

They Entered without any Rumour.

Human Rights in the Belgian Legal Periodicals

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Abstract

Legal periodicals offer an opportunity to gaze on the daily pursuits of legal practitioners. By measuring the attention on a certain topic, it is possible to retrace to what extent it was deemed to be important for Belgian jurists. In this particular paper, a closer look will be taken at human rights and their relevance for Belgian legal practice. Therefore, research will be done in one of the most influential periodicals in Flanders: the *Rechtskundig Weekblad*. The attention on human rights, and more specific the European Convention of Human Rights, can give an impression of the importance of these rights for Belgian, and more specific, Flemish legal practice. As this periodical was preoccupied with the Flemish movement, its ‘ideology’ also affected its reporting of human rights. Thus, legal periodicals can be found at the crossroads of all actors in the legal world.

A. Introduction

Periodicals¹ are mirrors or seismographs of cultural and social processes in a society. Legal periodicals are no exception, as they register day-to-day legal culture and reflect its evolution over a longer period.² The legal periodical as a genre dates back to the end of the 18th century when specific journals were founded to comment on legal cases.³ Surprisingly enough, despite their importance for the knowledge of legal culture, they were not studied scientifically until the 1980s. Since then, legal journalism

¹ In this paper periodicals, journals or reviews will be used as synonyms.

² M. Stolleis (ed.), *Juristische Zeitschriften. Die neue Medien des 18.-20. Jahrhunderts* (1999); M. Stolleis & T. Simon (eds.), *Juristische Zeitschriften in Europa* (2006); M. Luts-Sootak & M. Ristikivi, “Dear reader”, 17 *Juridica International* (2010) 1, 1.

³ Initially, they were part of periodicals dedicated to the sciences in general and mostly they were nothing more than a collection of case law. The French *Journal des Scavants*, established in 1669, is seen as the first scientific periodical and contained a small amount of case law. E. Holthöfer, *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert* (1993), 139; G. Van den Bergh & C. Jansen, “De wording van het juridische tijdschrift. Drie Nederlandse pogingen uit de Franse tijd”, 56 *Tijdschrift voor Rechtsgeschiedenis* (1988), 341; C. Jansen, “Rechtsgeleerd magazijn Themis (RM Themis)”, 16 *Ars Aequi* 2009, 589.

has become a hot topic of study in most European countries.⁴ However, Belgian historiography lags behind.⁵ Today, the impact of rankings and peer review on research funding, but also of technological changes cannot be underestimated. Therefore it is necessary to know how these publications work.⁶

In this paper, the importance of human rights in Belgian juridical periodicals will be analyzed. The main question is to what extent human rights were deemed to be important for Belgian legal practitioners. In order to answer this question, a study about periodicals will be made. In that way, one can gain an impression of the importance of human rights in the Belgian legal world, but also of certain selection criteria handled by the board of editors of law reviews. Did the board of editors give attention to the

⁴ P. Grossi (ed.), *La cultura delle riviste giuridiche italiane* (1984); *Id.*, *Riviste giuridiche italiane 1865-1945, Quaderni fiorentini per la storia del pensiero giuridico moderno* (1987); A.-J. Arnaud (ed.), *La culture des revues juridiques françaises* (1988); M. Stolleis (ed.), 1999, *supra* note 2; T. Simon & M. Stolleis (eds.), 2006, *supra* note 2; K. Saleski, *Theorie und Praxis des Rechts. Im Spiegel der frühen Zürcher und Schweizer juristischen Zeitschriften* (2007); M. Krupar, *Tschechische juristische Zeitschriften des 19. und 20. Jahrhunderts* (2011).

