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Illegitimate children between testamentary law and practice in the sixteenth-century Low Countries

ABSTRACT: *Ius commune* denounced illegitimate children and severely restricted their rights to receive from their father through either intestate and testamentary succession law. Since bastardy was a common phenomenon in Early Modern Europe, it is worth comparing this theoretical attitude with actual practice. A study of sentences from the Great Council of Malines illustrates the types of arguments raised by parties in cases regarding testamentary bequests to bastards and shows that the councillors judged with some leniency. They generally managed to balance out the interests of both the illegitimate child and the legitimate heirs, while fulfilling the testator's last will as much as possible.

KEYWORDS: Illegitimacy, *Ius Commune*, Testamentary Law.

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HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

1. *Introduction*

When some time before 1536 Jan Wouterssone, a canon in Veurne (a town in West Flanders) and parish priest of the nearby village Steenkerke, left this world to join his Creator, he might have found comfort in the knowledge that he had put all his affairs in order and had taken good care for Romain, his illegitimate son born from his concubine[1]. During his life, he already had transferred various goods to his son before the local magistrate, reserving a lifelong usufruct for himself[2]. He included further bequests in his last will, which amounted to a decent income. But, as the best laid plans of mice and men often go awry, his arrangements did not have the intended effect. His nephews and nieces, several of his *ab intestato* heirs, challenged the bequests before the Council of Flanders[3], as they considered it far too extensive for a bastard child and an infringement on their own rights. In spite of Romain invoking the local customary law, that allowed anyone to donate or bequeath up to a third of their estate to whomever they pleased (including illegitimate children), the donations and bequests were ruled invalid. Romain was left with a lifelong annual rent of ten *librae* as reasonable alimentation[4]. Grieved by the outcome, Romain lodged an appeal with the Great Council of Malines. His plea was not radically different from the one he had put forward in Flanders: he mainly emphasized the local custom that had allowed his father to make such donations. As an additional

[1] See J. Van Acker, *Geestelijke leden van de H. Kruisbroederschap van Veurne voor 1560*, in «Westhoek», XXVII (2011), p. 28. Jan bore the title of *magister* and was parish priest of Steenkerke since 1504 at least (Veurne, Municipal Archives, Old Archive, no. 1701, fol. 129r). He probably died only shortly before the conflict was brought before the Court of Flanders and the Supreme Court of Malines, as the accounts of the parish of Sint-Denis in Veurne mention him as paying an annual rent on a property in Veurne until the account year 1537-1538. In 1538-1539, the rent was paid by his illegitimate son Romain. Veurne, Archives of the Deaconry, no. 294-300. Apart from Romain, Jan appears to have had another illegitimate child: Hannekin (Bruges, Rijksarchief, registers of the Kasselrij Veurne, no. 559, fol. 208v). The author wishes to thank Jan Van Acker of the Ten Duinen Museum in Koksijde for this information and the archival references.

[2] The use of a *donatio reservato usufructu* is known through Christinaeus' account of the events. P. Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum decisiones*, Antwerp 1636, *decisio* 161, I, pp. 235-237.

[3] In disputes on ownership, the Council could act as a court of first instance. J. Verfaillie, *Het archief van de Raad van Vlaanderen (1386-1795): gids voor de gebruiker*, Brussels 2014, pp. 32-33.

[4] Ghent, Rijksarchief, Council of Flanders, inv. no. 7525 (Register of sentences covering the period 27 April 1536-23 February 1538), fol. 77. The sentence was published in L. Gilliodts-Van Severen (ed.), *Coutumes des Pays et Comté de Flandre. Quartier de Furnes. Coutumes de la Ville et Chatellenie de Furnes,* Brussels 1897, III. no. 73, pp. 332-338.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

argument he brought forward that his father's eldest sister, being the senior *ab intestato* heir, who had not been involved in the conflict, had never contested the bequests and should therefore be considered to have agreed. As such, the other heirs were no longer eligible to contest the will. In the end, the councillors were convinced and overturned the original judgement. Romain was to receive one third of his father's patrimonial goods and all the latter's acquired immovable goods in life long usufruct, as well as full, hereditary ownership over the movable goods (*catheilen ende utensillien*)[5]. The other two thirds of the immovable goods were to be relinquished to the heirs[6].

This case demonstrates the difficulties that one might encounter in securing a legacy for one's illegitimate children, or taking possession of one if they were illegitimate themselves. Such thoughts are not new. Illegitimacy is a subject to which many studies have already been dedicated. It is a highly interdisciplinary topic: the status of illegitimacy did not only entail legal repercussions, but also social, religious and economic. As such, it has been studied by jurists, historians, legal historians, theologians, and sociologists alike[7]. The topic is a two-edged

[5] Patrimonial goods were those goods that formed the backbone of a family's landed estate and were expected to be passed on from generation to generation. The term acquired goods (*acquêts* or *conquêts*) refers to the goods that the testator acquired through his own means or labour. Due to the inter-generational function of the patrimonial goods, heirs-at-law were often less willing to release their rights to them. P. Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, II ed., Brussels 1987, p. 142, c. 192 and pp. 241-242, c. 428.

[6] Brussels, Algemeen Rijksarchief, Great Council of Malines, no. 837 (Register of sentences covering the period 6 April 1537-13 April 1538), no. 33, pp. 323-330 (henceforth: sentence 837.33). On the numbering of the sentences in the rest of this paper, see *infra*, footnote 50. It is noteworthy that the heirs did not bring forward the likelihood of Romain having been conceived while his father was already a priest. That would have severely increased the stigma as the father would have broken his vow of chastity, which was considered a serious trespassing.

[7] Among historians the subject is popular: the International Medieval Bibliography includes 181 records for the index term 'Illegitimacy'. Valuable studies include: J. A. Mol, *Speelkinderen en papenkroost: testamentaire beschikkingen ten gunste van bastaarden*, in idem (ed.), *Zorgen voor zekerheid: Studies over Friese testamenten in de vijftiende en zestiende eeuw*, Leeuwarden 1994, pp. 259-288; the volume *Illegitimität im Spätmittelalter*, Munich 1994; T. J. Kuehn, *Illegitimacy in Renaissance Florence*, Ann Arbor 2002. M. Carlier, *Kinderen van de minne? Bastaarden in het vijftiende-eeuwse Vlaanderen*, Brussels 2001; L. Laumonier, *Bâtards et enfants naturels à Montpellier (XIV^e-XV^e siècles). De la caritas à une pleine paternité*, in C. Avignon (ed.), *Bâtards et bâtardises dans l'Europe médiévale et modern*, Rennes 2016, pp. 319-334 – as well as most other contributions to this volume; M. van der Heijden – A. Schmidt – G. Vermeesch, *Illegitimate parenthood in early modern Europe*, in «*The History of the Family*», XXVI.1 (2021), pp. 1-10. Among theologians, especially mentioned should be the work of Lefebvre-Teillard: A. Lefebvre-Teillard, *Causa natalium ad forum ecclesiasticum spectat: un pouvoir redoutable et redouté*, in «Cahiers de Recherches Médiévales et Humanistes», VII (2000), pp. 93-103 ; Ead., *L'effet rétroactif de la légitimation en droit canonique*

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

sword. Despite the stigma and difficulties, illegitimate children were ubiquitous in medieval and early modern society. For many parents, they were children that deserved affection and care, regardless of their official status. As most illegitimate children could not inherit *ab intestato*, especially from the father, it was common that parents made attempts to endow them in their last wills sufficiently[8]. Yet even these declarations were not always uncontested, as the case of Jan Wouterssone demonstrates.

The aim of this paper is to determine the position of illegitimate children in sixteenth-century inheritance and testamentary law in the Low Countries. With this aim in mind, this contribution is divided into two sections. In the first, the legal framework that existed in the Low Countries during the sixteenth and early seventeenth centuries is being reconstructed. In the second section, the emphasis is on legal practice. Did judges decide rigidly, or was there also leniency? Which arguments prevailed to this end? While quite some studies have been dedicated to the formal position of the illegitimate child in various socio-juridical environments, less attention has been given to the latter part: whether and how such doctrinal ideas permeated everyday legal practice.

The research is divided in three parts. First the theoretical legal framework regarding illegitimacy and the position of bastards in inheritance and testamentary law will be mapped. Following that, the methodological framework will be explained. This includes the choice of source material and their benefits and limitations. In the final section, the arguments brought forward by the parties and the possible motivations of the provincial courts and Great Council will be treated.

2. *The legal framework*

2.1. *Types of illegitimacy*

To understand the legal position of illegitimate children, knowledge of both *ius commune* and particular law is required. *Ius commune* opinions on illegitimacy and the restricted legal position such offspring suffered were developed from later Roman law and Christian thought. Classical Roman law had different

médiéval, in eadem, *Autour de l'enfant. Du droit canonique et romain médiéval au Code civil de 1804*, Leiden/Boston 2008, pp. 329-341. Among sociologists: S. F. Hartley, *Illegitimacy*, Berkeley 1975.

[8] From the judgements studied in this paper can be deduced that fathers usually left their illegitimate children significant amounts of wealth, including immovable goods, especially when they had no legitimate children. This was different in other regions of Europe. Cf. A-M. Certin, *Paternité et filiation illégitime dans les villes de l'Empire (XV^e^-XVI^e^ siècles)*, in C. Avignon (ed.), *Bâtards et bâtardises dans l'Europe médiévale et modern*, Rennes 2016, p. 341.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

notions regarding this subject. The basic requirements were the same. The ideal situation for producing offspring was within a legitimate marriage (*iustum matrimonium*). Any children born from this union were immediately granted a status as the father's *sui haeredes* within the *familia*. Illegitimate children had no place within a *familia*; they were *sui iuris*. This status set them outside of the *patria potestas* and made them incapable of inheriting. Roman law also knew the distinction between *naturales* and *spurii*. *Naturales* were born from a free father to an unfree mother; *spurii* had a free mother but an unfree father[9]. This was solely a technical distinction; it lacked moral repercussions.

In medieval and early modern *ius commune*, under influence of Christian ethics, the technical discrimination was accompanied by a moral dimension. An illegitimate child not only had a different legal status than a legitimate one; they were also born with a moral stain, arising from the *defectus natalis* that the illicit union of the parents had brought forth. Different types of illegitimacy were blemished to a different extent, allowing a more or less hierarchical structure. Children born within a legitimate marriage were *naturales et legitimi*. A child was *naturalis* when it was born from the union of the parents (as opposed to *e.g.* an adoptive child). Then there were the children born out of parents who were not married, but for whom no impediment to marriage existed. The union of these parents might be accompanied by long term co-habitation, in which case such relationship was called a concubinage (*concubinatus*). The offspring was called *naturalis* or, in the vernacular, 'simple bastards' (*simpele bastaerden*). It was one of two types of illegitimacy that could be resolved, as canon law held that the subsequent marriage of the parents would *ipso facto* legitimize these children[10]. Further down the scale were the children born from a union that was impeded, for instance when the parents were related within a forbidden degree of consanguinity. Legitimation of these children was also possible, once the impediment to the marriage had been resolved (*e.g.* by papal dispensation) and the subsequent marriage had taken place. At the bottom of the hierarchy were the children born from damnable unions (*ex damnato coitu*). These unions were considered more scandalous, as intercourse between the respective individuals was considered forbidden by religion or law and could not be redeemed. Such offspring was subjected to a social and moral stigma and had few or no rights. The general term for such children was *spurii*, although opinions differed as to what this exactly entailed. For Bartolus and Baldus, *spurii* were illegitimate children

[9] J. Evans Grubbs, *Making the Private Public: Illegitimacy and Incest in Roman Law*, in C. Ando - J. Rüpke (eds.), *Public and Private in Ancient Mediterranean Law and Religion*, Berlin 2015, pp. 118-119.

