

## A source of inspiration for legal historians: Raoul van Caenegem's views on legal history

Dirk Heirbaut

### Summary

Although Raoul van Caenegem claimed otherwise, he had very strong views on what legal history should be. In his opinion, legal history belonged to the disciplinary field of history, not to law. The legal historian should not only chronicle past evolutions of the law, but also explain them. To this purpose, van Caenegem himself turned to sociology, trying to work with types and models in order to generalise. Van Caenegem rejected the idea of a *Volksgeist* and advocated to look at the European context in a comparative legal history. Nevertheless, his 'Europe' was limited to the founding members of the European Union, joined by England. He constructed legal history as a history of power and preferred to study groups of law makers instead of individuals. In legal history, the European 'Second Middle Ages', from 1100 until 1750, stand out as the cradle of the modern rule of law, with a special role for the cities of medieval Flanders. Although well-known for a leading handbook promoting the idea of the *ius commune*, the common law of Europe, van Caenegem actually deemed custom to have been the primary source of law in medieval Europe, whereas the role of the *ius commune* had been, in his opinion, overestimated. As he showed many times during his distinguished career, van Caenegem wanted legal historians to take part in current debates. In the end, his main lesson from legal history was a plea for moderation, as taking a sound idea to its extreme leads to absurd or unintended consequences.

Keywords: van Caenegem - methodology of legal history - comparative legal history - English common law - *ius commune* - customary law - Flanders

“When asked about my philosophy, I answer that I do not have one.”<sup>1</sup> This somewhat disingenuous statement by Raoul van Caenegem<sup>2</sup> gives the impression that he did not harbour strong views on the legal historian's craft. Van Caenegem merely offered glimpses of his theoretical attitude to legal history, as that would have run counter to his disclaimer that he did not have a 'philosophy'. As this text hopes to show, he had a body of opinions on legal history that remain valuable today and can serve as a model or at least a source of inspiration for other legal historians. Needless to say, van Caenegem's views need to be seen in the context of his time<sup>3</sup> and should be judged from that perspective. With his statement on his

---

<sup>1</sup> R.C. van Caenegem, *How I came to write my books*, Juridiska foreningens i Finland tidskrift (2015), p. 317.

<sup>2</sup> On van Caenegem, see D. Heirbaut, *The life and work of Raoul Charles van Caenegem (1927-2018)*, Tijdschrift voor Rechtsgeschiedenis, 87 (2019), pp. 309-350 with the following corrigendum: the article neglected to mention two of his PhD students: Albert Derolez and Griet Maréchal (with my thanks to Prof. Dr. Marc Boone who kindly pointed this out to me).

<sup>3</sup> Cf. R.C. van Caenegem, *Henri Pirenne: medievalist and historian of Belgium*, in: *Law, history, the Low Countries and Europe*, ed. L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleeschouwers-Van Melkebeek, London-Rio Grande 1993, p. 162. (This text was first published in Dutch. Taking into account that more readers will know English, the references in

philosophy, he wanted most of all to distinguish himself from Marxist historians.<sup>4</sup> What he did not realise or wanted to realise was that by rejecting one side, he joined another.

### 1. Legal history belongs to history, not to law

Although he started studying at Ghent University to get a law degree, Raoul van Caenegem very soon also took on the study of history. Looking back on his career, he left no doubt that he saw himself first and foremost as a historian. In his 'Legal historians I have known', he calls several scholars his heroes. Most of them share a common trait: they moved from law to history. T.F.T. Plucknett did not really fit the mould because he had already started out as lawyer, but the real exception was Helmut Coing, who "remained a fully-fledged lawyer".<sup>5</sup>

As for van Caenegem, legal history was history, it is necessary to start with his views on history. The key person to understand van Caenegem is his master François Louis Ganshof, the man who had seduced, if one may say so, van Caenegem into taking up legal history. Despite van Caenegem's great admiration for Ganshof, his career was the antithesis of Ganshof's. Whereas Ganshof after some time shied away from generalisations, the sweeping all-encompassing synthesis became van Caenegem's hallmark. Ganshof practiced a very positivistic historiography.<sup>6</sup> In his memories of Ganshof, van Caenegem always refers to one incident: a lecture by Jean-François Lemarignier in Paris. The speaker introduced a hypothesis, which Ganshof ardently rebutted: "There is no text." Any argument Lemarignier made thereafter continued to be shattered by Ganshof's insistence on a text.

Van Caenegem however did not want to belong to the group of historians who just collect all the facts that can be verified exactly in the sources. Hence, he criticised the work of the Société Jean Bodin. Its conferences reported faithfully on the evolution of a certain legal rule or principle in a wide-ranging variety of countries, but failed to go beyond a mere overview of all this material.<sup>7</sup> Such an activity was not attractive to van Caenegem. He preferred to present a less than perfect answer to an interesting question rather than a very detailed answer to an irrelevant question.<sup>8</sup> After all, if the historian can only speak out about those elements of the past on which he has a secure knowledge, then a lot will have to remain unsaid.<sup>9</sup> Nevertheless, van Caenegem's work falls in two categories. On the one hand there are the great generalisations which indeed strive to answer big questions, but on the other he

---

the footnotes of this article, where possible, refer to the English version. Readers who prefer the Dutch version of the publications mentioned, can do so by perusing the bibliography published as an Annex to the article mentioned in note 2. Addendum to that bibliography A161: *The English common law, a divergence from the European pattern*, Tijdschrift voor Rechtsgeschiedenis, 47 (1979), pp. 1-7.

<sup>4</sup> Cf. van Caenegem (note 1), p. 317.

<sup>5</sup> R.C. van Caenegem, *Legal historians I have known: a personal memoir*, in: *Rechtsgeschiede. Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte*, 17 (2010), p. 255.

<sup>6</sup> Cf. R.C. van Caenegem, *F.L. Ganshof: persoonlijke herinneringen*, Tijdschrift voor geschiedenis, 119 (2006), pp. 517-519.

<sup>7</sup> R.C. van Caenegem, *History and experiment*, ed. L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleeschouwers-Van Melkebeek, London-Rio Grande 1993, p. 13 note 3.