⁵ There are a few studies about specific titles e.g. V. Carré, *Le Journal des Tribunaux d'Edmond Picard (1881-1899). Approche d'un journal judiciaire au dix-neuvième siècle*, unpublished master's thesis ULB, 1986; B. Coppein, *Mirror of changing law. The Journal des Tribunaux in the fin de siècle*, s.l.n.d.; A. Van Oevelen, "Vijfzeventig jaar Rechtskundig Weekblad", *Rechtskundig Weekblad [RW]* 2011, 1-6; S. Vandebogaerde, "Vive Lejeune! Het Tijdschrift van de Vrederechters (1892-2011)", in G. Martyn (ed.), *Scènes uit de geschiedenis van het vredegerecht/Scènes de l'histoire du justice de paix*, 129-146; As a general study about the Belgian legal periodicals one can consult E. Holthöfer, 'Belgien' in F. Ranieri (ed.), *Gedruckte Quellen der Rechtsprechung in Europa (1800-1945)*, (1992), 3-94; *Id.*, *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert*, (1993); D. Heirbaut, "Law reviews in Belgium (1763-2004): instruments of legal practice and linguistic conflicts" in Simon & Stolleis, *supra* note 2, 343-369.

⁶ Since 2003 the scientific output of universities in Flanders is an important element in the distribution of research funding. Thus the number of publications and citations has become more significant for a university. In the databases of Web of Science social and human sciences are underrepresented. The 2008 funding decree and the resolution on research funding established a committee to create a special database for these social and human sciences. This is called VABB-SHW (Vlaams Academisch Bibliografisch Bestand-Sociale en Humane Wetenschappen). For now, legal periodicals are divided in 'peer reviewed' and not 'peer reviewed'. Books are ranked per publisher, but as of now no Belgian publishers are considered to be scientific. N. Hoekx & A.-L. Verbeke, 'Verleden, heden en toekomst van juridische tijdschriften in Vlaanderen', *RW* 2011, 7-22.

evolutions in the field of European human rights? Was there a lot of doctrine and case law of the European Court or were only the leading cases published? Is there an evolution of doctrine and case law and how can it be explained?

The vastness of the subject requires a limitation in two ways. First, because it is one of the only legally enforceable human rights treaties, the impact of the European Convention and the European Court of Human Rights on the Belgian legal system will be subjected to research. This means that Belgian periodicals will be studied from 1950 onwards. The second limitation concerns the selection of the reviews. There are plenty of titles to choose from.⁷ There is one Belgian periodical specifically dedicated to the field of human rights, the *Tijdschrift voor Mensenrechten*⁸, but this would only present a distorted image. After all, specialized periodicals remain silent about the impact of their topic upon general legal culture. In contrast, an important general periodical better reflects the penetration of certain legal issues in the legal world. Therefore, the focus is on one of the most important general periodicals, the *Rechtskundig Weekblad*, which celebrated its 75th year of publication in 2011.⁹ The obtained data will probably confirm two hypotheses. Firstly, as the number of cases before the European Court has risen throughout its history, this should result in a rise of the attention for human rights in the *Rechtskundig Weekblad*. Secondly, as some rulings e.g. the *Marckxruiling* (1979) have had a profound impact upon

⁷ Depending on the definition of 'legal periodical' or library catalogues the number of titles can be more than 500 and even then are online publications excluded. Today, even law firms publish their own periodical, which is not always publicly accessible and thus not known for the researcher. A useful instrument is the yearly published *Recueil Permanent des Revues Juridiques/Permanent Overzicht van Juridische Tijdschriften* which summarizes what was published in 130 Belgian law reviews.

⁸ The *Tijdschrift voor Mensenrechten* is the successor of the *Liga Nieuwsbrief*, the newsletter of the league of Human Rights in Belgium. The goal of this review is to encourage research on human rights and to spread knowledge about it. It appears four times a year since 2003. Each edition contains two or three short articles, followed by an interview or report. Every editorial gives the opinion from a member of the editorial board. The last page is reserved for new leading cases. The difference with the old newsletter is that henceforth it is published by a professional publisher and it has an independent editorial board.

⁹ This commemoration started with an academic session, in which the first issue of that year was presented. It contained several articles which discussed the most important changes in every field of law, but it opened with a historical contribution written by its editor in chief Aloïis Van Oevelen, followed by an article about the future of legal periodicals.

Belgian legal system, this should be visible. These assumptions must be put in a larger historical context.