[10] A. Lefebvre-Teillard, *L'effet rétroactif*, cit., pp. 26-31.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

born to those not living under the same roof (*i.e.* to a married couple or one living in concubinage)[11]. Others used the same term *spurii* for children whose parentage was uncertain. This included children born to prostitutes, as their mother's profession obscured the paternity question[12].

Jurists quite early on developed a multitude of distinctions, that apart from *naturales* and *spurii* included terms as *vulgo concepti*, *varii*, *manzeres*, *incestuosi*, *nefarii*, *adulterini*, *sacrilegi*, *nothi*, *hybridae*, and *bastardi*[13]. *Adulterini* were children born to parents of whom at least one was married (legitimately) to another person and thus engaged in adultery. *Sacrilegi* was a term for children of which one of the parents had been initiated into holy orders, such as monks and nuns, and who were thus subject to the vow of chastity. Such children were also commonly, but confusingly, called *spurii*. Certainly not all these concepts are worth discussing here, as several were not encountered in the scope of this research[14].

In the sources, the multitude in terminology was brought back to three major categories: legitimate, natural, and spurious. Nonetheless, their legal differences could already lead to complicated situations. In the early sixteenth century, Felix van Deynse, an inhabitant of Sint-Niklaas[15], had been involved in a relationship with a woman, from which a daughter was born. He later married another woman, but continued the affair with the first. From this affair another

[11] P. Christinaeus, *Practicarum quaestionum … decisiones*, cit., *decisio* 161, n. 3, p. 236.

[12] Hostiensis, *In … libros Decretalium commentaria*, Venice 1581, IV, f. 35v, ad X 4.17.6, 'Tanta est', n. 3 and 4

[13] Bartolus de Saxoferrato, *In Institutiones et Authenticas Commentaria*, Basle 1562, *Tractatus 29: De successionibus ab intestato*, n. 9-13, p. 689.

[14] *E.g. nefarii*, who were born from the union of an ascendant and a descendant, and *incestuosi*, who originated from a union between other people otherwise closely connected by blood. Of course that did not mean that such situations did not occur. Most incestual relations concerned people marrying (not always knowingly) someone within the forbidden degrees of kinship. Such cases were treated in ecclesiastical courts. M. Vleeschouwers-Van Melkebeek*, Incestuous Marriages: Formal Rules and Social Practice in the Southern Burgundian Netherlands*, in I. Davis – M. Muller – S. Rees Jones (eds.), *Love, Marriage, and Family Ties in the Later Middle Ages*, Turnhout 2003, pp. 77-95. Due to the stigma attached to incest, those involved were likely not eager to expose themselves by appearing in court to lay claim to an inheritance or testamentary bequest. On the differences between the various types of illegitimate children, see T. Kuehn, A Late Medieval Conflict of Laws: Inheritance by Illegitimates in *Ius Commune* and *Ius Proprium*, «Law and History Review» 15.2 (1997), pp. 248-250.

[15] He was counted among the able-bodied men (*weerbare mannen*) of Sint-Niklaas in 1552 and as alderman of the town in the same year. It is impossible that he was the same as the Felix van Deynse who was counted among the able-bodied men in 1480. C. P. Serrure (ed.), *De weerbare mannen van het land van Waes in 1480, 1552 en 1558*, Ghent [1861], p. 28 and 88.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

child was born, a son. While the children were full brother and sister, they held different legal statuses. The daughter had been born before marriage and was thus a 'simple' natural child. With the conclusion of the marriage, the affair had become adulterous, and as a result the son was born a *spurius*. In a legal dispute regarding their father's estate many years later, this distinction had significant repercussions for each child's legal claim to a share[16].

Interestingly, while the mid-sixteenth century saw a number of writings on correct sexual and marital behaviour, the offspring was rarely discussed. Peckius' *De continentia clericorum* fully omits the topic[17]. Everaerts mentioned bastardy in two *consilia*, but he discussed the phenomenon from a purely legal perspective, not a moral[18]. Nor did illegitimacy receive attention at the major doctrinal event of the sixteenth century, the Council of Trent. Although the Council severely condemned concubinage in its penultimate session, the canons remained remarkably silent with regard to progeny[19]. One of the participants, the Italian cardinal Gabriele Paleotti (1522-1597), did later author a treatise on illegitimacy that became known in the Low Countries and was used by Malines councillors, but this was first published in 1573, ten years after the council had ended[20].

[16] Sentence 862.113.

[17] P. Peckius, *Cl. viri Petri Peckii Ziricaei olim in Academia Lovaniensi iuris professoris in magno senatu Belgico consiliarii opera omnia*, Antwerp 1647, *De continentia clericorum sive de non alendis concubinis liber singularis*, pp. 382-388.

[18] N. Everaerts, *Responsa sive Consilia D. Nicolai Everhardi a Middelburgo iureconsulti*, Leuven 1554, *consilium* 198, p. 497 and *consilium* 220, p. 546. Both cases concern the inheritance rights of illegitimate children.

[19] *Canones et decreta sacrosancti oecumenici concilii Tridentini sub Paulo III, Iulio III et Pio IV pontificibus maximis cum patrum subscriptionibus*, Leipzig 1876, *Sessio XXIV: Decretum de reformatione matrimonii*, *C. VIII: Concubinatus poenis gravissimis punitur*, p. 152. One can wonder how influential such decrees were in the immediate aftermath of the Council. It took quite some time before other legislation regarding this topic, such as the decree *Tametsi*, outlining the requirements and procedure for a valid marriage, was generally accepted and complied with. J. W. O'Malley, *What Happened and Did Not Happen at the Council of Trent*, in W. François – V. Soen (eds.), *The Council of Trent: Reform and Controversy in Europe and Beyond (1545-1700)*, Göttingen 2018, I*: Between Trent, Rome and Wittenberg*, p. 53.

[20] G. Paleoti, *De nothis spuriisque filiis liber singularis*, Frankfurt 1573. It was known to and used by the late sixteenth-century councillor Christinaeus. Christinaeus, *Practicarum quaestionum … decisiones*, cit., *decisio* 161, n. 11, p. 237.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

2.2. *Illegitimacy and inheritance law*

The options for an illegitimate child to acquire goods through inheritance were limited. It was universally accepted that no illegitimate child could inherit *ab intestato* from the father or paternal relatives[21]. Canon law provided one exception in a particular situation. If a man died without leaving a wife and legitimate children, his concubine and their children could inherit two-twelfth of his estate[22]. With regard to the mother, several regimes showed more leniency. Based on adages as '*mater semper certa est*' or '*een moeder en maakt gheen bastaert*', all children would inherit from their mother in equal measure regardless of legal status. Such was custom in Flanders, parts of Hainaut, Liège, Utrecht, parts of Brabant and parts of Holland[23]. This was different in other Brabantine regions, in Malines, and in Luxembourg: there they were fully barred from inheriting.[24] Unless specified, the customs concerned all illegitimate children, regardless of subtype. Learned jurists tended to distinguish, and were followed in this by some customs. Legal opinions were not unanimous on the right to any inheritance from the parents, but generally forbade them from inheriting from either parent[25]. Where bastards could inherit from their mothers, this did not directly

[21] P. Godding, *Le droit privé*, cit., pp. 117-118; n. 138. The canonical basis for this position was X. 4,17,6, 'Tanta est'.

[22] Hostiensis, *In … libros Decretalium commentaria*, cit., IV, f. 20v, ad X 4.7.5, 'Cum haberet', n. 11. It is not known if this was also held true *vice versa*, *i.e.* when a woman died without husband or legal offspring.

[23] M. Carlier, *Kinderen van de minne*, cit., pp. 136-137, and mentioned in sentence 833.139. P. Godding, *Le droit privé*, cit., pp. 117-118; n. 138. For Utrecht, see W. van der Meulen (ed.), *Costumen, Usantien, Policien ende Styl van Procederen, der Stadt, Jurisdictie ende Vryheid van Utrecht*, Utrecht 1709, pp. 227-228, art. 24-26, § 30-31. In South-Holland, including the city Dordrecht, illegitimate children could inherit from their mother. According to sentence 824.54, similar laws were enclosed in the customs of The Hague, Haarlem, Leiden and Delft. I have been unable to verify this on the basis of the Werken der Vereeniging tot uitgave der bronnen van het oude vaderlandsche recht, in the following volumes: G. 't Hart – H. F. W. D. Fischer (eds.), *Costumen van 's-Gravenhage 1451-1609*, Utrecht 1963; J. Huizinga (ed.), *Rechtsbronnen der stad Haarlem*, The Hague 1911; and P. J. Blok (ed.), *Leidsche rechtsbronnen uit de Middeleeuwen*, The Hague 1884. For Dordrecht, see J. A. Fruin (ed.), *De oudste rechten der stad Dordrecht en van het baljuwschap van Zuidholland*, The Hague 1882, II, p. 266.

[24] For Malines, see G. De Longe (ed.), *Coutumes de la ville de Malines*, Brussels 1879, Tit. XVIII, no. 3, p. 144. For Luxembourg: see M. N. J. Leclercq (ed.), *Coutumes des pays et duché de Luxembourg et comté de Chiny*, Brussels 1869, II, *Coutumes générales du pays de Luxembourg*, tit. XIII, p. 32.

[25] Hostiensis, *In … libros Decretalium commentaria*, cit., IV, f. 35v, ad X 4.17.6, 'Tanta est', n. 2 and 4. Such distinction was made in Ghent: A. E. Gheldolf (ed.), *Coutumes de la ville de Gand*,

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

include the right to inherit from maternal relatives. In the prince-bishopric of Liège, Malines and South-Holland (possibly excluding Dordrecht) and parts of Flanders, including the cities Bruges and Courtrai, for example, illegitimate children could not inherit from their maternal grandparents (and as a result, although not explicitly mentioned, of any other collateral relatives)[26]. In regions where illegitimate children were not allowed to inherit from their parents, the prohibition extended unto their own descendants as well. The existence of an illegitimate child was considered a rupture in the legitimate bloodline, separating relatives connected 'above' (*i.e.* as if depicted in a genealogical figure) the misstep from those 'below'. Thus, children born to a person of illegitimate birth, even when they themselves were born from a valid marriage, were not allowed to inherit from their grandparents[27]. Such restrictions would then apply equally to other relatives.

The transferral of property through testamentary disposition or donation *inter vivos* was not based on relationship through blood, but on the personal will and convictions of the testator. The last will was the means *par excellence* to take care of one's illegitimate children, especially for fathers, who were otherwise unable to[28].

Regardless, testators had no carte blanche to appropriate the last will for evading the restrictions in inheritance law. To what extent one could employ it depended on the testamentary regime of the region. General testamentary rules

Brussels 1868, I, art. XXVI.11, p. 152. The custom forbade children of clergy, those born from adulterous relationships, and those born to parents within forbidden degrees of consanguinity from inheriting from their mothers and maternal relatives. In Utrecht, the legal distinction between *naturales* and *spurii* was abrogated. Both were allowed to succeed their mother, *quae semper certa est*. W. van der Meulen (ed.), *Costumen*, cit., p. 228, art. 24-26, § 28.

