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Imperatoriam maiestatem non solum armis decoratam sed legibus oportet esse armatam …

Notes on the influence of Justinian’s Institutes on the codification of customary law in the Southern Netherlands

Introduction

The first printed version of the customary law governing Upper Guelders (*Overkwartier van Roermond*), a part of the Southern Netherlands, is adorned with an attractive frontispiece showing an engraving by Johannes Collaert based on a design by Peter Paul Rubens.[1] It features Archdukes Albert and Isabella, who in 1619 ratified the codification, in an architectural setting. They are standing on an elevation on either side of the cartouche, holding up a curtain that hangs down from the cartouche, thus revealing the title. The cartouche shows the Habsburg coat of arms. The base is ornamented with the arms of Guelders and Roermond flanking the printer’s vignette. On top is a horseman on horseback holding a shield with the arms of Guelders in his left hand. He is flanked by two putti holding up a ribbon on which the following heraldic device is written: "*Armis et legibus utroque clarescere pulchrum*". The motto seems to refer to the first lines of the Constitutio Imperatoriam: "*Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatum*."[2]

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[1] A.M.J.A. Berkvens, G.H.A. Venner, *Het Gelderse Land- en Stadsrecht van het Overkwartier van Roermond 1620*, Arnhem 1996 (Werken Stichting OVR 25), pp. lvii; R. Plötz (herausg.), *Das Goldene Zeitalter des Herzogtums Geldern. Geschichte, Kunst und Kultur im 15. und 16. Jahrhundert*, Geldern 2001 (Veröffentlichungen des Historischen Vereins für Geldern und Umgegend 100), S. 45.

[2] Const. Imp. pr.

If one compares the Guelders Country and Town Statute Book (*Gelderse Land- en Stadsrechten* [GLS]) with the Institutes, it is evident that the illustration is not a mere allegory. Such a comparative exercise was conducted by Franciscus Palmert in 1700.[3] Palmert, a jurist and attorney from Nijmegen, had defended his dissertation with Johann Ortwin Westenberg at Harderwijk University in 1698, where from 1694 until 1719 Westenberg taught the *principia juris* on the basis of the Institutes.[4]

In his introduction to the manuscript of *Symmetria sive Commensuratio Juris Oppidani et Ruralis Tetrarchiae Ruremundensis Ducatus Gelriae cum Jure Romano vicinorumque locorum,* Palmert makes some interesting remarks on the similarity between the GLS and the Institutes. In his view, the compilers of the law of Upper Guelders, carefully following in the footsteps of the Emperor Justinian, collected the laws and customs of Upper Guelders, as Tribonian, Theophilus and Dorotheus had done for the Institutes and the entire Corpus Juris Romani. According to Palmert, the GLS rather resembled the Institutes in system, whereas in volume it compared with the Pandects.[5]

Departing from the subdivision *personae*, *res*, *actiones*, *crimina*, Palmert concluded that the organisation of GLS was based on the system of the Institutes. GLS Book I "Of the rights of persons", corresponds with Book I of the Institutes; GLS Books II, III and IV: "Of the various types and qualities of property and related charges (*renten*) and servitudes", "Of various means and ways to obtain ownership or inherit property" and "Of agreements or acts and obligations", respectively, correspond with Books II and III and the first five titles of Book IV of the Institutes. GLS Book V: "Of civil procedure" corresponds with Titles 6 through 17 of Book IV of the Institutes. GLS Book VI: "Of trespasses and crimes and the way to prosecute these", however, deviates somewhat from the system of the Institutes. Although corresponding with Title 18 of the Institutes' Book IV, unlike the Institutes, it deals with both private and public unlawful acts, the latter being provided for by the Institutes in Book IV Titles 1-4 under the

[3] O. SCHUTTE, *Het Album Promotorum van de Academie te Harderwijk*, Arnhem 1980 (Werken "Gelre", no. 36), pp. 89-90.

[4] R. FEENSTRA, Ein später Vertreter der niederländischen Schule: Johann Ortwin Westenberg (1667-1737), in: R. FEENSTRA, *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries*, Variorum Collected Studies Series 556, XV. Westenberg was professor at Harderwijk from 1694 until 1716 and subsequently at Franeker and Leyden. He is known as the author of *Principia Juris secundum ordinem Institutionum Imp. Iustiniani in usu auditorum vulgata* (first edition Harderwijk 1699), which was followed by *Principia juris secundum ordinem Digestorum seu Pandectarum in usum auditorum vulgata* (first edition Harderwijk 1712).