B. The *Rechtskundig Weekblad*

The *Rechtskundig Weekblad* is seen as one of the most important legal reviews in Flanders, the northern, Dutch-speaking part of Belgium. Ever since its founding, a new issue appeared every week (with the exception of the years during the Second World War¹⁰ and the judicial recess in August and September) and it has always reached a considerable number of lawyers. To give an indication: today it has 4300 subscribers, without the ones who have only a subscription online, which makes it the most successful weekly published legal periodical in Flanders.¹¹ The periodical was founded in 1931 by the Antwerp attorney René Victor¹² who was the secretary of the editorial board and became the *de facto* editor in chief.¹³

¹⁰ During the Second World War it was not published due to higher costs and the refusal of editor René Victor to work for the German occupier.

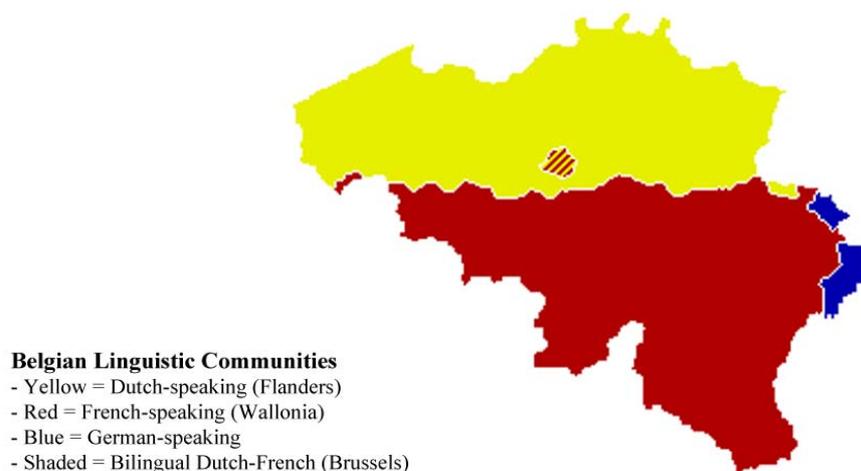
¹¹ A. Van Oevelen, *supra* note 5, 4.

¹² René Victor (1897 – 1984) born in Antwerp was a jack of all legal trades. He was an attorney at the Antwerp Bar, president and secretary of the Vlaamse Conferentie, the association of Dutch speaking attorneys there. He was one of the most passionate advocates of Dutch as the official legal language in Flanders, which can be explained by the fact that he was educated by August Borms, a Flemish nationalistic frontman and collaborator of the German occupier during both World Wars. During WWI Victor worked for *Het Vlaamsche Nieuws*, an activist newspaper. Therefore, after the armistice he was suspended as a State clerk. In 1921 he was *doctor iuris* and he joined the Antwerp Bar in 1922. He wrote a lot of articles and books and was appointed as the first Dutch-speaking professor at the *Université Libre de Bruxelles*. In 1941, he resigned due to a conflict with the Germans. In 1955 he became professor at Ghent University. Victor was president of the Flemish Jurists' Union (1964 – 1983). It is partly due to him that law in Flanders is taught, practised, discussed and examined in Dutch. Until 1982 he presented an overview of the Flemish legal literature in the *Rechtskundig Weekblad* every year. Because of his merits for the legal world, the King ennobled him. He died in 1984 and was succeeded as editor in chief by Edgar Boonen. F. Erdman, 'R. Victor en de Balie', *Rechtskundig Weekblatt [RW]* 1984 / 1985, 2865-2870; R. Vandeputte, 'Leven en Werk van R. Victor', *RW* 1984 / 1985, 2869-2884; M. Storme, 'R. Victor en de Vlaamse Juristenvereniging', *RW* 1984 – 1985, 2883-2886; J. Stevens, 'R. Victor en de Vlaamse Conferentie', *RW* 1984 – 1985, 2885-2888; H. Van Goethem, 'Victor, ridder René', in R. de Schryver (ed.), *Nieuwe Encyclopedie van de Vlaamse Beweging* (1998).