[26] P. Godding, *Le droit privé*, cit., pp. 117-118; n. 138. In Antwerp (duchy of Brabant), this right was restricted to inheriting from maternal ascendants, no collateral relatives. P. Christinaeus, *In leges municipales civium Mechliniensium ... notae seu commentationes*, Antwerp 1625, pp. 881-884, title 18, art. 3. It was allowed in Utrecht: W. Van der Meulen (ed.), *Costumen*, cit., p. 233, article 28, § 1. In South-Holland they could only inherit goods from their mother that the latter did not inherited from her parents or relatives. In Middelburg, in Zeeland, they could inherit from their mother, unless they were adulterous bastards. J. de Timmerman – C. Versluys (eds.), *Costumen, Ordonnantien, en Statuten der stad Middelburg in Zeeland*, Middelburg 1771, p. 181, rub. XIV, art. IX.

[27] Panormitanus, *Commentaria in … Decretalium Libros*, Venice 1617, VII, f. 41v, ad X 4,17,4, 'Causam quae', n. 3: '*nota secundo quod excluso ascendente tanquam illegitimo, excluduntur etiam descendentes, quantumcunque sint legitimi*'.

[28] *Ius commune* forbade a father to make bequests to his spurious children or to institute them as subsidiaries of the heirs. Bartolus de Saxoferrato, *In secundum tomum Pandectarum, Infortiatum, commentaria*, Basle 1562, p. 772, ad D. 34,9,25, 'Si gener', n. 3.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

needed to be followed when making bequests, regardless of the legatees being bastards or not. An important factor was the size of the testamentary reserve, and thus the size of the estate that could be disposed of freely[29]. In Flanders, this was set to one third[30]. The laws of Hainaut allowed bequests as long as they collectively did not exceed a value of 300 guilders. Furthermore, the bequests could not include immovable property[31]. This last restriction was also in force in Luxembourg. In contrast, Brabant had a highly liberal regime and allowed the disposition of the full estate by last will. One needed solely to respect the position of the surviving spouse and acquire consent of the respective liege lord in the disposing of fiefs[32].

Further rules might apply when an illegitimate child was involved. A number of jurists were opposed to allowing the institution of illegitimate children as testamentary heirs[33]. In various regions in the Low Countries, the usual type of last will was what Cappon called a '*Legatentestament*', a last will consisting mostly – if not entirely – of bequests[34]. The aim of such last wills was to instruct what should happen to parts of the estate that the testator did not want to be subject to standard inheritance law. Heirs-at-law needed not to be included, as they would receive all those portions of the estate not covered by the last will. A testator wishing to leave some of his goods to an illegitimate child could find recourse to such wills. In regions where the influence of *ius commune* was not strong and customary law did not maintain a testamentary reserve, one could thus transfer all one's goods as a bequest to an illegitimate child. The institution as heir had different legal consequences than being included as beneficiary. Upon the death of the testator, a heir would succeed directly (*saisine*) and was allowed to take direct action with regard to the estate. A beneficiary had a right to a part of the estate, but the nature of the right depended on whether the

[29] T. Rüfner, *Customary mechanisms of family protection: late medieval and early-modern law*, in K.G.C. Reid – M. J. de Waal – R. Zimmermann (eds.), *Comparative succession law, Volume III: Mandatory family protection*, Oxford 2020, pp. 46-47.

[30] P. Godding, *Dans quelle mesure pouvait-on disposer de ses biens par testament dans les anciens Pays-Bas méridionaux?*, «Tijdschrift voor Rechtsgeschiedenis», L (1982), p. 289.

[31] *Ibid.*, p. 288.

[32] *Ibid.*, p. 290-291. Nonetheless, in practice testators had to observe customary rules, such as the principles of devolution law and the matrimonial regime, that reserved a usufruct for the surviving spouse. M. Vermeer, *Testamentary practices and village courts in the Bailiwick of 's-Hertogenbosch (c. 1470-1550)*, «Tijdschrift voor Rechtsgeschiedenis», XCI (2023), pp. 482-485.

[33] Hostiensis, *In … libros Decretalium commentaria*, cit., IV, f. 35r-35v, ad X 4.17.5, 'Lator'; Panormitanus, *Commentaria in … Decretalium Libros*, cit., VII, f. 25v, ad X 4,7,5, 'Cum haberet', n. 13.

[34] C. Cappon, *De opkomst van het testament in het Sticht Utrecht*, Deventer, 1992, p. 193.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

bequest was *per vindicationem* or *per damnationem*. The latter did not give the beneficiary ownership of the specified good, but a claim. To seize the goods effectively, the beneficiary was dependant on the good nature and sense of duty of the heirs, or enforce his right through the legal apparatus[35].

In general, customary law allowed the testamentary disposal of property to children born outside lawful marriage, but a few customs posed obstructions[36]. In Namur, for example, since the sixteenth century one was not allowed to bequeath immovable property to bastards[37]. Where it was forbidden to institute illegitimate children as heirs or beneficiaries, mechanisms such as substitutions or *fideicommissa* could be employed to circumvent this prohibition. The child could be appointed substitute to one of their legitimate siblings, or the recipient of the goods was instructed to transfer them to the bastard. As such mechanics involved a degree of deception, several jurists and theologians, especially the late scholastics, considered them morally reprehensible[38].

The previous considerations did not mean that *spurii* were left completely out of the care of their parents. Unlike Roman law, canon law showed a relative mildness towards such persons and allowed them parental support in the form of alimentation. Its source was a decretal of Clement III, decreeing that while the birth of children from adultery only added to the severity of the parents' transgression, both parents *ex naturali aequitate* still had to provide for their children according to their needs[39]. Through this decretal such support was introduced into *ius commune*[40]. Commentaries materialized these provisions into two types of support: alimentation and a dowry[41]. Alimentation was above all

[35] What disadvantages the position of beneficiary had in comparison to the that of heir was encountered by the Bruges merchant Loys Altoniti in 1518.

[36] One could bequeath to illegitimate children in Utrecht (sentence 866.7) and Malines (*Costumen*, cit., p. 144).

[37] P. Godding, *Dans quelle mesure*, cit., p. 291. J. Grandgagnage (ed.), *Coutumes de Namur et Coutume de Philippeville*, Brussels 1869-1870, I, *Coutume de Namur du 27 Septembre 1564*, p. 13, art. 64.

[38] For instance L. Lessius, *De iustitia et iure caeterisque virtutibus cardinalibus libri quatuor*, Antwerp 1612, *lib.* 2, cap. 19: 'De testamento et legatis', *dubitatio* 6, pp. 242-243. I have found no authors approving such constructions.

[39] X 4,7,5, 'Cum haberet'.

[40] For instance by Bartolus de Saxoferrato, *In Institutiones et Authenticas Commentaria*, cit., *Tractatus 9: De alimentis*, n. 17, p. 610, with references to X 4,7,5, 'Cum haberet', and Auth. 'Ex complexu' to C. 5,5,6, 'Si quis'.

[41] Cf. Hostiensis, *In … libros Decretalium commentaria*, cit., IV, f. 20v, ad X 4.7.5, 'Cum haberet', n. 10 and 11. The rules for alimentation were implemented in various European countries, e.g. in Spain: E. Gacto Fernandez*, La situación juridica de los hijos naturales e ilegitimos menores de edad en el derecho histórico español. Alimentos y tutela*, in *L'enfant. Deuxième partie: Europe médiévale et*

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

considered the provision of food so as not to let the child experience hunger. Below the age of three, this was the responsibility of the mother. She would have to breastfeed the child herself, or pay for another to take over this task[42]. Once the child reached the age of three, the father was to step up. In a later stage of life, the alimentation needed to be sufficient to live from. What should be considered sufficient was a question left unanswered by learned jurists, and was delegated to the judiciary. There were a few exceptions in which the parent was no longer held by this duty. If the child showed ungratefulness towards his father, alimentation could be suspended. If he exercised a profession or craft that provided him with sufficient income to live from, no further support was necessary. Jurists declared the various grounds for disinheriting, as listed in Novella 115, also legitimate for suspending alimentation.[43] Just as there was an undefined minimal size of the alimentation, so too was there a maximal size. The prime consideration was that the donation to the illegitimate child was not allowed to infringe the minimal claims of the heirs-at-law. If it did, the latter could file a *querela inofficiosi testamenti* and demand alteration of the relevant donation[44].

It is important to note that these rules only concerned the situation in which paternity had been established. How this could be accomplished, was left untreated. Given the limited technical means available such questions were usually resolved by witness depositions[45]. Other arguments, such as physical appearance, were also invoked, but it is unknown how convincing they were[46]. If paternity could not be established, the child had to be considered an outsider and was unable to claim anything through consanguinity. Occasionally this might

modern, Brussels 1976, pp. 169-182.

[42] G. De Longe (ed.), *Coutumes de la ville de Malines*, cit., p. 146 (Tit. XVIII, no. 6).

[43] Panormitanus, *Commentaria in … Decretalium Libros*, cit., VII, f. 25v, ad X 4,7,5, 'Cum haberet', n. 10. Bartolus de Saxoferrato, *In Institutiones et Authenticas Commentaria*, cit., *Tractatus 9: De alimentis*, n. 11, p. 610.

[44] S. Lohsse, *Passing Over and Disinheritance in the Days of the Ius Commune*, in K. G. C. Reid – M. J. de Waal – R. Zimmermann (eds.), *Comparative Succession Law: Volume III: Mandatory Family Protection*, Oxford 2020, pp. 21-22 on the *querula* in Roman law and subsequent pages for the discussion in generated in *ius commune*. From the sixteenth century, such mechanisms found their way into customary law: T. Rüfner, *Customary Mechanisms of Family Protection*, cit..

[45] A. Shepard, *Accounting for Oneself: Worth, Status, and the Social Order in Early Modern England*, Oxford 2015, p. 25.

[46] S. De Renzi, *Resemblance, Paternity, and Imagination in Early Modern Courts*, in S. Müller-Wille – H.-J. Rheinberger (eds.), *Heredity Produced: At the Crossroads of Biology, Politics, and Culture, 1500-1870*, Cambridge, MA 2007, pp. 61-84. P. Crawford, Blood and paternity, in Eadem (ed.), *Blood, Bodies and Families in Early Modern England*, Abingdon 2004, 113-139.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

even increase their prospects as it opened the path to testamentary bequests that were less restrictive[47].

3. *Methodological framework*

Following the theoretical section, we will now address the primary sources. As the main point of departure, the sentences of the Great Council of Malines (*Grote Raad van Mechelen*) have been selected[48]. There are three distinct

[47] This is the case in Sentence 868.104. See also *infra*, section 4.1, under 'Establishing illegitimacy'.