<sup>8</sup> R.C. van Caenegem, *De bronnen voor de staatsrechtsgeschiedenis: enkele overwegingen*, Verslagen en mededelingen van de Stichting tot uitgaaf der bronnen van het oud-vaderlandse recht. Mededelingen, nieuwe reeks, 2 (1980), p. 69.

<sup>9</sup> *Skriptinterview. Raoul G. (sic) van Caenegem*, ed. H. Bas, F. Salomons, L. Schöduve and K. Van Lierop, *Skript. Historisch Tijdschrift*, 5 (1983/1), p. 16.

also made detailed studies of law during the central Middle Ages. The latter era stands at a crossroads: the legal historian has disposal of plenty of sources to come to well-documented statements, but they are not so numerous that it is impossible to browse through everything. In his detailed studies van Caenegem went very far. He also consulted archives<sup>10</sup> and narrative sources,<sup>11</sup>

Thus, the real distinction between van Caenegem and the “collectors of facts” was not in how completely the sources were consulted, but rather in the willingness to go beyond them. For van Caenegem the facts counted less than the ‘factors’ generating them, i.e. their causes Law had not just divinely fallen from the sky.<sup>12</sup> Students could not make him happier than by declaring that they did not only want to know what had happened, but also why it had happened.<sup>13</sup> In his books, two types occur: books with the chronological succession of events and books that try to look at the factors behind these evolutions and transformations. Thus, the *Historical introduction to private law*<sup>14</sup> and the *Historical introduction to Western constitutional law*<sup>15</sup> have as counterparts *Judges, legislators and professors*<sup>16</sup> and *European law in the past and the future*.<sup>17</sup> Even in the chronological books these factors are not wholly absent, as in both a chapter deals with the underlying factors and themes. Looking for the factors of evolution implied what we could call a contextual legal history, the impact of society on legal evolutions. Van Caenegem’s praise for Wieacker’s *Privatrechtsgeschichte der Neuzeit*<sup>18</sup> shows what he expected from legal history: “insight into the meaning of past events” and “the law in a broad cultural context”.<sup>19</sup> Nevertheless, the latter should not be exaggerated. Van Caenegem’s context limits itself mostly to the makers of the law: the judges, legislators, professors and others. Moreover, the relationship between law and society means that even with these limitations legal history can lead to valuable insights into the power relations of a past society.<sup>20</sup>

## 2. The legal historian as a ‘sociologist’

---

<sup>10</sup> Cf. R.C. van Caenegem, *Le jugement sous l’angle historico-comparatif*, Archives de philosophie du droit, 39 (1995), p. 125.

<sup>11</sup> R.C. van Caenegem, *Public prosecution of crime in twelfth-century England*, in: *Legal history: a European perspective*, London-Rio Grande 1991, p. 11; van Caenegem, *English lawsuits from William I to Richard I*, London 1990-1991 (Selden society publications, 106), viii.

<sup>12</sup> Cf. van Caenegem (note 5), pp. 296-297

<sup>13</sup> R.C. van Caenegem, *European law in the past and the future. Unity and diversity over two millennia*, Cambridge 2002, p. 73 note 1.

<sup>14</sup> R.C. van Caenegem, *An historical introduction to private law*, Cambridge 1992.

<sup>15</sup> R.C. van Caenegem, *An historical introduction to Western constitutional law*, Cambridge 1995.

<sup>16</sup> R.C. van Caenegem, *Judges, legislators and professors. Chapters in European legal history*, Cambridge 1987.

<sup>17</sup> Van Caenegem (note 13).

<sup>18</sup> F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, first edition Göttingen 1952 (English translation by T. Weir, *A history of private law in Europe*, Oxford 1995).

<sup>19</sup> van Caenegem (note 5), p. 293.

<sup>20</sup> R.C. van Caenegem, *La Peine. Exposé introductif*, in: Recueils de la société Jean Bodin, 55, La Peine, 1, Brussels 1991, pp. 15-16; R.C. van Caenegem, *Criminal law in England and Flanders under King Henry II and Count Philip of Alsace*, in: *Diritto e potere nella storia Europea. Atti in onore di Bruno Paradisi. Quarto Congresso Internazionale della Società Italiana di storia del diritto*, Florence, 1982, 1, pp. 248.

Van Caenegem wanted to go beyond explanations of single events and for that he turned to sociology, most of all to Max Weber. He never took a class on sociology, but as a student he became a frequent guest of Ghent law school's small library on sociology. The appraisal of sociology became a bone of contention between Ganshof and van Caenegem. To Ganshof, sociology was a siren that could only lead good historians astray.<sup>21</sup> Van Caenegem, on the other hand, looked for patterns<sup>22</sup> and pleaded for developing Weberian typologies.<sup>23</sup> As such, he pitted chroniclers of facts against system builders and model makers.<sup>24</sup> Once again, this should not be exaggerated. In van Caenegem's work, the sociological element merely amounts to making generalisations illustrated by some well-chosen examples.<sup>25</sup> Van Caenegem's sociology did not entail any quantitative analysis, though he pleaded for maps visualising the chronological dispersion of for example freedom charters.<sup>26</sup>

Van Caenegem may have loved sociology and went a far way into the direction of a more sociological legal history, but he did not go all the way. His *Historical introduction to Western constitutional law* kicks off with an attempt at defining public law Elsewhere, for example when writing on European civilisation, he refuses to provide a definition, as most of his readers will know what it is about anyway.<sup>27</sup> It is hard to imagine a sociologist agreeing to such legerdemain. Moreover, van Caenegem does not at all believe in monocausal explanations.<sup>28</sup> There is always a variety of causes at play.<sup>29</sup> In fact, in his opinion, the true historian distinguishes himself from a retrospective practitioner of another discipline by his willingness to look into not just the one element that interests him, but by considering all relevant elements. Thus, whereas a retrospective jurist only wants to trace back a legal rule in time, the legal historian pays attention to a variety of factors.<sup>30</sup> Given the complexity of past societies, the typologies and models of sociology only have a limited value. They are useful abstractions, but they cannot constrain the realities of the past<sup>31</sup> and factors may lead to a certain outcome, but not necessarily so,<sup>32</sup> exactly because there are too many of them interfering with one another.<sup>33</sup>

Van Caenegem was a child of both Ganshof's strict adherence to facts and Weber's models. The former had taught him to respect the variety of the past, the latter to reduce it to

---

<sup>21</sup> van Caenegem (note 6), p. 517.