¹³ The other editors were Jules Franck, Herman De Jongh, Louis Elebaers, John Stockmans, Ignace Van den Brande, Fernand Collin, Emiel Ooms en Gaston Craen. They were all attorneys.

Through it he wanted to develop a Flemish legal culture and thus to make Flemish lawyers contribute to the greatness of the Flemish culture. Hitherto the French language had dominated the Belgian legal world, even though the majority of the Belgians were Dutch speaking.¹⁴ This periodical cannot be comprehended without taking a closer look to the Belgian linguistic history.

Today Belgium is a federal State on the cultural boundary between Germanic and Latin Europe. It has three linguistic communities and three territorial regions. The northern part is Flanders, where Dutch/Flemish is spoken by the inhabitants, whereas in the southern part, Wallonia, they speak French/Walloon. In the Eastern part of Wallonia there is a German speaking community.¹⁵ The second half of the 20th century was marked by the rise of non-violent conflicts between the Dutch and French speaking Belgians fuelled by cultural differences on the one hand and an asymmetrical economic evolution of Flanders and Wallonia on the other hand. These conflicts have caused far-reaching reforms of the formerly unitary Belgian State into a federal State.



¹⁴ R. Victor, “Aan onze lezers”, *RW* 1931-1932, 1; R. Victor, ‘Ons doel’, *RW* 1931-1932, 17; D. Heirbaut, ‘Law reviews in Belgium (1763-2004): instruments of legal practice and linguistic conflicts’ in Simon en Stolleis, *supra* note 2, 358.

¹⁵ This small region was appointed to Belgium after the peace treaty of Versailles (1919) as compensation for war damages.

I. Belgian linguistic history

The French dominance was the product of history. Under the reign of the Emperor Charles V, French became the language of the nobility and the higher courts, whereas in lower courts Dutch was still used. Needless to say that Latin was the common language at universities. In this context it became fashionably for wealthy people to speak French.¹⁶ Moreover, literature in Dutch in the Southern Netherlands (the later Belgium) was vastly inferior to the vernacular literature in the Dutch Republic, so it is not strange that Dutch in Flanders became heavily influenced by French. The 1795 French annexation ended the use of Flemish in public institutions. The French imposed not only their administrative and legal system but also their language.

The Vienna conference (1815) reunited the Southern and Northern Netherlands. King William I. of the United Kingdom of the Netherlands decided in 1819 that Dutch should be used in administration and courts in Flanders. Due to practical problems, temporary measures were foreseen until 1823. Because there was not always a good translation for French legal terminology, or the possibility to achieve a uniform terminology, Dutch was still seen as inferior to French in the Southern Netherlands. Moreover, the lack of legal literature in Dutch in the South only compounded this problem. The linguistic policy of William I. and many other political decisions led to discontent amongst the French-speaking elite in the South, which resulted in the 1830 Belgian Revolution and the independence of the South as a new State: Belgium.

In theory the Belgian revolutionaries recognized the linguistic freedom, but in practice it amounted to the complete Frenchification of the Belgian legal world.¹⁷ Even though Flemings may have had the right to be judged in Dutch, attorneys and judges refused to cooperate, not in the least because they were trained in the French tradition. Some notorious cases showed how disastrous it could be for the Flemings to be judged in a language which was not their own. Some Flemish attorneys started a crusade for the use of Dutch in criminal trials.¹⁸ However, most attorneys

¹⁶ The Spanish and especially the Austrian domination of the Southern Netherlands introduced French in public offices.

¹⁷ There was difference between penal and civil cases. In the latter, French was used almost everywhere in the country, whereas for the former Dutch was used in Flanders.

¹⁸ H. Van Goethem (ed.), *100 jaar Vlaams rechtsleven 1885 – 1985* (1985); H. Van Goethem, 'De Nederlandse Rechtstaal in België in de 19^{de} eeuw', in F. Stevens & D.

continued to plead in French because they lacked the knowledge and experience to do so in Dutch. Therefore, Flemish Bar organizations, so called ‘*Vlaamsche Conferenties*’, organised moot courts in Dutch and they also supported the publication of the first legal periodical in Dutch in 1897: the *Rechtskundig Tijdschrift voor Vlaamsch België*. Despite all these initiatives and the first linguistic statutes, the position of Dutch as a legal language remained very minor. This frustrated René Victor, a radical Flemish lawyer, who wanted to mend this situation by publishing a real Dutch periodical: *Rechtskundig Weekblad*.