[48] An extensive bibliography up to 1980 was provided by R. van Answaarden and H. de Schepper, *Grote Raad van Mechelen. Bibliografie,* in *Miscellanea Consilii Magni. Ter gelegenheid van twintig jaar werkgroep Grote Raad van Mechelen*, Amsterdam 1980, pp. ix-xxvi. Additions up to 1988 were collected in H. Gall – J. Koster-van Dijk – A. Wijffels, *Fabre Facta. Bibliografische schetsen van de in druk verschenen publicaties van Prof. mr. J. Th. de Smidt*, in J. Koster-van Dijk – A. Wijffels (eds.) *Miscellanea Forensia Historica. Ter gelegenheid van het afscheid van Prof. mr. J. Th. de Smidt*, Amsterdam 1988, pp. 1-28. Since then, the number of publications has further expanded considerably. The following, non-exhaustive list was compiled from the International Medieval Bibliography. C. G. Roelofsen, *Traité et droit: le rôle des traités anglo-bourguinons auprès du Grand Conseil de Malines (1477-1482)*, «Revue du Nord: Revue d'Histoire et d'Archéologie des Universités du Nord de la France», LXVI.260 (1984), pp. 398-399. C. L. Verkerk, *De werkgroep "Grote Raad van Mechelen"*, «Holland historisch tijdschrift: Regionaal-historisch tijdschrift», XVI.6 (1985), pp. 331-340. A. Wijffels, *Qui millies allegatur. Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460-1580)*, Leiden 1985. A. Wijffels - J. M. I. Koster-Van Dijk, *Les procédures en révision au Grand Conseil de Malines (1473-1580)*, «Publications du Centre européen d'études bourguignonnes (XIVe-XVIe s.)», XXX (1990), pp. 67-97. D. Lambrecht, *Baljuw en deken in Kaprijke (1469): wereldlijke versus geestelijke rechtspraak*, «Bulletin de la Commission royale des anciennes lois et ordonnances de Belgique», XXXV (1992-1993), pp. 45-116. A. Wijffels, *Grote Raad voor de Nederlanden te Mechelen (ca. 1445–1797)*, in E. Aerts *et al.* (eds.), *De centrale overheidsinstellingen van de Habsburgse Nederlanden*, Brussels 1994, pp. 448-461. R. van Answaarden, *Verkenningen in een grensgebied: het requeste civile in de praktijk van de Grote Raad der Nederlanden, 1460-1580*, «Verslagen en mededelingen van de Stichtung tot Uitgaaf der Bronnen van het Oud-Vaderlandse Recht», VIII (1994), pp. 31-67. P. Lejeune, *Un document inédit: l'attribution du comté de Salm à la famille De Reifferscheid par le jugement du 6 février 1456 du Grand Conseil de Malines (première partie)*, «Glain et Salm. Haute Ardenne», XLVI (1997), pp. 102-113. C. H. van Rhee, *Litigation and legislation: civil procedure at first instance in the Great Council of for the Netherlands in Malines (1522–1559)*, Brussels 1997. A. Wijffels, *Grand Conseil de Malines: La rédaction des sentences étendues et le recueil de jurisprudence de Guillaume de Grysperre* in Idem (ed.), *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports, I: Essays*, Berlin 1997, pp. 299-316. H. De Schepper, *Staatsgezag en staatsmacht in de Nederlanden. Verworvenheden en beperkingen van het Bourgondisch-Habsburgse systeem*, in H. De Schepper – J. Geurts (eds.), *Staatsvorming onder de Bourgondiërs en Habsburgers. Theorie en Praktijk*, Maastricht 2006, pp. 13-50. L. T. Maes, *Het Parlement en de Grote Raad van Mechelen: 1473–1797*, Antwerp 2009. P. De Win, *Het monumentale schilderij. Plechtige*

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

arguments for this decision. Firstly, the Great Council was the highest judicial body in the Low Countries. It was an appellate court for decisions issued by the courts in the various provinces. Thus, the cases originated from various parts of the Low Countries, allowing a broader scope. Secondly, as a result of this the texts of sentences from the Great Council usually contained two – and sometimes even three – sentences: the original judgement of the provincial court and the one pronounced by the Great Council[49]. Lastly, on a more practical note, the sentences of the Great Council for most of the sixteenth century have been summarized and published between 1966 and 1988[50]. These volumes allowed

openingszitting van het Parlement van Mechelen onder Karel de Stoute (1474): weinig zekerheden, veel vraagtekens en een hypothese, «Handelingen van de Koninklijke Kring voor Oudheidkunde, Letteren en Kunst van Mechelen», CXXII (2018), pp. 17-53. C. Apers, *Lambert de Briaerde (ca. 1494-1557). Voorzitter van de Grote Raad van Mechelen en raadsheer van keizer Karel*, «Handelingen van de Koninklijke Kring voor Oudheidkunde, Letteren en Kunst van Mechelen», CXXII (2018), pp. 55-100. Noteworthy are also the dissertation of An Verscuren, with an overview of accessibility of the Great Council's archives on pp. 8-14, and the dissertation of Marc Ronvaux. A. Verscuren, *The Great Council of Malines in the 18th century. An Aging Court in a Changing World?*, Cham 2015; M. Ronvaux, *L'ancien droit privé namurois et sa pratique au XVIIIe siècle*, Namur 2020. Finally, it is necessary to mention the archival inventories of the various series in the archives of the Great Council. The Werkgroep Grote Raad van Mechelen has made inventories of the records concerning Holland: *Inventaris en beschrijving van de processtukken (dossiers) behorende tot de beroepen uit Holland, berustende in het archief van de Grote Raad van Mechelen*, 10 vols., Brussels 1964-1974, authored by J. C. Andries (vols. 1-3), J. Th. De Smidt (vol. 1), A. H. Huussen (vols. 4-5 and 9-10) and A. J. M. Kerckhoffs-De Hey (6-8). Other inventories are the following: E. Van den Bussche, *Inventaire des registres du Grand Conseil de Malines. Avec supplément pour les nos. 1186-1553 (requêtes et varia en portefeuilles)*, Brussels 1992. M. Oosterbosch, *Grote Raad voor de Nederlanden te Mechelen. Procesbundels beroepen uit Vlaanderen. Ordinaris processen (nr. 1-1000)*, Brussels 1998. Idem, *Inventaris van het archief van de Grote Raad voor de Nederlanden te Mechelen. Procesbundels. Beroepen uit Holland 1460-1740*, Brussels 2006. D. Leyder, *Inventaire des archives du Grand Conseil des Pays-Bas à Malines. Dossiers de procès de Flandre – Clergé, 1454-1792*, Brussels 2012.

[49] Sentence 833.139 decided in a case originally brought before the feudal men of Courtrai, whose judgement was appealed at the Council of Flanders; the case of sentence 850.66 was initiated before aldermen of Gorinchem and afterwards the Court of Holland; sentence 855.110 originated as a sentence of the aldermen of Aalst, which was later challenged before the Council of Flanders; the procedure of sentence 862.113 was started before the aldermen of the Land van Waas, and later before the Council of Flanders; sentence 865.120 was originally brought before the city aldermen of Dordrecht and later before the Council of Holland; and sentence 868.104 was originally tried by the aldermen of Namur and then the Court of Namur.

[50] J. Th. De Smidt *et al.* (ed.), *Chronologische lijsten van de geëxtendeerde sententiën berustende in het archief van de Grote Raad van Mechelen*, 6 vols., Brussels 1966-1988. To facilitate searching between the original volumes and the summaries, the editors have added page numbering in all volumes and numbered each sentence (renewed in each volume). Their reference system, *e.g.*

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

us to browse through the several thousands of sentences and easily identify relevant cases, something that is much more difficult for the archives of the provincial courts in the Low Countries[51]. Within the years 1500-1580 a total of twenty-five sentences were found that concerned testamentary or *ab intestato* succession and involved people of illegitimate birth. These cases form the backbone of this study. Given the prevalence of bastardy in early modern society, that number is remarkably low. This becomes even more apparent when contrasting it with the vast amount of cases treated by the Great Council in those years: just 0,3% of all cases included testamentary conflicts involving bastards[52].

In Figure 1 they have been distributed per decade, and further divided according to the provincial council that originally treated the case. The majority of the cases were brought in from Holland and Flanders. Absent from the list are the councils of Brabant, Hainaut and Gueldres, as the Great Council had no jurisdiction over them. There is no clear explanation for the prominence of cases from Holland. Their pre-eminence has also been signalled by the editors of the summaries, who denote that between 1511 and 1570 Holland provided 20-45% of the total amount, despite the distance that appellants had to traverse[53].

837.33 for the sentence in the case on Jan Wouterssone's estate (sentence 33 in inv. no. 837 of the archive of the Great Court), has been adopted in this paper.

[51] Summaries of sentences pronounced by the Court of Flanders have been included by Buntinx. J. Buntinx, *Inventaris van het Archief van de Raad van Vlaanderen*, 9 vols., Brussels 1964-1979.

[52] This number is based on the overview of edited registers as given in J. Th. De Smidt *et al.* (ed.), *Chronologische lijsten*, cit., VI, p. XI. The total amount of cases for the volumes II-VI (covering the years 1504-1580) is 7.929, of which twenty-five cases is 0,3%. If volume I, covering the years 1470-1504, is included, the percentage decreases to 0,2%.

[53] J. Th. De Smidt *et al.* (ed.), *Chronologische lijsten*, cit., VI, p. VIII and Graph 2b. See also Wijffels, *Qui millies allegatur*, cit., I, p. 15 (Graph A.2). The prominence of appeals from Holland has also been noticed by Zuijderduijn, albeit without explanation. C. J. Zuijderduijn, *Medieval capital markets: markets for renten, state formation and private investment in Holland (1300-1550)*, Leiden 2009, pp. 44-45.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

Period	Amount	Provincial council						
		Artois	Flanders	Holland	Malines	Luxemb.	Namur	Utrecht
1511/20	1		1					
1521/30	1			1				
1531/40	4		3	1				
1541/50	8	1		5	1	1		
1551/60	4		1	1	1		1	
1561/70	7		2	3			1	1
Total	25	1	7	11	2	1	2	1

Figure 1. The amount of judgements concerning inheritances and last wills involving illegitimacy, grouped per original provincial court and per decade.

Wijffels has argued how the extended sentences had primarily the function of a legal executorial title, with which the victorious party could demand satisfaction from the opposing party.[54] The word 'extended' has a double meaning here. On the one hand, the registers contain the texts of the sentences *in extenso*, with only a few formulaic elements abbreviated[55]. On the other hand, the version contained in the registers is the version extended to the party or parties involved. Each sentence is therefore shaped as letters patent and structured accordingly. The text is issued in the name of the prince and opens with a protocol, in which he addresses the readers. A long narrative clause then describes the events leading up to the sentence in a more or less chronological order. Thus, the text is initiated with names of the parties and the cause for the discord, followed by the various legal steps undertaken in court. These include the main arguments of the parties, their responses to or refutations of the other party's arguments, and the presenting of additional evidence such as documents or legal advice. Each party also delivers its claim. The text concludes with the pronunciation of the sentence. When the case had originally been treated by a lower court and the procedure at the Great Council was an appeal, the second procedure is structured in the same format, albeit in a more general and shortened form. Elaboration was only considered necessary if existing arguments were amended or new ones were added. The end of this description concludes the narrative clause and starts the actual disposition: the definitive judgement given by the Malines councillors.

[54] A. Wijffels, *Grand Conseil de Malines*, cit., pp. 302-303.