<sup>22</sup> R.C. van Caenegem, *Over koningen en bureaucraten. Oorsprong en ontwikkeling van de hedendaagse staatsinstellingen*, Amsterdam 1977, p. 153.

<sup>23</sup> R.C. van Caenegem, *Le problème des chartes de libertés*, in: Album Elemer Malysz, Brussels, Librairie encyclopédique, 1976, p. 14.

<sup>24</sup> Cf. van Caenegem (note 5), p. 269

<sup>25</sup> van Caenegem (note 22), p. 153; cf. R.C. van Caenegem, *Max Weber: historian and sociologist*, in: *Legal history: a European perspective*, London-Rio Grande 1991, pp. 212-220.

<sup>26</sup> van Caenegem (note 23), p. 15.

<sup>27</sup> R.C. van Caenegem, *Historical reflections on European syncretism*, Sartoniana, 7 (1994), pp. 245-260.

<sup>28</sup> R.C. van Caenegem, *Willem de Zwijger en de opstand der Nederlanden: een proeve van plaatsbepaling*, in: Herdenking Willem van Oranje 1584-1984, Brussel Paleis der Academiën 12 oktober 1984, Brussels, 1985, p. 44.

<sup>29</sup> van Caenegem (note 22), p. 172.

<sup>30</sup> R.C. van Caenegem, *Clio and the humanities: Alma Mater and prodigal sons*, in: *Law, history, the Low Countries and Europe*, ed.L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleeschouwers-Van Melkebeek, London-Rio Grande 1994, p. 30.

<sup>31</sup> Van Caenegem (note 25), p. 212.

<sup>32</sup> R.C. van Caenegem, *Engeland, wonderland*, Leuven 2005, p. 23.

<sup>33</sup> Van Caenegem (note 28), p. 44.

types, but these two irreconcilable approaches clashed. Van Caenegem's way out of this dilemma was calling in 'chance', as if it were a *deus ex machina*. Chance crops up as an explanation, wherever the generalisations he develops fit well with certain situations, but not with others. As an explanation chance leaves much to be desired. It left van Caenegem free to generalise and to sweep discrepancies under the rug as the product of chance. Nowadays, a better way to cope with this would be process tracing, as political scientists and in their wake historians, have developed and applied this method. Process tracing delves deeper than factors and outcomes, but looks at the mechanisms of the evolution in between. Thus, it can help identify intervening factors.<sup>34</sup> If van Caenegem could have applied this method, he would have noticed that many events he ascribed to chance were actually the result of an intervening factor. However, process tracing would have meant a painstakingly detailed research of the sources which would have made it impossible for van Caenegem to write so many books.

As he was aware of the weaknesses of his reliance on chance, van Caenegem turned to counterfactual history. Whereas he still showed some reservations towards it in 1973,<sup>35</sup> he later became an enthusiastic convert, mostly thanks to Niall Ferguson's *The pity of war*,<sup>36</sup> which explored several counterfactual scenarios concerning World War I.<sup>37</sup> The newest generation of historians in Belgium may have embraced counterfactual history,<sup>38</sup> but older generations did not understand how a serious scholar like van Caenegem could be fascinated by it. However, counterfactual history helped van Caenegem to further develop the element of chance. Unlike other scientists, historians cannot experiment, but they can make comparisons with another situation in the past, where one element is either absent or additionally present.<sup>39</sup> Developing a likely outcome of events based on such a well-chosen comparison more than a game, as it helps to show the importance of what did happen<sup>40</sup> and makes clear that if certain groups had acted differently another history could have been possible.<sup>41</sup> English history, or rather English legal history, turned out to be particularly interesting in this regard.

Amongst the many factors that played a role in legal evolution, the national spirit is not one van Caenegem accepted. For example, he saw no sign of a particular English national spirit, a *Volksgeist* in Savigny's terminology, that inevitably had resulted in the English common law, distinct from the *ius commune*, the common law of Europe.<sup>42</sup> In general, England did not evolve differently from other European countries, although its law did not follow the European pattern.<sup>43</sup> Timing played a crucial role. England had become a strong

---

<sup>34</sup> D. Beach, *Process-tracing methods in social science*, in: Oxford research encyclopedia of politics: qualitative political methodology, ed. W. Thompson, Oxford 2017 (<http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-176>, consulted on 1 April 2020); A. Verfaillie, *Breaker of chains, diplomat of change? Amnesty international's advocacy for human rights at the United Nations (1961-mid-80s)*, Ghent 2020 (unpublished PhD thesis Ghent university), pp. 26-27.

<sup>35</sup> Van Caenegem (note 7), p. 13.

<sup>36</sup> N. Ferguson, *The pity of war*, New York, 1999.

<sup>37</sup> R.C. van Caenegem, *Counterfactual History and the First World War*, *European Review*, 25 (2017), pp. 494-501.

<sup>38</sup> M. Van Ginderachter, K. Aerts and A. Vrints (ed.), *Het land dat nooit was. Een tegenfeitelijke geschiedenis van België*, Amsterdam 2014.

<sup>39</sup> Van Caenegem (note 7), pp. 6-7.

<sup>40</sup> Van Caenegem (note 32), p. 129.

<sup>41</sup> Van Caenegem (note 36), p. 495.

<sup>42</sup> Van Caenegem (note 16), p. 71.