His policy was to publish only case law from Flemish courts, written in Dutch and his successors remained faithful to this publication policy until the present day.¹⁹ The birth of the new review coincided with another linguistic earthquake in Belgium. In 1930, Ghent University became the first university to teach in Dutch. This finally gave Flemish lawyers the training they had lacked for so long.²⁰ Nevertheless, it still took until 1935, with a statute concerning the use of languages in court, before French and Dutch had equal rights in court.²¹ Thereafter, the *Rechtskundig Weekblad* could focus on the further development of a Flemish legal culture which had to be ‘purified’ from French influences.²²

The scientific element of the review became more important by the publication of annotated case law and since the 1970s professors and assistants of the Flemish universities are asked to comment on judgments.

van den Auweele, “*Houd voet bij stuk*”. *Xenia iuris historiae, G. Van Dievoet oblata* (1990), 587-599.

¹⁹ In the first year, the periodical had to publish a lot of Dutch cases from the Netherlands, because there were not enough in Flanders. This led to a new attention to the Netherlands instead of France, which was traditionally the guiding example in Belgium.

²⁰ L. Vandersteene, ‘*De geschiedenis van de rechtsfaculteit van de universiteit Gent. Van haar ontstaan tot aan de Tweede Wereldoorlog (1817 – 1940)*’, Verhandelingen der Maatschappij voor Geschiedenis en Oudheidkunde te Gent, Deel XXXIII, 2009.

²¹ This act determined the use of languages in court. In Flemish districts, the whole procedure is in Dutch, in the Walloon districts in French, except for the Eupen courts which can use German. The situation of the courts in the Brussels district is more complicated, because they can be unilingual or bilingual. Parties can ask to complete the procedure in another language. By doing so, the case is passed to a court in another region.

²² The periodical wanted to build a Dutch legal vocabulary by publishing a list of words that could be used instead of commonly used French terms. Every year the periodical started with an overview of legal literature published in Dutch.

Around the same time attorney Edgar Boonen²³ and judge Camiel Caenepeel²⁴ entered the board of editors.²⁵ To guarantee the professional character and to enhance the scientific element, there were some changes in the editorial board. Initially, only attorneys were on it, today are they accompanied by magistrates or professors. The editorial board is in its policy assisted by an advisory board, which exists of magistrates and academics. The policy is to offer young researchers an opportunity to publish their research results, with peer review guaranteeing the quality of these contributions. Furthermore, every legal branch has its own section editors. In that way the *Rechtskundig Weekblad*'s existence as a scientific legal periodical is ensured.²⁶

²³ Edgar Boonen (1912 – 1993) obtained his law degree not from a university, but from a State commission. He became a member of the Antwerp Bar in 1936. Even though he was an apprentice of Joseph Aerts he soon became a collaborator of René Victor helping him with editing the *Rechtskundig Weekblad*. He was a die hard Flemish nationalist and was therefore deported to France at the start of WWII. He had joined the Flemish Catholic Student Union which during the 1930s became gradually more extremist. After the war, its members were prosecuted because of their German sympathies, Edgar Boonen included. He was disbarred, this marked him but he never lost his Flemish ideals. Nevertheless, he could after a few years return to the Bar and was even elected as president of it from 1970 - 1972. As such, he made a lot of changes in the Antwerp Bar. As a member of the editorial board, he selected the cases to be published in the *Rechtskundig Weekblad*; J. Stevens, 'Stafhouder Mr. Edgar Boonen', *RW* 1993 – 1994, 1-3.

