⁹ and political offences.²⁰

3. Public *ius commune* and human rights

In most universities of the Low Countries the study of Roman law is still important as an introduction into the history of private law. In Louvain the course of Roman law is focused on the reception of Roman law into *ius commune*. The central courts of the Middle Ages and the Modern Times are also studied in this course. The evolution from civil rights towards natural rights in the Early Modern Times and towards rights of men in Modern Times is an issue of the *ius commune*. In this course we also study the beginning of the science of public law in the 17th century. Antonio Perez wrote and lectured the first specific course on public law in the Low Countries in the 1630s. So a lot of principles of history of public law are studied in research on Roman law.²¹

In the period of reference, Jacob Giltaij wrote a study about human rights in Roman law.²² The Utrecht Department of History studied the history of human rights on the other end of the scale, from the French Revolution until today.²³

¹⁷ E.g. M. Duchateau, J.W. van Rossem, *Soevereiniteit: nog steeds een nuttig concept?*, “Groniek” 2008, nr 178, pp. 35–50.

¹⁸ E.g. the Institute for Public Law of KU Leuven received a grant for a research about *The notion of sovereignty in the Belgian constitution of 1831, A legal historical research of sovereignty in the organisation of Belgian state power (2015–2019)*. Political philosophers also supervise this project.

¹⁹ E.g. B. Delbecke, *De lange schaduw van de grondwetgever. Perswetgeving en persmisdrijven in België (1831–1914)*, Gent 2012.

²⁰ E.g. B. Delbecke, *Modern constitutionalism and legal transfer. The political offence in the French Charte constitutionnelle (1830) and the Belgian Constitution* [in:] *Entanglements in legal history. Conceptual approaches*, ed. Th. Duve, Frankfurt/Main 2014, pp. 427–459.

²¹ L. Waelkens, *Amne adverso, Roman legal heritage in European culture*, Louvain 2015; with recent bibliography.

²² J. Giltaij, *Mensenrechten in het Romeinse recht?*, Nijmegen 2011.

²³ *Geschiedenis van de mensenrechten, Bouwstenen voor een interdisciplinaire benadering*, ed. M. Kuitenbrouwer, M. Leenders, Hilversum 2000.

4. History of international law

The most striking renewal in the historiography of public law in the last fifteen years deals with the study of international law. It started in Leyden, with an optional course by Cees Bezemer. It became important with Randall Lesaffer, who is professor of legal history in Tilburg law faculty and who is also a part-time professor in the Leuven law faculty.²⁴ He organised research about the origins of international law in Tilburg and Leuven.²⁵ Both faculties organised courses on the history of international law, from the 16th century to the 19th. In Leyden Randall Lesaffer founded the “Journal of history of international law” and the new Brill “Studies on the history of international law”. Since then, the study of the history of international law has spread out, for instance to the Legal History departments of Ghent and UL Brussels.²⁶

Out of decency the history of colonial law is now also considered to belong to the history of international law. In the reviewed period the Low Countries saw some beautiful studies on this topic.²⁷

At the base of this new research on the history of international law, there is again a need for contemporary jurists: in EU-law there are discussions about the exact and precise hierarchy of norms and we are confronted with more diffuse needs for collaboration between nations, often with undefined ways for preserving our cultural and legal position. Internally, the EU applies a lot of principles of soft law, which originated in international law. So our legal historians study the historical foundations of the international law in order to instruct our faculty colleagues and our students on how to cope with these new elements of daily life.

The “Tijdschrift voor Rechtsgeschiedenis/The Legal History Review” also publishes articles about the history of international law, in competition with the “Journal of the history of International law”. However, the articles do not usually originate in the Low Countries.

5. History of penal law and transitional law

Let us also briefly mention the research on history of penal law, which technically belongs to the history of public law.²⁸ Criminal law leads us to the growing interest in the Low

²⁴ See his bibliography on https://www.tilburguniversity.edu/nl/webwijs/show/r.c.h.lesaffer_nl.htm.

²⁵ For Tilburg see for instance the bibliography of Raymond Kubben on <https://www.tilburguniversity.edu/webwijs/show/r.m.h.kubben.htm>. In Leuven Dante Fedele works as a postdoctoral researcher on the medieval antecedent of the international law of Early Modern Times. Last year, on the medieval ambassadors and legates and on the influence of the papal universal jurisdiction in the 14th and 15th century on international law, in a project about the medieval foundations of the international law: *Baldus de Ubaldis (1327–1400), doctrine and practice of the ius gentium*.

²⁶ Where F. Dhondt became a specialist of the history of diplomacy and produced an impressive bibliography: <https://biblio.ugent.be/person/002002082323>.

²⁷ E.g. I. Van Hulle, *Britain, West Africa and the Formation of Imperial International Law (1807–1885)*, PhD dissertation, Leuven 2016; M. Van der Linden, *The Acquisition of Africa (1870–1914). The Nature of Nineteenth-Century International Law*, PhD dissertation, Tilburg 2014.