<sup>43</sup> Van Caenegem (note 32), p. 67; R.C. van Caenegem, *The English common law, a divergence from the European pattern*, *Tijdschrift voor rechtsgeschiedenis*, 47 (1979), p. 2.

centralised state earlier than other European countries<sup>44</sup> and when it modernised its law, the *ius commune* did not yet present a readymade package. Hence, England developed its own system.<sup>45</sup> If not for that, its law would not have diverged from the common European pattern. Moreover, England's indigenous development of its common law used general European elements.<sup>46</sup> Thus, England's divergent evolution presents an interesting case. It shows what European law could have become without a dominant *ius commune*.<sup>47</sup> Even if England went its own way, it continued a European pattern. Thus even English legal history confirms the following statement: "European history, which is fundamentally a whole, but extremely varied in detail."<sup>48</sup>

### 3. Comparative European legal history

In line with his rejection of a predestination of nations, van Caenegem advocated for a distinctly European view on legal history. Even his studies of Flemish or English law<sup>49</sup> do not disregard the European context. His *Introduction to private law*, targeted at readers from France and the Low Countries, does not ignore the broader European background, since to van Caenegem the national era of law was only a recent phenomenon that would not last.<sup>50</sup> This explains why the *Introduction* despite its Franco-Belgian point of view contains plenty to attract other readers. Van Caenegem's first book in Dutch on the history of England also belongs in this category. Although van Caenegem claimed to have written it at the request of the students of English in Ghent who had no book on English history in their own language,<sup>51</sup> he also used the occasion to write down his view of English history. Neither England, nor its law developed in isolation from the continent.<sup>52</sup> Interestingly, van Caenegem was not really impressed by English law. In his *Engeland, wonderland*,<sup>53</sup> the last great monograph he wrote, he asks and answers the question which legal system he deems superior: common law or civil law. Due to the lack of a theoretical framework and clear concepts, he prefers the latter over the former.<sup>54</sup> As the book was published in Dutch, his English friends could not take notice and, thus, had no reason to complain.

Van Caenegem's Europe is very much Europe as his generation in Belgium saw it: Belgium and the neighbouring countries. At the start of his career as a tenured scientist, he witnessed the birth of the European Communities. As such, van Caenegem's Europe is very much like the European communities in their infancy. France and Germany take center stage, and as the countries in between them, van Caenegem paid due attention to Belgium, Luxemburg and the Netherlands, but also Italy. Although England only joined this group in

---

<sup>44</sup> Van Caenegem (note 43), p. 6.

<sup>45</sup> R.C. van Caenegem, *The Birth of the English common law*, Cambridge, 1973, pp. x-xi.

<sup>46</sup> R.C. van Caenegem *Public prosecution of crime in twelfth-century England*, in: *Legal history: a European perspective*, London-Rio Grande 1991, p. 11.

<sup>47</sup> Van Caenegem (note 13), p. 84.

<sup>48</sup> R.C. van Caenegem, *Methods of proof in Western medieval law*, in: *Legal history: a European perspective*, London-Rio Grande, Hambleton press 1991, pp. 71-113.

<sup>49</sup> E.g. van Caenegem (note 11), p. xvi.

<sup>50</sup> Cf. also van Caenegem (note 13), p. 1.

<sup>51</sup> *Rechtshistorici uit de Lage Landen: interview met R.C. Van Caenegem*, ed. S. Faber and D. Heirbaut, Pro Memorie, 1 (1999), p. 10.

<sup>52</sup> R.C. van Caenegem, *Geschiedenis van Engeland. Van Stonehenge tot het tijdperk der vakbonden*, The Hague - Antwerp 2003, p. 9.

<sup>53</sup> Van Caenegem (note 32).

<sup>54</sup> Van Caenegem (note 32), 82.

1973, van Caenegem included it from the start, but that was only due to his own personal interests. To van Caenegem, nothing beyond the original European six and England did not really count. Spain was, at best, only mentioned in passing. In the *Introduction to private law* the school of Salamanca is remarkable for its absence.<sup>55</sup> Beyond Germany, a vacuum seems to exist. Northern, Central and Eastern Europe were not worthy of much attention. American law schools, albeit they dominated the twentieth century and influenced van Caenegem himself<sup>56</sup>, do not appear in the book. In the *Introduction to Western constitutional law* the United States appear, but mostly because its constitution was an offshoot of European ideas, influencing Europe in turn Europe,<sup>57</sup> which in fact meant only the Western European countries van Caenegem was really interested in. The Soviet Union was another exception, but for an author with a professional career during the Cold War era, it would have been hard to ignore this challenger to the ideals for which, in his opinion, Western Europe stood.<sup>58</sup> If Caenegem had belonged to the current generation, there is no doubt that he would also have looked at Islam, as he did in one article at the end of his life.<sup>59</sup> In van Caenegem's Western Europe, Italy is somewhat of an outsider. Describing the medieval *ius commune*, he could not ignore Italy, but its contribution ends with Andrea Alciato in the first half of the sixteenth century.<sup>60</sup> Moreover, Italy amounts to Northern Italy. The kingdom of Sicily is only mentioned once in the private law book<sup>61</sup> and not at all in the constitutional law book, even though its importance for the development of the modern state is undeniable.

Van Caenegem's European gaze was inextricably linked to a comparative perspective. In his opinion, even duller branches of law, like civil procedure, became interesting when studied comparatively.<sup>62</sup> Legal transplants, an important topic for comparative lawyers, were far from an issue to van Caenegem, as history contained many examples of legal transplants that did not disrupt a nation's life.<sup>63</sup> His own Belgium served as the best example. The French annexation in 1795 meant twenty years of foreign rule, sweeping away the old indigenous law and replacing it with French law. As already indicated, to van Caenegem comparative legal history, meant more than just descriptions of the different legal systems, what Germans would call *Auslandskunde*. Of the latter he already had an example in *Le droit privé des peuples* by René Dekkers,<sup>64</sup> who had been of his teachers in Ghent. By his search for underlying mechanisms, van Caenegem went into the other direction.

---

<sup>55</sup> Compare this with the recent publication of a research guide for studying this part of legal history: W. Decock and C. Birr, *Recht und Moral der Scholastik der Frühen Neuzeit 1500-1750*, Oldenbourg, 2016.

<sup>56</sup> See below.

<sup>57</sup> Van Caenegem (note 15), p. 151.

<sup>58</sup> Cf. van Caenegem (note 15), p. 249.

<sup>59</sup> R.C. van Caenegem, *Historical reflections on Islam and the Occident*, *European Review*, 20 (2012), pp. 203-209.

<sup>60</sup> Van Caenegem (note 14), pp. 56-57.

<sup>61</sup> Van Caenegem (note 14), p. 88.

<sup>62</sup> R.C. van Caenegem, *Gentse Professoren in de Rechten en de Letteren - 1946-1992*, *Gendtsche Tydinghen*, 44 (2015), p. 251.