[55] Apart from the registers of extended sentences, the Council also kept registers of *dicta*, highly summarized records containing often not more than the names of the parties and the outcome. J. Th. De Smidt, *Chronologische Lijsten van de Geëxtendeerde Sententiën. Inleiding*, in *Miscellanea Consilii Magni. Ter gelegenheid van twintig jaar werkgroep Grote Raad van Mechelen*, Amsterdam 1980, pp. 5-7.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

The sentences generally do not give an extensive motivation, nor many references to learned law in the argumentation of the parties[56]. Particular law was more commonly cited. Godding locates this lack of motivation in a canon law tradition, that discouraged judges from motivating their decisions[57]. Consequently, he believed that it was not possible to evaluate the effect of the parties' arguments recorded in the sentences. In this, he disagreed with Verkerk, who claimed that the selection of arguments found in the sentences were the ones that had convinced the councillors[58]. I concur with Godding. A consideration of individual arguments and the rationale behind the judgements cannot be reconstructed. Neither is it always possible to discern how parties thought about specific arguments. It was common for parties to have themselves represented in the Great Council or in the provincial councils by professionals. The argumentation and refutation of the other party's arguments would likely have been influenced – or at least framed – by the representatives' legal knowledge[59]. Nonetheless, I do believe that the sentences can be studied to make some statements about the intentions of the parties and councillors. This cannot be accomplished on an individual level, but by studying a set of sentences of similar cases – *in casu* testamentary conflicts involving illegitimate children – tendencies might be indicated. If a specific argument appears in multiple sentences and the decision is more or less similar, it might be hypothesized that argument was deemed valid by the councillors.

An additional source are the editions of *decisiones*, decisions of – in the Low Countries – supreme courts that were published since the early seventeenth century[60]. In the Southern Low Countries, the first set of *decisiones* was printed

[56] A. Wijffels, *Grand Conseil de Malines*, cit., pp. 300-302 and idem, *La motivation des decisions judiciaires*, in F. Hourquebie – M.-C. Ponthoreau (eds.) *La motivation des cours suprimes et cours constitutionnelles*, Brussels 2012, pp. 160.

[57] P. Godding, *La motivation des arrets du Grand Conseil de Malines au 16e siècle. A propos d'un article recent*, «Tijdschrift voor Rechtsgeschiedenis», XLV (1977), pp. 155-158.

[58] C. L. Verkerk, *Onderzoek naar de motivering in rechte bij de Grote Raad van Mechelen in de zestiende eeuw*, «Verslagen en Mededeelingen Vereeniging tot uitgaaf der bronnen van het Oud-Vaderlandsche recht», XIV (1975), pp. 297-298. Despite Godding's criticism, an unaltered version of the text (minus the appendices) was published in 1980: C. L. Verkerk, *Onderzoek naar de motivering in rechte bij de Grote Raad van Mechelen in de zestiende eeuw. De tienden van raapzaad en hennep in Snellerwaard, Hekendorp en Lange Linschoten*, in *Miscellanea Consilii Magni. Ter gelegenheid van twintig jaar werkgroep Grote Raad van Mechelen*, Amsterdam 1980, pp. 97-120.

[59] This influence is particularly suspected when Roman legal terminology is being used, such as *quarta Falcidia* (sentence 857.133), and *coniunctio verbalis* and *coniunctio realis* (sentence 862.113).

[60] W. Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries (c. 1500–1680)*, Leiden 2020, pp. 61-76.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

in 1626-1632: they concerned sentences of the Great Council, collected and organised by Paulus Christinaeus. The collection was published in six volumes: the first volume had an ephemeral scope; volumes two to five followed the order of the Codex Justiniani; and volume six concerned feudal law[61]. For the first volume Christinaeus had collected material from various sources, including notes from Charles de Boisot, who was a councillor at the Great Council between 1531 and 1546 and also his wife's grandfather[62]. Among the cases was that of Jan Wouterssone's estate, which was included by Christinaeus[63]. Such *decisiones* were not simply the texts of the judgements, they were used as example in a short treatise or explanation regarding a specific legal question[64]. In this case, the *decisio* had the title '*Utrum filio sacerdotis aliquid possit per patrem relinqui, & quantum*'. Christinaeus first considered the civil law prohibition to provide goods to *spurii*. He then asked what *spurii* exactly are, and whether children from priests could be counted among them. To reach an answer he needed to wrestle through the many various opinions of doctors. In the end, he reaches the conclusion that *spurii* are those illegitimate children not born to a father and the concubine he lives together with (and for whom there are no impediments for marriage). Children to parents who did fulfil that condition, were *naturales*. The next step was to determine how a father could make bequests to his spurious child. According to Bartolus, supported in this by others, the safest way was by bequeathing it either as alimentation or as dowry, as canon law forced fathers to take care of such children, and not to give too excessively since this could be considered fraud and the bequest would be subject to reduction. The proper size of such alimentation should be determined in each individual case and depended upon factors as the necessity and dignity of the recipient. The *decisio* then arrives at the actual case. Christinaeus introduces the facts, the legal procedure, and the argumentation. As he concludes the description of the procedure in the Great Council, he gives the councillors' rationale and the date of the sentence. The *decisio* was completed by providing references to further literature, in particular Nicolaus Burgundius' *Tractatus controversiarum ad consuetudines Flandriae* and Gabriele Paleotti's *De nothis spuriisque filiis*.

[61] W. Druwé, *Loans and Credit*, cit. pp. 137-138.

[62] A. Wijffels, *Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries)*, in J. H. Baker (ed.), *Judicial Records, Law Reports and the Growth of Case Law*, Berlin 1989, pp. 193 and 195. He suggests that *decisiones* 53 to 185 were taken from De Boisot's notes.

[63] P. Christinaeus, *Practicarum quaestionum … decisiones*, cit., *decisio* 161, pp. 235-237.

[64] This corresponds to Druwé's fourth type of *decisio*-collections. W. Druwé, *Loans and Credit*, cit., pp. 71-72.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

These collections of *decisiones* are valuable since they provide the reader with various sentences pronounced in past cases and embed these in references to *ius commune* and opinions from other authorities. Christinaeus had access to sources now lost that allowed him to gain a deeper understanding of the cases. For instance he knew, possibly through De Boisot, who as a councillor might have present when the case was being discussed, that two major arguments formed the basis of the councillors' judgement in the case of Jan Wouterssone's estate: the first being that the value of the bequeathed goods was not considered excessively high; the second that the ownership remained with the heirs-at-law and only the usufruct was given to the spurious son for the remainder of his life[65]. Thus, in the end the contested goods would revert to the legitimate branches of the family and no real damage would befall the family estate.

In spite of the benefits that the *decisiones* offer, they are simultaneously a possible pitfall. In the absence of the original councillors' notes, it cannot be ascertained any more whether the Roman and canon law in the references were actually consulted and considered by the councillors, or by Christinaeus to harmonize retroactively historical decisions with *ius commune* principles. One of the reasons why *decisiones* were collected was so that they could function as a reference work for judges or scholars who searched for legal precedents[66]. The addition of references to *ius commune* would have been intended to facilitate this, just as the references to similar sentences in other countries. In *decisio* 161, for instance, Christinaeus cites a similar sentence of the German *Reichskammergericht*, as collected and edited by Andreas Gaill[67]. One is at risk to overestimate the role of *ius commune* in the Council's jurisprudence of the sixteenth century[68].

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[65] P. Christinaeus, *Practicarum quaestionum … decisiones*, cit., *decisio* 161, n. 10, p. 237: '*Senatusque considerauit multum quod parentibus & proprinquis non fiebat magnum praeiudicium, quippe quibus dabatur proprietas rerum donatarum, quodque vsusfructus remanebat penes spurium, quodque summa triginta-quatuor librarum Grossorum non erat immensa summa, & quod illae triginta-quatuor librae dicto spurio erant necessariae ad se alimentandum*'.

[66] W. Druwé, *Loans and Credit*, cit., pp. 55-56.

[67] A. Gaill, *Practicarum observationum tam ad processum iudiciarium, praesertim Imperialis Camerae, quam causarum decisiones pertinentium libri duo*, Cologne 1645, II, *observatio* 88, pp. 464-466: '*An pater filiam spuriam dotare possit*'.

[68] To determine the influence of *ius commune* on the process of decision making of the Council is not possible. Wijffels has shown that from the late fifteenth century the amount of references to *ius commune* in the pleas increased significantly, reaching a zenith in the years 1541-1560 before decreasing again. Wijffels, *Qui millies allegatur*, cit., I, pp. 130-131 (Tables C.7a-b) and p. 152 (Tables C.19a-b). See also A. Wijffels, *Law Reports as Legal Authorities in Early Modern Belgian Legal Practice*, in G. Rossi (ed.), *Authorities in Early Modern Law Courts*, Edinburgh 2021, p. 228.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

Being collected and edited was a prerogative not just reserved for the *decisiones* of supreme courts; the same occurred to those of provincial courts. Within the body of cases discussed in this contribution, one was the subject of a *decisio* by the Council of Utrecht, edited by the Dutch jurist Radelant[69]. This case was later appealed before the Great Council of Malines[70].

4. *Practice*

The following section is dedicated to the argumentative strategies available to the parties, both those invoked by illegitimate children or their representatives or successors, and those challenging the position of bastards. This does not mean that they mirror the situation truthfully, but they inform us on the parties' intentions and on the arguments, they believed to be defensible and convincing in court. In most cases, the challengers were the heirs-at-law. Not all arguments were aimed directly towards the illegitimacy. These could be genuine restrictions, or arguments presented by the other parties in court to reinforce their own position. The arguments have been divided in five types. Subsequently, by connecting the arguments with the outcome as recorded in the sentence, it might be possible to make statements on their success. Two general principles have been identified and will be discussed.

4.1. *Types of arguments presented by the parties*

ESTABLISHING ILLEGITIMACY – The determination of one's birth status in an age devoid of precise demographical records was difficult and once assumed equally difficult to refute[71]. Most often, claimants resorted to common

[69] A conflict between an illegitimate daughter of a canon and the chapter of Saint-Peter's church in Utrecht was brought by the former to the Court of Utrecht in June 1552: a sentence was pronounced against the defendants in July 1560. Shortly after the defendants lodged an appeal with the Great Council of Malines; the council confirmed the original sentence in May 1565 (Sentence 866.7; Utrecht, Het Utrechts Archief, Kapittel van Sint Pieter te Utrecht, no. 620-a-1). For a reason unknown the conflict continued, and in 1581 the chapter brought the son of the original claimant before the Court of Utrecht, which again ruled against the chapter. Utrecht, Het Utrechts Archief, Hof van Utrecht, no. 188.09, unfoliated (scans 277-295). This latter sentence was used by the Utrecht jurist and councillor Willem Radelant in his *Decisiones*. W. Radelant, *Decisiones Posthumae Curiae Provincialis Traiectinae*, Utrecht 1637, *decisio* XVII, pp. 28-34.

[70] Sentence 866.7.

[71] Sentence 824.54: p. 514-515: '*ende al waere hii haere zone geweest, des de voirs. verweerers niet en geloifden, zoe moeste hii bii haer geprocreert geweest hebben staende haeren huwelicke metten voirs. wiilen heeren Henrick de Zwane, ende soe was hii een overwonnen kint ende adulterin, ende en mochte ziinder*

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

knowledge, which could be corroborated by testimonies if necessary. Around 1534, Adriaen van Dam had bequeathed a not insignificant sum of two hundred *librae* to his illegitimate son Claes. Twelve years after his death, his son brought his father's widow to court to demand an inventory of his late father's estate. He claimed to have been legitimized, and needed the inventory to determine his child's share. The widow defended herself by remarking that no proof of such legitimation existed, and further added that Claes was not a simple bastard but an adulterous one, as he had been born from an adulterous relationship during her husband's first marriage. This would imply that he would not even have been eligible for the two hundred *librae*, let alone for a child's share[72]. The widow could not support her claim with records, but she would have been able to find a number of persons able to corroborate if necessary. Other arguments were sensorily perceptible indicators or logic inference. To exemplify these, a combination of the two can be found in a 1543 case from Namur, concerning the estate of Jehan Jaspart, former dean of the church of Notre-Dame in Namur[73]. The heir-at-law aimed to have the provisions of the last will overturned, as he believed the main beneficiary, Pierchon Michot, to be the testator's illegitimate son. He first brought forward Michot's physical resemblance to the testator as proof of them being son and father respectively[74]. Then, he reasoned that the testator had bequeathed to his three nephews and his niece sums of twenty-six florins each, to his own brother only ten florins, and to Michot half his estate with a total value of ten thousand florins. This would only have been logical if Michot was related closer to him than the other family members: he must therefore have been his son[75]. If this could be proven, then the prohibition to bequeath to bastards was violated, resulting in the nullification of the bequest and replacing Michot with the testator's nephews and nieces, of which the plaintiff was one, as heirs-at-law.