[5] Compilatores huius juris statutarii praeclara methodo, prudenter insistentes vestigiis imperatoris Justiniani, dicti sacratissimi principis in *Rubr. Libri 1. Instit.* pari solertia et fide huius Tetrachiae Jura et Consuetudines collegerunt; qua Tribonianus olim Theophilus et Dorotheus Institutiones Justinianeas, totumque Juris Romani Corpus iussu eiusdem imperatoris composuisse perhibentur. Methodum enim si spectas, institutiones diceres: copiam rerum pandectas.

heading *res*.[6] He also established similarities between the GLS Ratification Act and the Promulgation Acts of the Corpus Juris Civilis, such as the Constitutio Imperatoriam. He deemed these similarities so remarkable that he could not but assume that these constitutions served as drafting examples for the GLS Ratification Act.[7] On the basis of this, he concluded that the compilers of GLS were certainly not the lesser of Tribonian and company, because they had successfully integrated the elements of Roman and of municipal law.[8]

Since the draft of the 1564[9] Country Statute Book (*Landrecht*) shows a completely different system, it is interesting to investigate why the compilers of the Guelders Country and Town Statute Book opted for the system of the Institutes. The answer to this question lies in the intellectual and institutional context of customary law recording in sixteenth-century Netherlands.

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[6] Institutiones imperatoris in quatuor libros partita sunt, *§ 4.proem. instit.* ceu ad totidem iuris separata objecta: personas videlicet, res, actiones et crimina *§ ult. instit. de jure natur. gent.* criminum materia sub vocabulo actiones, late sumpto, comprehensa. Perinde, ac si titulus instit. de actionibus, de judiciis privatis inscriberetur: quemadmodum de criminibus titulus, de judiciis publicis inscribitur: sub generico, judicium, tum actionibus, tum accusationibus metonymice comprehensis: cum alias in criminalibus, accusationis vocabulo – *princip. Instit. de judic. publ.* – in civilibus et privatis causis, actionis propie utamur. Pariter hoc statutum – Ius Civile huius Tetrachiae non inscite appellandum authoritate Imperatoris Iustiniani in *§ 1 & 2 Instit. de jure natur: gent: & civili*; coll. Christin. ad Consuetud. Mechlin. in praelud. num. 2.3.4.5 – digestum secundum superiora quatuor capita.
(1) De Personis parte 1. Instit. Lib. 1.
(2) De Rebus parte 2.3.4 Instit. Lib 2.3.4. usque ad titul. 5 inclusive.
(3) De Actionibus parte 5 Instit. Lib. 4 tit. 6 usque ad 17 inclusive.
(4) De Criminibus, parte 6 Instit. Lib. 4, tit. 18.
Hac solam differentiam, quod Statuti parte 6 universim tractetur materia delictorum, tam privatorum quam publicorum; privata vero delicta in Institut. separatim tractentur sub classe rerum. Quae statuti methodus vel hoc solo laudari potest et defendi: quod hodie vix laeso agente ad reparationem damni privati contingat, quinsimul reus conveniatur ob interesse publicum mulctandus, aut aliter corrigendus, quo spectat titulus pandectarum de extraordinariis criminibus et *§8 Instit. de injuriis*, alliisque loci complures.

[7] Addit ad laudem operis et in argumentum non dissimilis industriae compilatorum huius statuti, quod Albertus et Isabella Gelriae pariter sacratissimi principes, easdem pene ob rationes eodemque stylo huius Tetrarchiae statuta confirmarint, quo Iustinianus olim suas juris Romani Institutiones, Pandectas, Codicem et Novellas confirmavit: tanta passim simulitudine verborum et sententiarum, consonantia et affinitate phrasium, ut nisi cui rei genium ita dictare videatur, statuti huius confirmatio, ad Justitiani prototypon formata esse videatur.