²⁴ Camiel Caenepeel (1921 – 1998) studied law at Leuven University. He joined the Antwerp Bar in 1946 and in 1963 he became a judge in the Commercial Court. In 1975 he was appointed as a judge in the Antwerp Court of Appeal and four years later as a judge in the Belgian Court of Cassation where he remained active until 1991. From the start of his career as a magistrate Caenepeel contributed to the *Rechtskundig Weekblad*. He wrote innumerable articles and was one of the first to write annotations of judgments. Furthermore, he had done a lot of work as an editor, so it was almost predestinated that he would succeed Edgar Boonen after his death in 1993. Caenepeel took the review to a higher scientific level and paved the way for a more 'academic' board of editors. De Redactie, 'Camiel Caenepeel (1921 – 1998)', *RW* 1998 – 1999, 1-2.

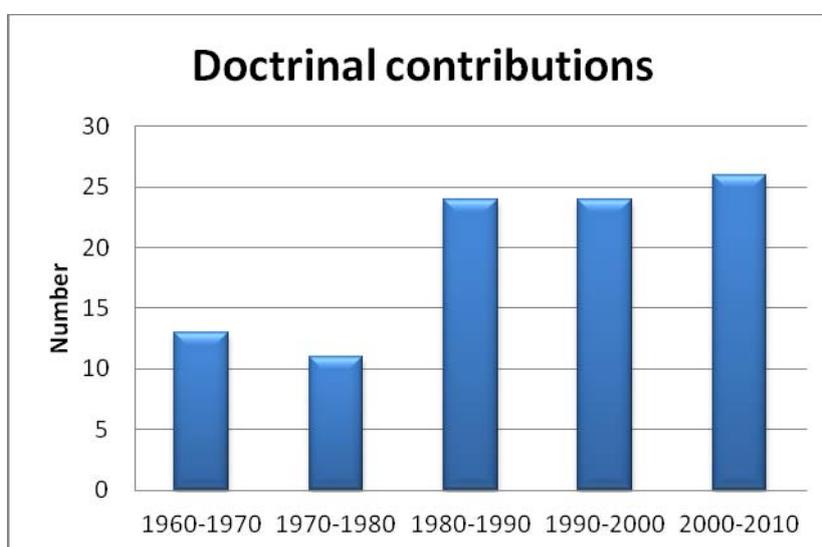
²⁵ They were the leading personalities. Until the death of René Victor, they took terms in editing new issues.

²⁶ A. Van Oevelen, 'Vijfenzeventig jaar Rechtskundig Weekblad', *RW* 2011, 4-5.

II. Quantitative analysis

1. Autonomous doctrinal contributions

Attention will go to autonomous doctrinal contributions published under the heading “Contributions” (“Bijdragen”) about the European Convention and Court of Human Rights. This means that neither annotations of case law nor small announcements were taken into account. Because of their smaller relevance, the 1950s were also left out.



Graph 1: Doctrinal contributions in *Rechtskundig Weekblad* (1960-2010)²⁷

In the decade 1960-1970 13 doctrinal contributions were dedicated to the European Convention and Court. They had a more general approach towards the new institutions which had been created, and most of the time they discussed the position of the individual in the framework of the Convention.

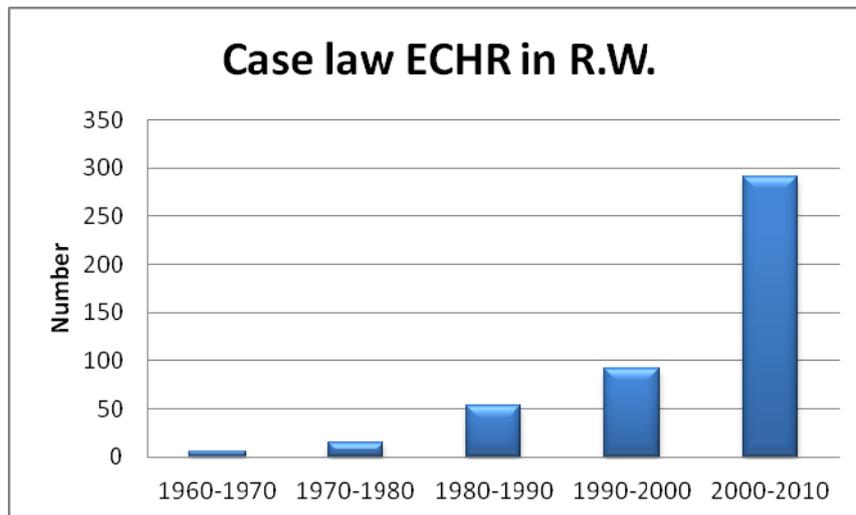
During the 1970s a slight diminishment can be seen, followed by a sudden rise in the 1980s. Although thereafter the number increased slightly, stagnation can be perceived. This can be influenced by the fact that only one doctrinal contribution per issue was published. Anyhow, the first hypothesis