In response, Michot fiercely denied paternity and stated that he had always been treated and acknowledged by his mother and her husband as their joint, legitimate son. The relationship between the parent and the child was an often-

moeder niet succederen.'

[72] Sentence 849.10.

[73] Sentence 868.104. See also Brussels, Algemeen Rijksarchief, Great Council of Malines, Dossiers de procès de Namur (1479-1698), nos. 549-550 for the case files.

[74] Sentence 868.104, p. 1755: '*comme aussy pour tel il estoit repute par commune fame et renomme daultant plus pour ce quil le resembloit entierement*'

[75] Sentence 868.104, p. 1754-1755: '*que ledit Pierchon* (...) *auroit par forme dalimentation dix mille florins ou plus, la ou a son propre frere, pere des demandeurs, il auroit seullement laisse dix florins une fois et a ses trois nepueux et une niepce la valeur denviron six vingtz florins une fois*'.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

used indicator. A close relationship might point towards an acknowledgement of the child as a member of one's family – regardless of their legal standing – and a parental inclination to take good care of them[76]. While the argument did not have any legal implications, it might be useful in convincing the councillors that certain donations or bequests were indeed in accordance with the parent's intentions (or – in Michot's case – that since his official parents acknowledged him as such, Jaspart could not have been his father and the will was thus valid). This argument was brought forward in four different cases. Thrice the child stated to have been brought up in the family of the parent and to have been acknowledged by the latter as their child[77]. Once the argument was used in reversed form. The heirs-at-law of Vranck van Dam claimed that in the years preceding his death Van Dam had never shown his illegitimate son any sign of friendship or love, or even displayed a desire to welcome him in his house. The cause for this had been the son's marriage to a Lutheran woman, which Van Dam had been vehemently opposed to[78].

(IN)CAPACITY TO RECEIVE – Intrinsically connected to the debate on the status were the restrictions on what could be left to the illegitimate child. Regular natural children could be included in the last will as beneficiaries; the limits of the bequests in their favour were set by the rules of testamentary freedom. If the heirs-at-law wished to challenge these, they had to prove that what the testator had given, was excessive. Thus, legal discrimination took place at the very root of the testamentary possibilities. The restriction of illegitimate children to be instituted as heirs not only separated them from their legitimate siblings, it also gave them a less advantaged position in the actual acquisition of what had been promised to them by will, as beneficiaries only had a claim on the estate. This was the point of contention in the conflict regarding the estate of Cornelio Altoniti, a wealthy and influential Florentine banker and merchant who resided in Bruges[79]. Altoniti had an illegitimate son Loys, to whom he had

[76] P. Godding, *Le droit privé*, cit., p. 121, c. 145.

[77] Sentences 824.54, 862.113 and 868.104.

[78] Sentence 844.104, p. 995: '*dat de voorn. Vranck zeven oft acht iaren voor ziin overlyden den heescher noyt vrintscap noch teycken van liefde bewesen en hadde oft oick tziinen huyse hadde willen ontfangen, als hebbende gedaen tegens ziinen wille trouwende een huysvrouwe infect van der secte Lutheriane, seggende de voirn. Vranck altoos dat de voorn. eyscher van ziinen goeden nyet eenen stuver hebben en zoude, maer dat ziin broeder ende zuster, zusters ende broeders kinderen alleenliick ziin goeden zouden genyeten*.'

[79] On the Altoniti, see A. Dewitte, *'Wapen'cleeden van Fluerence ca. 1500*, «Biekorf» LXXXVII (1987), p. 271. M. Boone, *Le crédit financier dans les villes de Flandre (XIV^e-XV^e siècles)*, «Barcelona Quaderns d'Historia», XIII (2007), p. 65. P. Stabel, *Entre commerce international et économie locale. Le monde financier de Wouter Ameide (Bruges fin XV^e-début XVI^e siècle)*, M. Boone – W. Prevenier,

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

bequeathed a lifelong rent, the right to be raised in his household along with his legitimate children, and a position in his trading firm. Apart from appointing executors, he had also tasked a relative, Lattanzio Altoniti, with the continuation of the firm on behalf of his children. A year after Cornelio's death, in October 1507, a commission of powerful men that included the bishop of Arras, the lord of Verre (possibly Veere in Zeeland (NL)), and the president of the Council of Flanders, had decided that Lattanzio had fulfilled his executorial duties completely and released him from the position. No longer bound, Lattanzio had Loys thrown out from Cornelio's house, ceased payment of alimentation, and took over control of the firm. His mismanagement caused the company to be pronounced bankrupt just four years later. In a pre-emptive move to outsmart the creditors, Lattanzio had transferred all property to a fellow Italian merchant, Filippo Gualterotti. Having been deprived of his rightful income, Loys brought the matter to court, demanding the continuation of his alimentation. The Bruges aldermen acknowledged his claim. Upon Gualterotti's refusal to continue payment, Loys responded by bringing the matter to the Great Council and demanded that the estate was handed over to the original executors for the proper fulfilment of the last will or – if the latter were no longer alive – to new executors who were to be appointed by the Council. Gualterotti maintained his resistance and claimed that there was no legal relation between him and Loys, as the latter was neither an heir of Corneille, an executor of his will, nor a guardian of his heirs. If he desired to file claim, it should be directed at the heirs. The Council eventually, in 1520, decided in favour of Loys and ordered Gualterotti to cede the goods to him (probably on behalf of the heirs-at-law) and to pay the overdue alimentation[80]. In this example Loys' illegitimate status was not the cause of the discord, but it complicated his position. By being reduced to beneficiary, he possessed a disadvantaged juridical position in

Finances publiques et finances privés au bas Moyen Âge - Public and Private Finances in the Late Middle Ages (Actes du colloque tenu à Gand les 5 et 6 mai 1995 - Proceedings of the Colloquium, Ghent, May 5th and 6th 1995), Leuven 1996, pp. 85-88.

[80] This judgement did not fully settle the case, as Gualterotti remained opposed to ceding the goods and suggested a payment offer instead. Loys had the goods seized, upon which Gualterotti summoned him to the Council. The seizure was approved by the councillors. Cf. Sentence 820.17. While the case was being treated, outside of court the conflict continued. Loys simultaneously made additional attempts to secure his father's estate for the rightful heirs. In 1518, in his capacity as representative of the Florentine nation, he collected a set of the nation's jewels kept at the Franciscan convent in Bruges. A group of Florentine merchants, including Gualterotti, charged him with unlawful possession of these jewels, as he would not release them. Loys in turn claimed to keep the jewels for the heirs of Cornelio to collect them. L. Gilliodts-Van Severen (ed.), *Cartulaire de l'ancienne estaple de Bruges*, Bruges 1904-1909, II, pp. 471-472; no. 1454.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

comparison to an heir, and his clout against the machinations of Gualterotti was limited[81].

If the illegitimate child was found a *spurius*, the bequest was not subject to the rules of a reasonable bequest but had to be reduced to a dowry or an alimentation. This meant the reduction of the size of the gifts, as a reasonable alimentation was generally much smaller than whatever bequest their parents had provided for them. Such was the rationale in the case of the estate of Jan Wouterssone, mentioned in the introduction. His heirs-at-law argued that if the illegitimate son had been included in the will as a normal beneficiary, it contravened law. If the bequest had been granted as alimentation, it was too excessive. The annual rent that the Council of Flanders had assigned, was considered an income sufficient to support him[82]. As mentioned above, the Great Council disagreed and set a much higher sum. With such divergent opinions on what a 'reasonable alimentation' should be, it is not surprising that none of the parties ever specified the size in their demands. In the sentences, the term is used without further explication. Only once the plaintiff explicitly requested the Council to determine a fair quantification[83]. It can be assumed that this was set individually and depended on social status and the wealth of the family.

NATURE OF THE GOODS – While any personal covetous motives of the heirs-at-law to challenge a last will cannot be excluded, there was an important reason to protest the outflow of too much wealth to members not officially part of a family. The collective of patrimonial goods formed the core of a family's landed estate and was intended to be preserved and transferred from one generation to the next[84]. Bequeathing them to 'outsiders' was not encouraged, as it diminished the family wealth[85]. Hence heirs-at-law regularly emphasised how the last will infringed this principle and harmed the family as collective. Beneficiaries of

[81] Nicolaas Everaerts wrote two *consilia* in which he expounded on the differences between heirs and legatees, see: W. Druwé, *Consilia by the Leuven Law Professors Robertus De Lacu (†1483) and Nicolaus Everardi (c. 1462-1532) on the Law of Last Wills*, in M. Vermeer – W. Druwé – M. Mikula (eds.), *Testamentary Freedom, Ius Commune and Particular Law (c. 1400-1620)*, Leuven 2023, pp. 95-97.

[82] Ghent, Rijksarchief, Council of Flanders, inv. no. 7525, fol. 77. L. Gilliodts-Van Severen (ed.), *Coutumes des Pays et Comté de Flandre,* cit., III. no. 73, pp. 332-338.

[83] Sentence 857.133.

[84] Cf. P. Godding, *Le droit privé*, cit., p. 142, c. 192 and pp. 241-242, c. 428.

[85] P. Godding, *Le droit privé*, cit., p. 393, c. 703. For normal conveyances of immovable goods this reticence was reflected in the *droit du retrait*, that allowed relatives of the seller to take ownership of a good within a specified time period in exchange of the same price the buyer had paid.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

a contested last will often brought forward the argument that the testator had acquired a significant share, if not the majority, of the estate not through inheritance but through his own industry and labour[86]. Such acquired goods (*acquêts*) were not subjected to this restriction and could be bequeathed freely[87].

FORMAL AND TECHNICAL ELEMENTS – Another approach was to question the validity of the last will. While the requirements of the late medieval and early modern last will were much less strict than those of their classical counterparts, the absence of the few formal requirements could still lead to invalidation of the disposition. In that case, the testator was supposed to have died intestate and the estate was to devolve into the hands of the heirs.

Challenging a will on formal grounds occurred in a number of cases. In a dispute regarding the estate of Adriaen van Meerdervoort, originally judged by the Council of Holland, the document which the illegitimate children had brought forward as their father's last will – in which he had left them an annuity – was considered by the legitimate children no more than a hastily written wish on a scrap of paper (a '*cartabelleken oft notule*'). It had been written by the testator on his deathbed, while he was in Bergen op Zoom in Brabant, and was signed only by the parish priest and a single witness. Furthermore, the latter argued, their father had not been mentally sane to make a testamentary disposition. He had suddenly become ill and by the time the parish priest had arrived to administer the last rites, he had lapsed into insanity ('*furiosus ende niet compos mentis*') and remained so until he died later that day. The account contains two grounds for invalidation: the lack of a sane mind and the insufficient amount of witnesses. Apart from the notary (or parish priest, in this case), two witnesses were required[88]. In a similar case, in 1542 Vranck van Dam's last wills were contested. The heirs had found no testament among the deceased's possessions and his illegitimate son had not exhibited a legal instrument, but an extract from the notarial register that lacked the testator's and witnesses' signatures and which they therefore did not consider valid. Above that, the heirs argued that the deed that was shown to them likely would not have been the most recent version of the last will of the deceased, as the executors who were appointed by it had died

[86] For instance sentence 868.104: p. 1756: '*nauroit jamais eu aucuns biens patrimonaulx ne autres venans de pere et mere ou autre parent, mais par son industrie, frugalite et labeur avoit acqueste*'. See also sentences 837.33 and 849.5.