<sup>63</sup> R.C. van Caenegem *Considérations historiques sur l'unification du droit européen*, in: *Actes des Journées internationales de Toulouse de la Société d'histoire du droit*, Juin 2005, Toulouse 2006, pp. 493-494. On Dekkers, see D. Heirbaut, *René Dekkers (1909-1976): een duizendpoot van het recht*, in: *Tweehonderd jaar rechtsfaculteiten Gent en Luik/Deux-centième anniversaire des facultés de droit de Gand*, ed. D. Heirbaut, P. Wautelet, P. Humblet, J.-F. Gerken, G. Grandjean and M. Cools (ed.), Bruges 2019, 149-154.

<sup>64</sup> R. Dekkers, *Le droit privé des peuples*, Brussels 1953.

### 3. Law is (not only) power

A title like ‘Law and power’<sup>65</sup> indicates that to van Caenegem, law reflected the outcome of political struggles: a *Kampf ums Recht* in von Jhering’s words or the ‘law is politics’ of American scholars.<sup>66</sup> Thus, in his opinion, legal history belongs to political history.<sup>67</sup> Whereas others constructed legal history as a history of ideas, for van Caenegem it was about power.<sup>68</sup> Yet, he did not deny the role of ideas. Political actors need arguments and intellectuals deliver the necessary ammunition. However, ideas cannot thrive without the political will to turn them into reality.<sup>69</sup> Ultimately, this amounts to “Law scholars serve the power that be.”<sup>70</sup> In short, the law scholar has a legitimizing/supporting role, but it should not be exaggerated. More generally, whether judges, legislators or professors, each of these law makers represents powerful social groups, steering legal development.<sup>71</sup> Remarkably, in his book on kings and bureaucrats from 1977, a book never translated from Dutch, van Caenegem mentions a fourth group,<sup>72</sup> the bureaucrats, but in his later work the latter are absent.

The individual legislator, judge or professor only represents larger groups. Their specific contribution is just a small stone of the bigger mosaic. Although van Caenegem admitted that individuals could make a difference,<sup>73</sup> he preferred not to study them. To him, they were just ‘bricks in the wall’. Some of the changes he attributed to chance may actually be better understood if seen as the product of individual choice. Nevertheless, two persons stand out, because they dominated his licentiate’s, PhD and habilitation thesis: the Flemish Count Philip of Alsace and the English King Henry II. Van Caenegem’s first two books on criminal law and criminal procedure in Flanders from the eleventh to the fourteenth century had in common that a fundamental modernisation occurred in twelfth century Flanders under Philip of Alsace. Philip, in his opinion the greatest of Flanders’ counts,<sup>74</sup> starred in many of van Caenegem’s publications. He even bestowed the name ‘Grand charter’ (Grote keure) on

---

<sup>65</sup> R.C. van Caenegem, *Law and power in twelfth-century Flanders*, in: *Cultures of power. Lordship, status, and process in twelfth-century Europe*, ed. T. Bisson, Philadelphia 1995, pp. 149-171.

<sup>66</sup> R.C. van Caenegem, *De ‘heren van het recht’: rechters, politici en geleerden*, in: *Historisch vooruitzicht. Opstellen over rechtsgeschiedenis en burgerlijk recht*. BW-krant, Jaarboek 1994, ed. M. Franke, J. Smits and W. Valk, Arnhem 1994, p. 66; R.C. van Caenegem *Galbert of Bruges and “Law is politics”*, in: *Inter Amicos. Liber amicorum Monique Van Melkebeek*, ed. M. Decaluwé, V. Lambert and D. Heirbaut, Brussels, 2011, pp. 19-32; van Caenegem (note 13), p. 89.

<sup>67</sup> van Caenegem (note 16), p. 108.

<sup>68</sup> R.C. van Caenegem, *The English common law seen from the European continent*, in: *Legal history: a European perspective*, London-Rio Grande 1991, p. 169.

<sup>69</sup> Van Caenegem (note 14), p. 183; cf. R.C. van Caenegem, *La tradition juridique en tant que limite aux réformes du droit*, in: *Rapports belges au Xe Congrès international de droit comparé*. Budapest 23-28 août 1978, ed. J. Limpens, Brussels 1978, p. 23.

<sup>70</sup> Van Caenegem (note 16), p. 155.

<sup>71</sup> Van Caenegem (note 14), p. 170.

<sup>72</sup> Van Caenegem (note 22), pp. 12-13.

<sup>73</sup> Van Caenegem (note 22), p. 236.

<sup>74</sup> R.C. van Caenegem, *Philippe d’Alsace, comte de Flandre et législateur*, in: *Actes des Journées du néerlandais organisées à l’occasion du 25e anniversaire de l’introduction des études néerlandaises*, ed. W. Thijs, Lille 1976, pp. 79-96.



the criminal charters Philip imposed on the great Flemish cities,<sup>75</sup> thereby elevating Philip himself to a higher level of importance. Philip of Alsace had interacted with all the great princes of his time<sup>76</sup> and of them Henry II of England drew van Caenegem's attention, because Henry's reforms ran parallel to Philip's.<sup>77</sup>

#### 4. The Middle Ages as the cradle of modernity

Ghent University is located in the old county of Flanders, a region which knew its heyday during the central and late Middle Ages. Hence, in the twentieth century, the great historians of Flanders focused in the Middle Ages. This tendency manifested itself even more strongly in legal history. Until the end of the twentieth century legal history by definition was medieval history. Van Caenegem fit that mould perfectly, but unlike his colleagues, he also explained why the Middle Ages for him was history's crucial era. When he became a full professor, Ghent University had no tradition of inaugural lectures. Van Caenegem held one, no doubt hoping, in vain, to start a tradition. His lecture unveils a fundamental part of van Caenegem's program: the place of the Western Middle Ages in world history.<sup>78</sup> In van Caenegem's opinion, today's world has to thank the Middle Ages for two great gifts: modern science and the rule of law.<sup>79</sup> In his further career he only worked on the latter, though for a long time he harboured the hope that at the end of his career he would also write a big book on the contribution of the Middle Ages to the rise of the modern scientific mind.<sup>80</sup> Rule of law or rather *Rechtsstaat* lies at the heart of many of his publications.<sup>81</sup> These terms are just shorthand for the Western-style democracy in which the citizens vote for members of parliament and the powers of the state are limited by constitutions. Van Caenegem developed his own line of evolution which debuts with the medieval church and feudalism. The importance of the church and its papal revolution on the road to the modern state has become well-known thanks to the two volumes of Harold Berman's *Law and revolution*.<sup>82</sup> The English and American reader may know only van Caenegem's *Historical introduction to Western constitutional law*, which even in its original Dutch version appeared five years after Berman's first volume. However, van Caenegem had already published another book on the history of public law, *Koningen en bureaucraten (Kings and bureaucrats)*. In this 1977 book van Caenegem already develops the idea of the medieval church as a model emulated by secular states. Van Caenegem did not continue with this book, which readers of Dutch

---

<sup>75</sup> R.C. van Caenegem, 54. with L. Milis, *Kritische uitgave van de "Grote Keure" van Filips van de Elzas, graaf van Vlaanderen, voor Gent en Brugge (1165-1177)*, Handelingen van de Koninklijke commissie voor geschiedenis 143 (1977), pp. 207-257.