[8] Adeo ut memorati collectores vel testantibus ipsis principibus in [hanc] confirmatione non inferiori loco habendi sint quam Tribonianus olim, nec non caeteri illustres et faecundissimi viri, utpote quod per utrosque et civilis nostri patrii et Romani juris thesaurus collectus est, ac in quattuor membra partitis, velut totius legitimae scientiae, tum nostrae tum Romanae prima elementa.

[9] K.J.TH. JANSSEN DE LIMPENS, *Rechtsbronnen van het Gelders Overkwartier van Roermond*, Utrecht 1965 (Werken der Vereeniging tot Uitgaaf der bronnen van het Oud-Vaderlandsche Recht, 3rd series, no. 20), pp. 440-458.

Intellectual and Institutional Context of the Codification of Customary Law in the 16th Century

Codification presupposes an intellectual capacity to synthesise, as well as the driving force of an administration wishing to promulgate the product of such a synthesis as exclusively applicable law. Knowledge acquired must be rethought; the result presented in a systematic order. This process is often initiated by the legislator and aims at formulating legal rules and systemizing entire legal areas.[10]

By way of the Ordinance of 7 October 1531, Charles V gave the first impulse to the systematic recording of customary law in the Burgundian-Habsburg Netherlands. The order was not very effective at first and had to be reissued in 1540, 1569 and finally, in 1611, by the "Perpetual Edict for a better administration of judicial matters". In the past, opposition to the political endeavour to unify statute law, which was seen as a threat to local privileges, has often been considered the reason for the need to reissue orders for recording customary law. Gilissen, in particular, has pointed out the problems involved in writing down customary law. Without recurring pressure by central government and the provincial courts of law, together with frequently uttered threats that non-ratified customary law would be forcibly abolished, local authorities could often not be moved.[11] Recently, however, Martijn argued that these arguments were untenable for the reign of Archdukes Albert and Isabella, since towards the end of the sixteenth century the need for codification was generally felt. The authority which ratified the codified customary law should no longer be seen as the most important element in this, but rather the desires of local and provincial judges, who wanted certainty about the existing customary law in their area.[12] The formulation of the Guelders Country and Town Statute Book is part of this tradition, since it concerns recording unwritten law at the initiative of the Estates of Upper Guelders, which had come about in close cooperation with the Sovereign Council of Roermond, the supreme court for the area.[13]

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[10] M. VAN DE VRUGT, *Aengaende Criminele Saken. Drie hoofdstukken uit de geschiedenis van het strafrecht*, Deventer 1982 (Rechtshistorische Cahiers 4), pp. 12-13.

[11] J. GILISSEN, Les phases de la codification et de l'homologation des coutumes dans les XVII provinces des Pays-Bas, in: *Tijdschrift voor Rechtsgeschiedenis* 18 (1950) 36-67; 240-291, op. cit.. 58; idem, La rédaction des coutumes en Belgique aux xvie et xviie siècles, in: J. GILISSEN (red.), *La rédaction des coutumes dans le passé et dans le présent*, Bruxelles 1962, pp. 87-111.

[12] G. MARTIJN, *Het Eeuwig Edict van 12 juli 1611. Zijn genese en zijn rol in de verschriftelijking van het Privaatrecht*, Brussel 2000, pp. 137-138.

This may raise the question as to whether the increased willingness to cooperate in the codification of customary law is owed to improved intellectual conditions. Indications of this can be found in the work of Victor Brants. In his history of the faculty of law of the University of Louvain, he observes that, even though the codifications of customary law and the royal ordinances of the second half of the sixteenth century were not drafted at the University, the process was heavily influenced, in any case, by the Louvain doctors.[14]