²⁷ Number obtained by a search on and count of the lemmas ‘human rights’ and ‘european court on human rights’ under the subtitle ‘Bijdragen’ (Contributions/Articles) in each year’s index.

we made in the introduction can be considered true. The growing attention for the European Convention and Court on Human Rights run parallel with one another, but what about the evolution of human rights in the published case law?

2. Case law

The focus for this part is on the application of the ECHR in Belgian Courts and of course the cases of the ECtHR. The strategy used focuses on the term “Human Rights” in the index which appears for the first time in the year 1962-1963. This corresponds fairly with the first judgments of the European Court. For earlier years the index did not have a separate entry on human rights, so we had to find the relevant cases ourselves.



Graph 2: number of cases based on the European Convention on Human Rights (1960-2010)²⁸

Over the five decades, 455 cases related to the European Convention on Human Rights were published. Only four of them during the 1960s²⁹, but

²⁸ Number obtained by a search on and count of the lemma’s ‘human rights’ and ‘european court on human rights’ under the subtitle ‘Rechtspraak’ (Case Law) in each year’s index.

²⁹ Three of them were pronounced by the European Court, one by the Belgian Court of Cassation. The European Court judged between 1959 and 1973 only seventeen times. In the period 1974 to 1983 there were only 59 cases and the decade thereafter already 372.

thereafter we notice an exponential growth. Remarkable is the enormous rise of published cases of the European Court of Human Rights from 2000 on.

Between 2000 and 2010 the *Rechtskundig Weekblad* published 172 cases from the European Court³⁰, whereas previously it published only case law from Belgian courts referring to the ECHR³¹, the Belgian Court of Cassation being the main supplier.³²

Only to a small extent can this be explained to a rise of case law changes in the Courts procedure. From 1959 until the end of September 1998, the European Court delivered 837 judgments out of more than 45,000 applications. Since the 'new court' (*infra*) is in place, it has almost the same amount of applications each year. In 2010 the count stopped at 61,300 complaints.³³

How can the obtained data be interpreted and explained? Clearly the periodicals have more and more attention for everything which has to do with the European Convention of Human Rights. There are some external changes to which the periodical responded, but also some internal changes can explain the rising attention for the European human rights.

C. External: Belgian cases procedural changes

I. Linguistic issues create a greater attention for Strasbourg

In the aftermath of WWII, there were many unanswered questions on international law, especially how to punish the Nazi regime for its atrocities, but also about the UN and its declaration on Human Rights. Nevertheless, it took until 1949 before the *Rechtskundig Weekblad* mentioned International Human Rights.³⁴

³⁰ Out of a total of 291 cases related to the European Human Rights in that decade.

³¹ In the 1970s and 1980s, no case law from the European Court was published in the *Rechtskundig Weekblad*. During the late 1990s the European Court revived to boom in the 2000s.

³² On the total of all cases 41% came straight from Strasbourg whereas 31% was pronounced by the Belgian Court of Cassation. The other courts: Belgian Constitutional Court (9%), Council of State (3%), Courts of Appeal and First Instance (8% each).

³³ ECHR, 'Analysis of Statistics 2010' (2011) available at http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38/85F4/A93113A78F10/0/Analysis_of_statistics_2010.pdf (last visited 1 May 2012).

³⁴ J. De Meyer, 'De raad van Europa', *RW* 1949 – 1950, 145-150.