<sup>76</sup> See on him T. de Hemptinne, *Philipp von Elsass, Graf von Flandern*, in: *Lexikon des Mittelalters*, Zürich, 1980-1998, VI, c. 2071-2072.

<sup>77</sup> Van Caenegem (note 20, 1982), pp. 232-254.

<sup>78</sup> R.C. van Caenegem, *De plaats van de westerse middeleeuwen in de universele geschiedenis*, Bruges 1964.

<sup>79</sup> Van Caenegem (note 78), p. 8. See also e.g. R.C. van Caenegem, *De Rechtsstaat: een Europese verworvenheid*, in: *Recht en macht*, ed. M. Storme, Brussels 1990, p. 277.

<sup>80</sup> Cf. *Skriptinterview* (note 9), p. 16.

<sup>81</sup> E.g. R.C. van Caenegem, *Parliament: a European deviation?*, in: *Law, history, the Low Countries and Europe*, ed. L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleeschouwers-Van Melkebeek, London-Rio Grande 1994, pp. 55-70.

<sup>82</sup> H. Berman, *Law and revolution*, 2 vol., Cambridge (Mass.) 1983-2003.

consider to be a masterpiece,<sup>83</sup> and replaced it with the *Historical introduction to Western constitutional law*,<sup>84</sup> a good book, unless the reader has first fallen in love with *Koningen en bureaucraten*.

For van Caenegem, feudalism furthermore played a crucial role.<sup>85</sup> To Marxists, it may seem anathema to see feudalism, in which rich landlords oppress poor peasants, as a champion of freedom, but van Caenegem's feudalism was Ganshofian feudalism, based on a contract between two free persons, the lord and the man, with the man offering his services, but the lord also giving something in return, protection and the vassal's upkeep, the latter mostly by the grant of a fief.<sup>86</sup> For van Caenegem, feudalism transformed the relation between the ruler and the ruled. Originally, subjects only had duties, but as vassals they had a contract with their prince which also awarded them rights. Hence, the vassal was the missing link between the subject, with only duties, and the citizen, with duties and rights.<sup>87</sup>

Van Caenegem's Middle Ages started around 1100, when the church awoke from its slumber and started to reform, in turn inspiring the rest of European society. Thus, the twelfth century forms a watershed and the Middle Ages actually consist of two eras, the Early Middle Ages and the era from 1100 until 1750. Although he uses this distinction in his *Introduction to private law*, its main justification can be found in his concise history of the Middle Ages in Dutch.<sup>88</sup> Van Caenegem's view of the Early Middle Ages needs some clarification. Generally, he saw the evolution of law and institutions as going towards a more rational,<sup>89</sup> i.e. law based society,<sup>90</sup> though as usual for him, not as the consequence of grand design, but rather due to a lot of chance.<sup>91</sup> The Early Middle Ages was still firmly rooted in an irrational mentality, as was evident from its methods of proof.<sup>92</sup> Van Caenegem had to defend himself against the accusation that by labelling early methods of proof irrational, he had called medieval people backwards. Therefore, he clarified his views.<sup>93</sup> The word 'irrational' to him did not imply a

---

<sup>83</sup> Cf. O. Vervaart, *Diversity and unity: Raoul Charles van Caenegem (1927-2018)* (<https://rechtsgeschiedenis.wordpress.com/2018/06/27/diversity-unity-raoul-charles-van-caenegem-1927-2018/>).

<sup>84</sup> On his reasons for doing so, see Heirbaut (note 2), p. 323.

<sup>85</sup> R.C. van Caenegem, *De feodaliteit in Engeland van Willem de Veroveraar tot Magna Carta*, Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden, 89 (1974), p. 224.

<sup>86</sup> F.-L. Ganshof, *Feudalism*, Toronto 1996.

<sup>87</sup> R.C. van Caenegem, *The modernity of medieval law*, *European Review*, 8 (2000), pp. 49-50.

<sup>88</sup> *Geschiedenis van de middeleeuwen*, Ghent 1991, p. 105. See also e.g. R.C. van Caenegem, *Chivalrous ideals and religious feeling*, in: *Law, history, the Low Countries and Europe*, ed. by L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleschouwers-Van Melkebeek, London-Rio Grande 1993, pp. 145-146.

<sup>89</sup> Van Caenegem (note 15), pp. 294-295.

<sup>90</sup> Van Caenegem (note 15), p. 293.

<sup>91</sup> R.C. van Caenegem, *Constitutional history: chance or grand design*, *European constitutional law review*, 5 (2009), pp. 147-163.

<sup>92</sup> van Caenegem (note 48), pp. 71-113.