[87] See P. Godding, *Le droit privé*, cit., p. 244, c. 433 for a list of customs that extended the *droit du retrait* to include the *acquêts*.

[88] J. B. Christyn (ed.), *Brabandts Recht, dat is generale costumen vanden Lande ende Hertoghdomme van Brabandt midtsgaders van het Hertoghdom van Limborgh, Stede ende Lande van Mechelen*, Antwerp 1682, II, *Costumen ende Usantien der Stadt Berghen Op-ten-zoom*, title XVII, art. 1-3, p. 789.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

several years before the testator. At the very least the testator would have needed to replace them.

When feudal property was involved, additional formalities might be necessary to create a valid last will. In a case originally treated by the Council of Utrecht, the dean and chapter of Saint-Peter's church in Utrecht claimed that one of their canons, Herman van Amerongen, should never have bequeathed to his illegitimate daughter certain lands which he held from the chapter in heritable leasehold. As these goods were fiefs, Van Amerongen would have needed consent of the feudal lord (emperor Charles V as lord of Utrecht), of which they could not find any proof. This would also have meant that upon Van Amerongen's death the goods would have reverted to the emperor, who had returned them to the chapter. The chapter had thus acted in full accordance with the law when they had given out the lands in leasehold again to another person. The illegitimate daughter protested to this depiction of the events. The role of the emperor as lord of Utrecht had been reduced and the chapters have been behaving as independent actors freely alienating property for many years. Her father had been capable of bequeathing the feudal property, as it had been given to him in heritable leasehold. The customs of Utrecht acknowledged all last wills bequeathing feudal property – even when given to illegitimate children, when made with the consent of the feudal lord. The original conveyance of leasehold had included just a single restriction on bequeathing, *viz.* that the recipient needed to be an inhabitant of the Nedersticht, where the goods were located. As the daughter fulfilled this requirement, there existed no impediment to her succeeding in the goods. All further arguments presented by the chapter were false and part of a scheme to trick her out of the goods[89].

The primacy of customary law was brought forward in other cases as well to support the position of the beneficiary. A Flemish bastard claimed to be the true owner of a fief that had been left by his maternal aunt. He cited two Flemish customs: the first confirmed that fiefs passed on to the most senior relative to the deceased; the second was the general custom that a mother could not give birth to a bastard. His claim to ownership was challenged by the husband of his younger half-sister, who claimed that the custom required the successor to be of legitimate birth and that his wife, being the oldest child from the mother's lawful marriage, should succeed in the fief[90].

When the last will in its entirety was beyond reproach, individual bequests could be challenged on technicalities. In the dispute concerning the estate of Felix van Deynse, the exact wording of the last will was at stake in the dispute.

[89] Sentence 866.007.

[90] Sentence 833.139.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

The heirs quoted Felix' last will, in which was determined that his two illegitimate children would each receive an equal share in the third part of his estate he was completely free to dispose of. In the interpretation of the heirs, this phrasing constituted a *coniunctio verbalis* rather than a *coniunctio realis*. Both *coniunctiones* were legal constructions in which a testator made a bequest to multiple legatees. In the former, the bequest was made in a single sentence (*i.e.:* 'I bequeath X to A and B'), giving each of the legatees an equal share in the bequest. In the latter, pronounced in two separate sentences (*i.e.:* 'I bequeath X to A and I bequeath X to B'), each of the legatees had a full right in the bequest. If one of the legatees was unable to claim their share, a *coniunctio realis* allowed for the acquisition of that share by the others (a *ius accrescendi*). A *coniunctio verbalis* limited to each their original share in the bequest; the share that was not being claimed returned to the *ab intestato* heirs. Thus, the heirs argued, the incapacity of the spurious son to claim meant that his share returned to them, rather than to his sister who received the other share. The invocation of such a Roman legal concept must have overwhelmed the knowledge of the original councillors (the aldermen of the Land van Waas): the sentence recorded that they resorted to learned jurists for advice. As the final judgement granted ownership of half the estate, the jurists would have agreed with the existence of the *coniunctio verbalis*[91].

In some jurisdictions, probate had to be granted by the courts within whose territory the goods were located before the legatee could seize his bequests[92]. He would then have to be invested by these courts with the ownership of the goods.

OTHER ARGUMENTS – Among the arguments recounted in the *narratio* of the sentences, the consent of heirs is one found in several cases. Obtaining consent generally was not obligatory, although a few customs did prescribe it.[93] Where it was not obligatory, it could facilitate the future execution of a last will, as it formally disqualified the other heirs from opposing the last will. It could be obtained before, during, and after creating a last will. If obtained beforehand or during, the testator could include in his last will a reference to the written act of consent or the person or persons giving consent could be present and confirm their agreement. When the last will had already been created, the relatives could

[91] Sentence 862.113. A second example is found in sentence 860.029, p. 400, where it was claimed that an illegitimate daughter did not have a *ius accrescendi* in the goods of her father following the death of her brother.

[92] P. Godding, *Dans quelle mesure*, cit., p. 287. Cf. sentence 860.029

[93] Sentence 838.029: Casselambacht. Cf. M. Carlier, *Kinderen van de minne*, cit., pp. 174-175, where the necessity of heirs' consent was based not on customary law, but on equity.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

approbate it. Not all heirs needed to express consent; that of the closest heir sufficed. This immediately eliminated the claims of other, more distantly related heirs. Nevertheless, it did not always deter these other heirs from at least attempting to challenge the will. Although Cornelis van der Beke managed to obtain his brother's consent to his last will, allowing him to bequeath goods to his illegitimate son, following his death his brother's children challenged the will and laid claim to the goods.[94] Vice versa, heirs-at-law could plead in court that they had never agreed with the contents of a last will[95]. Consent of relatives was also necessary in matters that indirectly influenced the inheritance process. Thomas de Hooge, priest in Malines, had tried to legitimise his illegitimate son Jan. He managed to acquire letters patent from the prince confirming this, but his heirs-at-law protested subsequent attempts to have Jan appointed as heir[96].

Just as the behaviour of the father towards the illegitimate child was presented as proof of his benevolent attitude and paternal responsibility, so did fathers often already during their lives reveal their intentions for their goods following their death. Making this known to others could strengthen the position of their last will against those who afterwards wished to challenge it. Thomas de Hooghe had informed his relatives of the bequests he had included in his last will for his bastard son; Jehan de Holloingne had had his last will ratified in the courts in whose jurisdiction the goods were located; and Felix van Deynse had demanded his relatives to comply with the content of his last will and renounce their rights on the goods bequeathed to his bastard, on punishment of disinheritance[97].

4.2. *Sentences of the provincial courts and the Great Council*

As was already mentioned above, the sentences do not contain a rationale. It is therefore not possible to determine with certainty whether individual arguments were followed by the councillors. However, by comparing the arguments made in various cases and their respective outcomes, it might be possible to identify general principles they tried to uphold, and make any statements on decision tendencies.

[94] Sentence 855.110.

[95] Cf. Sentence 849.178.

[96] Sentence 849.178. Godding had stated that a legitimisation by princely rescript did not immediately entail succession rights. Unlike their legitimate siblings, legitimised children did not inherit from their father. P. Godding, *Le droit privé*, cit., pp. 114-115, c. 132.

[97] Sentences 849.178, 860.029, and 862.113. P. Godding, *Dans quelle mesure*, cit., 287.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

Before discussing possible decision tendencies, we will first have a look at the outcome of the cases under scrutiny. In figure 2 below all twenty-five sentences have been split up simplified in the various stages of legal action. For each action, the figure gives the party that came out most successful. There were various ways the Great Council could respond to an appeal. The councillors could overturn a previous judgement, or dismiss an appeal and confirm the sentence. The latter cases are marked with '(conf.)'. A quick glance at the final column shows that in thirteen cases (52%) the Great Council ruled in favour of the bastard or their successors; in the latter cases the bequests to the bastard were *ipso facto* legitimised. This is somewhat less than the amount of sentences of provincial courts that ruled in favour of the bastard: this numbers fifteen out of twenty-one (71%). This observation brings forth a question: was the Great Council more conservative than the lower judicial bodies?

Year	Parties (Great Council)	Role of bastard child(ren)	Sentence local court in favour of:	Sentence provincial court in favour of:	Sentence Great Council in favour of:
1520	819.8: bastard vs. possessor of estate	Party	NA	NA	Bastard
1524	824.54: bastard vs. mother and legitimate siblings	Party	NA	mother and legitimate children	mother and legitimate children (conf.)
1534	833.139: woman vs. bastard half brother	Party	Bastard	Bastard (conf.)	Bastard (conf.)
1537	837.33: bastard vs. heirs-at-law	Party	NA	heirs-at-law (mainly)	bastard (mainly)
1537	838.29: heirs-at-law vs. bastard	Party	NA	heirs-at-law (mainly)	heirs-at-law (mainly) (conf.)
1538	838.39: heirs-at-law vs. bastards	Party	NA	Bastard	Bastard (conf.)
1538	838.40: heirs-at-law vs. bastards	Party	NA	Bastard	Bastard (conf.)
1543	843.58: Executors vs. heir-at-law	Beneficiary in contested will	NA	heir-at-law	Executors
1544	844.104: Bastard vs. heirs-at-law	Party	NA	Bastard	Bastard (conf.)
1546	846.64: Bastard vs. heirs-at-law	Party	NA	Bastard	Bastard (conf.)
1548	849.5: Heirs-at-law vs. executors and bastard	Party	NA	NA	Heirs-at-law
1548	849.10: Widow vs. bastard	Party	NA	Bastard	Widow
1549	849.178: heirs-at-law vs. bastard	Party	NA	NA	Heirs-at-law (mostly)
1549	850.66: Heir-at-law vs. heir of bastard	Previous beneficiary	Heir-at-law	Heir of bastard	Heir-at-law
1555	855.110: Heirs-at-law vs. heir of bastard	Previous beneficiary	NA	Heir of bastard	Heir of bastard (conf.)
1555	856.7: Heir of bastard vs. heirs-at-law	Previous beneficiary	NA	Heir of bastard	Heir of bastard (conf.)
1557	857.133: Heir-at-law vs. bastard	Party	Bastard	Bastard (conf.)	Heir-at-law
1559	860.29: Heirs of bastard vs. heirs of widow	Previous beneficiary	NA	NA	Heirs of widow (mostly)
1561	862.49: Heirs-at-law vs. bastard	Party	NA	Bastard	Bastard (conf.)