²⁸ During the surveyed years two excellent studies summarized the history of criminal law: for the Southern Netherlands by J. Monballyu, *Six centuries of Criminal Law in the Southern Netherlands and*

Countries for its legal history of transitional public law, which is the opposite of constitutional law: it allows the application of special public law principles in special circumstances. The Institute of Comprehensive Transitional Justice in New York promotes the study of transitional justice.²⁹ In recent years Christian Behrendt (Leuven/Liège) analysed how the Belgian constitutional court values the legal norms created during the Belgian Revolution of 1830 and in the aftermath of the two world wars.³⁰ In the Northern Netherlands there was a beautiful PhD about the decisions of the Dutch war cabinet in London.³¹ Most studies on transitional law, however, dealt with the history of penal law in the aftermath of the two World Wars. In particular, Jozef Monballyu studied the case law of the military court during and after World War I and opened the archives of the repression after World War II.³² He explains how during revolutionary periods populist law overruled constitutional principles. This is also important for our colleagues in public law, who are confronted with the new populism in Europe – think of Brexit – and for the legal education of our students who probably will have to resolve more problems of transitional law than we did.

6. History of the relations of Church and State

In fine we mention *pro memoria* the historical studies about public canon law and church and state. The faculty of canon law of Leuven is active in these domains.³³

In the Low Countries legal history is in a quite healthy state, and so are the history of public law and constitutional law. We mainly work as jurists, in order to give historical foundations to our colleagues who study current public law. Our Dutch language cuts us off from the European colleagues, but we continue to work for our faculties, our lawyers and our students.

Belgium (1400–2000), Leyden 2014, and for the Northern Netherlands by A.G. Bosch, *Ontwikkeling van het strafrecht in Nederland van 1795 tot heden*, Nijmegen 2011.

²⁹ <http://www.ictj.org>.

³⁰ C. Behrendt, *Excursion à l'orée de la chasse gardée du juge constitutionnel. La Cour constitutionnelle et le contrôle de la constitutionnalité des arrêtés-loi de pouvoir extraordinaires et des décrets du Congrès national*, Brussels 2007.

³¹ P.H.J. Körver, *De besluitwetgeving van de Nederlandse regering in Londen in internationaalrechtelijk en staatsrechtelijk perspectief. The emergency legislation of the Dutch government in London in the perspective of international law and Dutch constitutional law*, Rotterdam 2004.

³² J. Monballyu, *Slechte Belgen! De repressie van het incivisme na de Eerste Wereldoorlog door het Hof van Assisen van Brabant (1919–1929)* [Studies over de Eerste Wereldoorlog, 19], Brussels 2011; *idem*, *Inventaris van het Archief van het Hof van Assisen van Brabant. Strafdossiers tegen incivieken van de Eerste Wereldoorlog*, Brussels 2011; *idem*, *La justice transitionnelle dans les affaires pénales après la Première Guerre mondiale en Belgique (1918–1928)*, “Tijdschrift voor Rechtsgeschiedenis” 2012, vol. 80, pp. 443–479; *idem*, *Het uur van de vergelding. Vlaamse activisten voor de krijgsraad van het Groot Hoofdkwartier van het Leger (23 januari tot 30 juni 1919)*, “Wetenschappelijke tijdingen op het gebied van de geschiedenis van de Vlaamse Beweging” 2010, vol. 69, pp. 306–330, and 2011, vol. 70, pp. 7–33; *idem*, *De strafrechtelijke repressie van het Vlaamse activisme tijdens de Eerste Wereldoorlog in de Duitse krijgsgevangenkampen (november 1918 tot juli 1925)*, “Wetenschappelijke tijdingen op het gebied van de geschiedenis van de Vlaamse Beweging” 2011, vol. 70, issue 1, pp. 230–258, and issue 3, pp. 313–343.

³³ See e.g. the book series *The Dynamics of Religious Reform in Church, State and Society in Northern Europe, 1780–1920*, ed. P. Yates, D. van Eijnatten, Louvain.

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Piętnaście lat najnowszej historiografii prawa publicznego i konstytucyjnego w Belgii i Holandii

Streszczenie

Tekst poświęcony został badaniom w zakresie historii prawa publicznego, prowadzonych na wydziałach prawa uniwersytetów Belgii i Holandii. W szczególności przedstawiono studia dotyczące suwerenności sądów i orzecznictwa sądowego; historii prawa konstytucyjnego i ustawodawstwa; zagadnieniom *ius commune* i prawa człowieka; historii prawa międzynarodowego; historii prawa karnego; historii stosunków Kościoła z państwem. Jako ogólny wniosek przyjęto, że w historii krajów niderlandzkich historia prawa cieszy się dużym zainteresowaniem, podobnie jak historia prawa publicznego i prawa konstytucyjnego.