<sup>93</sup> L. Milis, D. Lambrecht, H. Symoens and M. Van Melkebeek, *Preface*, in: *Law, history, the Low Countries and Europe*, ed. L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleschouwers-Van Melkebeek, London-Rio Grande 1994, pp. x-xi.

value judgment, but only wanted to convey the idea that early medieval man did not use rational human reasoning, but instead relied on outside divine intervention.<sup>94</sup>

Van Caenegem's second Middle Ages, from 1100 until 1750 are, of course, European Middle Ages. The rule of law with all it implies is, in his opinion, a European achievement<sup>95</sup> and he considers European history to be, in this, an anomaly in world history.<sup>96</sup> This could easily have led to a very Eurocentric view, but van Caenegem also makes clear that this unique European position does not result from any divine providence or special quality of Europe. The singular European case is merely an accident of history.<sup>97</sup> Within Europe, this time the Low Countries occupy a special place. Van Caenegem does not think highly of his own region's contribution to the development of law. Apart from the "towering figure of Grotius",<sup>98</sup> there are no great judges, legislators or professors.<sup>99</sup> This sounds very strange coming from a man who constantly met Dutch legal historians and cannot have failed to notice that the Dutch fame as a European leading nation of law was based on more than just Grotius. For van Caenegem, the Low Countries meant the Southern Low Countries, today's Belgium and within that area only one region really counted: Flanders. There the first "seeds of modern democracy" took root.<sup>100</sup> True, the county of Flanders had no document of freedom and liberty like Magna Carta, but only because the power of its great cities meant that the Rechtsstaat was realised at the local level, with charters for the individual cities.<sup>101</sup> Hence, his interest in the 1127 Saint-Omer borough charter and in Galbert of Bruges' 1127-1128 diary which chronicled how the citizens of Bruges and Ghent had realised the first great experiment in medieval democracy.<sup>102</sup> As a legal historian from the old county of Flanders, van Caenegem did not devote much attention to the great series of general freedom charters for the old county of Brabant<sup>103</sup> and he only glosses over the contribution of Spain,<sup>104</sup> a pioneer of medieval parliamentarism and constitutionalism. Yet, he added a twist to the typical evolution of modern parliaments and constitutions as seen by Anglo-Americans. Their teleology goes from Magna Carta to the American constitution. Van Caenegem adds a second source of inspiration for the United States: the Dutch republic, or, by another name which makes the

---

<sup>94</sup> R.C. van Caenegem, *Reflexions on rational and irrational modes of proof in medieval Europe*, Tijdschrift voor rechtsgeschiedenis, 58 (1990), pp. 263-279.

<sup>95</sup> Van Caenegem (note 79), pp. 269-277.

<sup>96</sup> Van Caenegem (note 81), pp. 55-70.

<sup>97</sup> Van Caenegem (note 81), p. 61.

<sup>98</sup> R.C. van Caenegem, *Reflexions on the place of the Low Countries in European legal history*, in: *Legal history: a European perspective*, London-Rio Grande 1991, p. 149.

<sup>99</sup> Van Caenegem (note 98), pp. 149-153.

<sup>100</sup> R.C. van Caenegem, *Mediaeval Flanders and the seeds of modern democracy*, in: *Foundations of democracy in the European Union*, ed. J. Pinder, Basingstoke 1999, pp. 4-17.

<sup>101</sup> R.C. van Caenegem, *L'Etat de droit dans la Flandre médiévale*, in: *Excerptiones iuris: studies in honor of André Gouron*, ed. B. Durand and L. Mayali, Berkeley 2000, pp. 759-772.

<sup>102</sup> He was, *inter alia*, the moving force behind the Dutch and French translations (*Galbert van Brugge. De moord op Karel de Goede. Dagboek van de gebeurtenissen in de jaren 1127-1128*, transl. by B. Demyttenaere Antwerp 1978; *Galbert de Bruges. Le meurtre de Charles le Bon*, transl. by J. Gengoux, Antwerp 1978). Of his many articles on Galbert, see in particular, R.C. van Caenegem, *Galbert van Brugge en het recht*, Brussels 1978.

<sup>103</sup> Cf. van Caenegem (n. 15), pp. 77, 81.

<sup>104</sup> Van Caenegem (n. 15), p. 80.

link even more evident: the United Provinces.<sup>105</sup> However, for van Caenegem, the Dutch provinces mainly form the bridge between medieval Flanders and later events. After all, the Dutch republic was only a successor of the Burgundian-Habsburg Low Countries of which Flanders had been the shining jewel on the crown.<sup>106</sup>

## 5. Custom: the real life of the law

The end of the twentieth century witnessed a new instrumentalisation of legal history. Proponents of a new common law for Europe found their justification in history. After all, if Europe had one common law in the past, the *ius commune*, consisting of Roman and canon law, it becomes difficult to oppose the creation of a new common law for Europe. Van Caenegem's books provided ideal ammunition for the new *ius commune*, as they described in several languages the love affair between Roman and canon law on the one hand and European society on the other hand, during the 1100-1750 era. Even more than Koschaker and Wieacker, van Caenegem may have helped to promote the idea of the old *ius commune*. He also wrote a book<sup>107</sup> and articles on Roman and canon law in the Southern Low Countries.<sup>108</sup> However, looking at those publications van Caenegem is not at all a defender of the common law of Europe. Instead, he emphasizes how small the impact of the learned law was in the Middle Ages.<sup>109</sup> In his opinion, the specialists of the learned law overestimated its importance.<sup>110</sup> It did not help here that van Caenegem's attitude towards his own books was 'Walk and don't look back'. Rewriting a book was not in his character. Hence, his valuable warning on the importance of the *ius commune* never made it into his own handbook on the history of private law. Moreover, his main article downplaying the role of the learned law<sup>111</sup> only appeared in Dutch, so that his international readership inevitably failed to notice it.

To van Caenegem the principal source of law in medieval Europe had been custom. Local customs, not the learned law of Europe, determined the life of ordinary people.<sup>112</sup> In his view, there is no doubt that currently the role of the *ius commune* is overestimated. Why should a young aspiring law scholar work on local law? That only leads to attention from a local public. The *ius commune* on the other hand implies international publications and a greater chance at fame and tenure. Van Caenegem's own career also reflects this. As one may expect from a scholar who points out the importance of customs, he deemed local research to be important and presided for most of his life over the board of editors of the most important

---

<sup>105</sup> Van Caenegem (n. 15), pp. 142, 147. See also R.C. van Caenegem, *Historical considerations on judicial review and federalism in the United States of America, with special reference to England and the Dutch Republic*, Brussels 2003.

<sup>106</sup> Van Caenegem (n. 105), 26-31

<sup>107</sup> R.C. van Caenegem, *Le droit romain en Belgique*, Milan 1966.

<sup>108</sup> R.C. van Caenegem, *Bookish law and customary law: Roman law in the Southern Netherlands in the Late Middle Ages*, in: *Law, history, the Low Countries and Europe*, ed. L. Milis, D. Lambrecht, H. De Ridder-Symoens and M. Vleeschouwers-Van Melkebeek, London-Rio Grande 1994, pp. 119-133; R.C. van Caenegem, *Notes on canon law books in medieval Belgian booklists*, *Studia Gratiana*, 12 (1967), pp. 265-292.