At the beginning of the sixteenth century, the formation of Louvain jurists was firmly rooted in the Bartolist tradition. When in 1531 Charles V issued an order to codify customary law, as the French had done, legal science had not yet been much influenced by the emergence of Humanism in the Netherlands. Gabriël Mudaeus (1500-1560), who may be considered the founder of the philologico-historical legal method at the Louvain law faculty, was only appointed *professor institutionum* or *ordinarius in iure civili* in 1537.[15] It is mainly to the credit of Viglius of Aytta (1507-1577) that students of Mudaeus were actively involved in recording customary law. Viglius had begun his legal studies in Louvain, subsequently studied in Dôle and was a student of Alciatus, in Avignon, Valence and Bourges, before being appointed *professor institutionum* at Padua in 1532. There, in 1533/34 he published the Theophilus Institutes. In the Prologue to these Institutes, Viglius expressed the programmatic wish that Emperor Charles V would follow in the footsteps of Justinian in order to "bring order, union, [and] conciseness to our private law". Later on, in his capacity of President of the Secret Council of Brussels, he helped to bring this about.[16] In cooperation with the famous Louvain professor, Elbertus Leoninus, he fostered the institution of three royal chairs at the Louvain faculty of law in 1557, with a view to offering Louvain students a general introductory overview of Roman and Canon law. In 1560, he was one of the founders of the University of Douai and in 1569 he set up the Viglius College at Louvain University.[17]
Since students of Mudaeus were appointed to these royal chairs, legal instruction at Louvain was reformed on the basis of Humanism. As a result, the medieval method of instruction based on the exegesis of the Corpus Juris was replaced by a more systematic approach, whereby the law was explained as a system. This implied that no longer the *ordo legum*, the sequence of the

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[13] A.M.J.A. BERKVENS, G.H.A. VENNER, *Het Gelderse Land- en Stadsrecht van het Overkwartier van Roermond*, Arnhem 1996 (Werken Stichting OVR, nr. 25), pp. vii-viii, xvi-xix.
[14] V. BRANTS, *La Faculté de Droit de l'Université de Louvain à travers cinq siècles*, Paris / Bruxelles s.a {1917], p. 49.
[15] R. DEKKERS, *Het humanisme en de rechtswetenschap in de Nederlanden*, Antwerpen 1938, 97-143; G. VAN DIEVOET et al (ed.), *Lovanium docet. Geschiedenis van de Leuvense rechtsfaculteit*, Leuven 1988, p. 68 (M. Oosterbosch).
[16] R. DEKKERS, *Het humanisme*, pp. 49. Where Dekkers refers to "our *private law*" this should perhaps be read as "our *ius civile*", because the sixteenth-century codification effort was not limited to private law, but also comprised criminal law.

Digests, was decisive, but that introductory lectures were given on the basis of Justinian's Institutes and the final titles of the Digests: "*de verba significatione*" and "*de diversis regulis iuris antiqui*".[18]

The institution of the royal chairs not only served as an important incentive for legal humanism at Louvain University, but also turned the University into a breeding ground for justices, who, upon being appointed to the provincial courts of the Netherlands, were able to turn Viglius' codification effort into reality. This ultimately eroded, from within as it were, the particularist resistance against the codification and ratification of customary law: Archdukes Albert and Isabel capitalised on the innovation of legal teaching at Louvain, thus drastically speeding up the process of codification and ratification, in cooperation with the provincial courts. The application of the systematic method in formulating customary law meant a major quality impulse in particular with regard to the Antwerpian *Compilatae* and the related Guelders Country and Town Statute Book. This now makes it possible to fully appreciate François Palmert's eulogy.

Conclusion

According to Spruit, the system of the Institutes is of major importance, inasmuch as it determined the organisation of a number of eighteenth- and nineteenth-century West European codes, including the Dutch Civil Code as obtained between 1838-1992. In his view, Humanism introduced a fresh orientation of the Institutes' system, since jurists of that period –unlike the earlier glossators and commentators- aimed at a proper systematic classification of the subject matter. Seventeenth-century students of natural law, such as Hugo Grotius, were strongly attracted to the relatively simple model of the Institutes based on the *personae–res–actiones* trichotomy.[19] It must please him to whom this contribution is dedicated so rightly and deservedly, to know that, ahead of Hugo Grotius, the compilers of the Guelders Country and Town Statute Book drew their inspiration from the *Cunabula seu Elementa Iuris*!

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[17] *Lovanium docet*, p. 66

[18] G.C.J.J. VAN DEN BERGH, Geleerd recht, Deventer 2000^{4}, pp. 61-62; P. STEIN, *Roman Law in European History*, Cambridge 1999, pp. 71-101.

[19] J.E. SPRUIT, *Enchiridium. Een geschiedenis van het Romeinse privaatrecht*, Deventer 1994^{4}, § 247; idem, *cunabula iuris. Elementen van het Romeins privaatrecht*, Deventer 2001, p. V.