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

1562	862.94: Executors vs. heirs-at-law	Beneficiaries in contested will	NA	Heirs-at-law	Heirs-at-law (conf.)
1562	862.113: Heirs-at-law vs. bastards	Party	Heirs-at-law	Bastards	Heirs-at-law
1565	865.120: Heirs-at-law vs. bastard	Party	Heirs-at-law	Bastards	Heirs-at-law
1565	866.7: Possessor of estate vs. bastard	Party	NA	Bastard	Bastard (conf.)
1567	868.104: Bastard vs. heir-at-law	Party	Bastard	Heir-at-law	Heir-at-law (mostly)
1568	869.61: Heirs-at-law vs. heirs of bastard	Previous beneficiary	NA	Heirs of bastard	Heirs of bastard (conf.)

Figure 2. The simplified course of the testamentary cases involving illegitimate children.

PRESUMPTION OF THE VALIDITY OF THE LAST WILL – In the sentences, the councils, and in particular the Great Council, display a highly benevolent attitude towards last wills, assuming a presumption of their validity until the evidence brought against them was overwhelming. The verification of last wills was approached formally: as long as the basic requirements had been fulfilled, the will was considered valid. In at least three instances, provincial courts determined a challenged will to be valid; these judgements were subsequently upheld by the Great Council[98]. One of them concerned the last will of Vranck van Dam, delivered to the heirs only in an unsigned copy from the notarial register. For the Great Council, this was sufficient; such copies were considered to hold probative value as the original record could be found in the register[99]. If on the other hand the evidence for the existence of a valid will was insufficient, then the councillors had no scruples to rule against the will. Such was the fate of the putative last will made by Matthijs van Streefkercke. His illegitimate daughter claimed that shortly before her marriage he had written a document in which he had included her as heir. He had then given this document to two men who had been present and had obliged them to conceal it until further notice, to avoid his relatives objecting to his daughter's marriage. As this account of

[98] Sentences 856.7; 866.7 and 869.61

[99] Notarial process developed the idea that not the public instrument was the undeniable proof that a legal act had taken place, but the original copy in the notary's register, the so-called *imbreviatura* or *protocollum*. While lacking several of the formalities found in the public instrument, its position as the first in the 'chain of versions' and the eventual legislation regarding the keeping and preserving of proper registers gave it credibility and probative force. For Holland, the Estates and Charles V issued such legislation in 1525 and 1540 respectively. A. I. Bosma, *Repertorium van notarissen residerende in Amsterdam Amstelland, ambachtsheerlijkheden en geannexeerde gemeenten 1524-1810*, Amsterdam 1998, p. 10. R. Huijbrecht, *Het notariaat in de gewesten Holland en Zeeland*, in A. F. Gehlen – P. L. Nève (eds.), *Het notariaat in de Lage Landen ±1250-1842*, Deventer 2005, pp 149-150 and 175-180.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

events could not be corroborated by further proof, the existence of the will was refuted by the Great Council[100].

In the other cases, where the invalidity had not been proven, and the last will was thus not considered impugned, the Great Council nearly always ruled in favour of the testators' wishes. Challenges to the contents appear to have been conceded only rarely. Only two of the twenty-five sentences did not or not entirely fulfil the stipulations in the will. In the first case, the Council sentenced the illegitimate son to return a feudal estate to the heirs-at-law, while allowing him to retain another feudal estate and all the patrimonial and acquired goods he had received by last will[101]. The arguments employed by the heirs-at-law to contest the bequest were twofold: the absence of consent of the closest heir and the incapacity of the illegitimate son to receive by last will. Why then the Council chose to have just one feudal estate returned to the heirs is unclear. The arguments of the heirs cannot have been sufficient, as they claimed ownership over all goods, not just the feudal estate they in the end received. There is no mention of lacking seigneurial authorisation for the transportation of feudal property that could invalidate the bequest of (one of) the feudal estates. It might be possible that a partial restitution was considered by the Council an equitable solution for both parties. In the second case, the motives appear somewhat clearer[102]. Three brothers, as *ab intestato* heirs of their uncle Thomas de Hooge, a priest and chaplain at St. Rumbold's Cathedral in Mechelen, filed a claim against Thomas' two illegitimate children. The latter had taken possession of their father's goods and had claimed ownership as their father had donated them some of these goods by life and bequeathed others in his last will. The donations had been recorded by the appropriate authorities (*i.e.* the city's aldermen). Conversely, the nephews denied that their uncle had acquired the consent from the prince that allowed him to provide his illegitimate children with more than an alimentation, and therefore the donations and the last will were null and void.

POSITION OF CUSTOMARY LAW – A second important principle found in the sentences of the Great Council was the observance of the customs. Within the legal order of the sixteenth century, the custom was no longer the exclusive source of law, albeit still one of the major legal fundaments[103]. While legal

[100] Sentence 865.120. Curiously, the Council of Holland had earlier considered the existence of the will adequately proven.

[101] Sentence 838.29.

[102] Sentence 849.178.

[103] J. Gilissen, *La coutume*, Turnhout 1982, p. 54.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

arguments are rarely recounted in the *narratio* (especially references to *ius commune* were omitted), when they were, they were almost exclusively drawn from customary law[104]. It can be presumed that parties had knowledge of their local customs when they entered legal procedure. That did not stop them from disputing the content of customary rules, particularly when the latter had not yet been homologated. It those cases, the party presenting the custom would have to prove its existence and validity, for instance by providing witness depositions. If this was insufficient, then the disputed custom was not admitted as evidence. This was not explicitly mentioned in the sentence, but can be inferred from the final judgement. In 1524, the claimant asserted the existence of a custom in The Hague, Haarlem, Leiden and Delft that allowed all children – including those born outside lawful marriage – to inherit from their mother as argument to claim half his mother's estate. The existence of this custom was disputed by the defendants and therefore had to be proven. The Great Council ruled in favour of the defendants: the existence of the alleged custom would not have been proven[105].

When a custom was proven to exist, the Council had to acknowledge it. The councillors also stood before the important task of harmonising customary stipulations with principles from *ius commune*. In most of the cases studied here, this meant bringing in line the learned legal ban on bequeathing to illegitimate children with the customary freedom of disposing of (part of) one's estate. Canon law provided a first step towards a solution by allowing alimentation: the councillors then needed to reach a balance that honoured both the legal principles and the testator's will. In passing a sentence regarding the estate of Jan Woutersone, they found this balance in allowing the illegitimate son the immovable goods in usufruct. Firstly, the sentence respected *ius commune* as it did not transfer ownership, only the right of use of the goods and their fruits. This income made a suitable alimentation. Secondly, the sentence determined that upon the death of the illegitimate child the heirs-at-law would receive full ownership, and thus secured the patrimonial goods for the family. Thirdly and finally, in maintaining the volume of the goods bequeathed the councillors respected the testator's wishes.

In exceptional cases, the Great Council could even set customary law aside. In a sentence of 9 September 1559, the Council declared a customary rule from Namur non-binding, preventing an illegitimate daughter from successfully

[104] References to customary law were found in sentences 824.54; 833.139; 837.33; 838.29; 843.58; 850.66; 860.29; 862.113; 865.120; and 866.7.

[105] Sentence 824.54. Indeed scrutinising the editions of the Leiden, The Hague and Haarlem customs led to the conclusion that such rules were not present. See *supra*, footnote 23.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

claiming the goods her father had bequeathed her in his last will[106]. The testator's widow had retained the goods and refused to release them. The customary rule that was the main point of content allowed a priest or a man who did not have children with his wife to bequeath both his patrimonial goods and acquired goods to any illegitimate children[107]. The illegitimate daughter, and later her legal successors, upheld the validity of her father's testament as it was compliant with this custom. The widow, and eventually her successors, claimed that the marriage contract she had made with him had overruled her husband's last will and challenged the custom itself as being unjust and contrary to moral. Apart from pronouncing the customary rule non-applicable in this particular case, the Great Council decided that the disputed custom *in se* was corrupting and the Great Council forbade the people of Namur from further using it[108]. It was indeed omitted from the 1564 codification of the Namur customs[109]. This decision was based on the notion that both good and bad customs existed, and that the latter were the cause for sin or bad example. As the prince at his accession had promised his subjects to safeguard their good customs, he was allowed – perhaps even obliged – to root out the bad ones[110]. The Namur custom was considered bad and facilitating immoral behaviour, hence the prince possessed the power to abrogate such customs, which was done through one of the delegated governmental institutions.

5. *Concluding remarks*

Through twenty-five sentences pronounced by the Great Court of Malines, complemented with a number of *decisiones* by Christinaeus, the position of the illegitimate child in actual testamentary practice has been compared to their

[106] Sentence 860.29.

[107] Regarding the usage of this custom in pre-sixteenth-century Namur, see: Godding, *Dans quelle mesure*, cit., p. 285.

[108] Sentence 860.29, p. 402: '*declarons par ceste nostre sentence diffinitive et pour droit la pretendue coustume de Namur par laquelle le pere prestre ou marye pourroit legater a ses enffans adulterins et awitrons biens patrimoniaulx ou acquestes a rachat pour la valeur dueulx, sorruptele et pur telle estre de nulle valeur, interdisant a noz subietz dudit Namur doresnavant plus en user*'. The custom had been invoked in 1543 in the case regarding the estate of Jehan Jaspart. Sentence 868.104, p. 1763.

[109] J. Grandgagnage (ed.), *Coutumes de Namur*, cit., I, *Coutume de Namur du 27 Septembre 1564*.

[110] J. Gilissen, *La coutume dans les « pays de par-deçà » (Belgique, Pays-Bas, Nord de la France) (XIIe-XVIIIe siècles)*, in *La coutume. Deuxième partie: Europe occidentale médiévale et moderne = Custom. Second Part: Medieval and Modern Western Europe*, Brussels 1990, pp. 296-297. Idem, *La coutume*, cit., pp. 30-31.

HISTORIA ET IUS - 1 GIUGNO 2024 - DOI 10.32064/25.2024.17 www.historiaetius.eu - 25/2024 - paper 17

theoretical position in learned and customary law. In the argumentation brought forward by the parties, a number of fixed strategies can be recognised.

A first point of contention found in several cases was the exact legal status of the illegitimate child. The difference between normal bastardy and a spurious birth had consequences for what could be bequeathed. If the child was indeed spurious, then their share could be diminished to alimentation without having to further challenge the will. Within the will itself various grounds for invalidation could be found. Incomplete or incorrect formalities were often presented. In these cases, the Great Council generally ruled in favour of the last will, unless there was unquestionable proof against it being a trustworthy account of the testator's wishes. Heirs-at-law could also protest the nature of the bequest: the inclusion of too many patrimonial goods would harm the economic position of the family as a community. Lastly, heirs-at-law occasionally supported their claims by referring to indicators that might indirectly invalidate the contents of the will, such as the absence of heirs' consent or a troubled relation between father and child that made the bequests unlikely. Vice versa the illegitimate children or their successors often emphasized the close affectional ties they enjoyed with their father, and that the goods they had received their father had acquired through his own efforts rather than inherited as part of the family patrimony.

To return to the questions proposed at the beginning of this paper, it can be stated that the councillors of the Great Council indeed judged with leniency and sought solutions that benefitted – or at least led to as little damage as possible for – both parties. Which arguments exactly served for this purpose cannot be reconstructed, but an important role was reserved for a proper balance between customary rules and precepts from learned law, emphasising the restricted position of the bastard but interpreting the provisions of the last will in a liberal manner. Although the numbers show that the provincial courts ruled more often in favour of a bastard than the Great Council, there is insufficient evidence to suggest that the Great Council was more conservative. In a number of cases, including that of Jan Wouterssone this paper started with, the councillors set a more liberal solution than had been sentenced by a provincial court.