<sup>109</sup> Van Caenegem (note 108, 1994), pp. 119-133.

<sup>110</sup> R.C. van Caenegem, *Aantekeningen bij het middeleeuwse gewoonterecht*, in: *Tijdschrift voor rechtsgeschiedenis*, 64 (1996), p. 99.

<sup>111</sup> Van Caenegem (note 110), pp. 97-111.

<sup>112</sup> Van Caenegem (note 110), pp. 97-111.

local historical review in the province of East Flanders<sup>113</sup> and also supported its counterpart in neighbouring Western Flanders.<sup>114</sup> However, he mainly addressed a European public with broader issues. Last but not least, van Caenegem's outlook on the relationship between local customs and the learned law remained coloured by his own origins. Like Northern France, the regions of what would later become his native Belgium belonged to the *pays de droit coutumier*, the lands of customary law, i.e. those parts of Western Europe where, together with England, custom resisted the encroachment of the learned law the best.<sup>115</sup> Thus, van Caenegem's research on criminal law and criminal procedure in medieval Flanders unearthed no learned influence.<sup>116</sup> Things might have been different had he worked on a later era or another region. In short, whereas he was right in warning against overestimating the importance of the *ius commune*, he extrapolated from his own research on Flanders, which may have led him to underestimate the role of the *ius commune* elsewhere.

## 6. The legal historian and current debates

Van Caenegem worked in both the law and the arts faculties of Ghent University. In the law school a convivial atmosphere reigned, whereas the arts faculty felt more like a snakepit to van Caenegem.<sup>117</sup> Although he considered himself to be a historian, van Caenegem could not escape the mentality of friends and colleagues from the world of law. To Ganshof a historian should merely describe past events and for the remainder stand above the fray.<sup>118</sup> Van Caenegem, however, also took current concerns into account. *Historia docet*: the historian can draw valuable lessons from the past for his own time.<sup>119</sup> By communicating the experience of the past, the historian can also contribute to current debates.<sup>120</sup> If not, others will do so in his stead. They may even be colleagues from other human sciences. In that case, the danger is limited. Unlike a historian, these outsiders will not see the complete picture, as they have only selected what is relevant to them.<sup>121</sup> At worst, legal historians themselves abuse legal history for political reasons.<sup>122</sup> In that case, van Caenegem prefers to take a stand, to present his own value judgements.<sup>123</sup> The historian can judge, for example, whether law has been liberating or oppressive.<sup>124</sup>

---

<sup>113</sup> M. Boone, *In memoriam Raoul C. Van Caenegem (Gent, 14 juli 1927-15 juni 2018)*, in: *Handelingen van de maatschappij voor geschiedenis en oudheidkunde te Gent* 71 (2017), pp. 3-5.

<sup>114</sup> L. Devliegheer, *Bij het overlijden van prof. dr. R. Van Caenegem*, in: *Handelingen van het genootschap voor geschiedenis te Brugge* 155 (2018), pp. 415-419.

<sup>115</sup> Cf. van Caenegem (note 14), p. 35.

<sup>116</sup> *Geschiedenis van het strafrecht in Vlaanderen van de XIe tot de XIVe eeuw*, Brussels 1954, p. 333.

<sup>117</sup> Van Caenegem (note 62), pp. 338-339.

<sup>118</sup> R.C. van Caenegem, *Professor Ganshof herdacht*, *Handelingen der maatschappij voor geschiedenis en oudheidkunde te Gent*, new series, 60 (2006), pp. 21-30.

<sup>119</sup> Van Caenegem (note 79), p. 25.

<sup>120</sup> *Rechtshistorici* (note 51), p. 14.

<sup>121</sup> Van Caenegem (note 30), p. 30.

<sup>122</sup> See in particular van Caenegem (note 13), pp. 120-126 on Karl August Eckhardt's devotion to nazism.

<sup>123</sup> R.C. van Caenegem, *Oud recht, goed recht?* (=Old law, good law?), in: *Hulde aan René Dekkers*, Brussels, Bruylant, 1982, p. 157.

<sup>124</sup> R.C. van Caenegem, *Law in the medieval world*, in: *Legal history: a European perspective*, London-Rio Grande, Hambledon press, 1991, p. 141.

Here, van Caenegem encounters a problem. An evaluation needs a standard, and which standard should one use? In an article on ‘Old law, good law’, he pleads for evaluating an era and its laws by its own, contemporary, criteria.<sup>125</sup> This clashes with his acceptance of anachronisms in other publications<sup>126</sup> and his willingness to embrace different standards which may lead to different evaluations.<sup>127</sup> Van Caenegem liked most of all to offer his opinion on the growing unification of law in Europe. He distinguished pessimists, who argue unification will never happen and optimists, who believe it will. He positioned himself in the latter camp, as he saw convergence of common law and civil law,<sup>128</sup> but he wrote this, of course, before the Brexit.

#### 7. Conclusion: sound ideas, yes; absurd consequences, no

Even before the British leave vote, van Caenegem still had his doubts and reservations on the future of England and Europe, which seems to characterize all of his scholarship. In order to understand this attitude, one should consult one of his last articles: *Sound ideas and absurd consequences*.<sup>129</sup> It summarizes van Caenegem’s main lesson from history: humans, and in particular jurists of the past sometimes had very sound ideas. However, taking those ideas to the extreme inevitably leads to absurd or unintended consequences. A bit of prudence is always advised. If the legal historian takes only one lesson from van Caenegem’s rich and diverse work, it should be this one.

---

<sup>125</sup> Van Caenegem (note 123), p. 160.

<sup>126</sup> E.g. R.C. van Caenegem, *De instellingen van de middeleeuwen: geschiedenis van de Westerse staatsinstellingen van de Ve tot de de XVe eeuw*, Ghent 1989, p. 9.

<sup>127</sup> Van Caenegem (note 28), p. 54.

<sup>128</sup> Van Caenegem (note 63), pp. 485-498; Van Caenegem (note 13), pp. 20-37.

<sup>129</sup> R.C. van Caenegem, *Sound ideas and absurd consequences*, *European review* 19 (2011), pp. 93-104.