The first article mentioning the European Convention on Human Rights was published in 1958.³⁵ An academic had written it, which can indicate that Belgian practitioners at that time were not interested in international human rights.³⁶ Firstly, the 1831 Belgian Constitution foresaw many civil rights and secondly the international human rights were not directly applicable in legal practice, which explains the rather low interest in it. One would suspect that the establishment of the European Court would be a cause for celebration in the European legal world, but it went rather unnoticed in the *Rechtskundig Weekblad*. Or to quote Mr. Nyssens:

“*The European Convention on Human Rights has made its entrance in our legal system without any rumor and without drawing any attention*”³⁷

The first time the *Rechtskundig Weekblad* made a big issue of human rights was in 1968 with the so called Belgian Linguistic case.³⁸ It was not the first time that Belgium was summoned before the ECHR³⁹, but this case

³⁵ J. Bacalu, ‘Het verdragsrecht betreffende de Rechten van de Mens’, *RW* 1957-1958, 1321.

³⁶ There was a European Commission for Human Rights in 1954. The Court was established in 1959.

³⁷ Free translation of “*Het Europees Verdrag der Rechten van de Mens heeft in ons wetgevend arsenaal zijn intrede gedaan zonder rumoer en zonder de aandacht te trekken.*”; A. Nyssens, ‘Het Europees Verdrag van de Rechten van de Mens, is dit een voldoende bescherming?’, *RW* 1959-1960, 1213.

³⁸ *Belgium v. Belgium*, ECHR (1968) Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

³⁹ That was the case *De Becker v. Belgium*, ECHR (1962) Appl. No. 214/56, in which for the first time application of the freedom of speech was demanded. Mr. Raymond De Becker filed a request to the European Commission of Human Rights against the government of the Kingdom of Belgium. De Becker, an author and journalist was in 1946 condemned to death by the Brussels Court Martial on the count of collaboration with the German authorities in various ways, especially in his function as general editor of the newspaper *Le Soir*. In appeal the judgment was reformed to a lifelong sentence. To a result of this condemnation, De Becker lost all his civil rights as stated in article 123sexies of the Belgian Penal Code. A few years later he was released under parole but he was banned to France, could not engage in politics and remained deprived from his rights as a Belgian citizen. Therefore, he could not take up his professional writing and sought relief in the European institutions. Belgium acted swiftly by publishing a new act on June 1, 1961 by which a judgment became unnecessary. On October 5, 1961, De Becker’s attorney wrote a letter to the Commission stating that Belgian law henceforth was in compliance with the European Convention and therefore he gave up his complaint. The Court had two options: striking the case from the list or to judge on the contested article 123sexies. The Court choose the former. In the *Rechtskundig Weekblad* nothing was mentioned about it at that time, for reasons which are unclear. K. Aerts, ‘There’s something rotten in the

had a huge symbolic value not in the least for René Victor and his companions who fought for the right to speak Dutch in Flemish courts. The judgment of the European Court was considered a victory in this struggle for the recognition of Flemish as a language of law.

In complicated linguistic issues, the Belgian Parliament has enacted several statutes concerning the use of languages in administrative, judicial and educational matters. Nevertheless, the linguistic issue in Belgium loomed up again when the Belgian Parliament voted for a new act 'relating to the use of languages in education'.⁴⁰ Even though a large majority in Parliament stood behind it, six applicants filed a complaint against Belgium, on their own behalf and the behalf of their children. They claimed that the legislation relating to education infringed their rights under the Convention.⁴¹

The act stated that the language of education should be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region. In Kraainem and five other communities at the outskirts of Brussels⁴², kindergarten and primary, but not secondary education were allowed in French if the latter was the child's maternal or usual language. All applicants were inhabitants of Alsemberg, Beersel, Antwerp, Ghent, Louvain and Vilvoorde which belonged to the Dutch-speaking region. Only one was from Kraainem, which belonged to the Brussels region.

The Court condemned Belgium only for the fact that in Kraainem certain children, solely on the basis of the residence of their parents, did not have access to French-language schools existing in the six communities

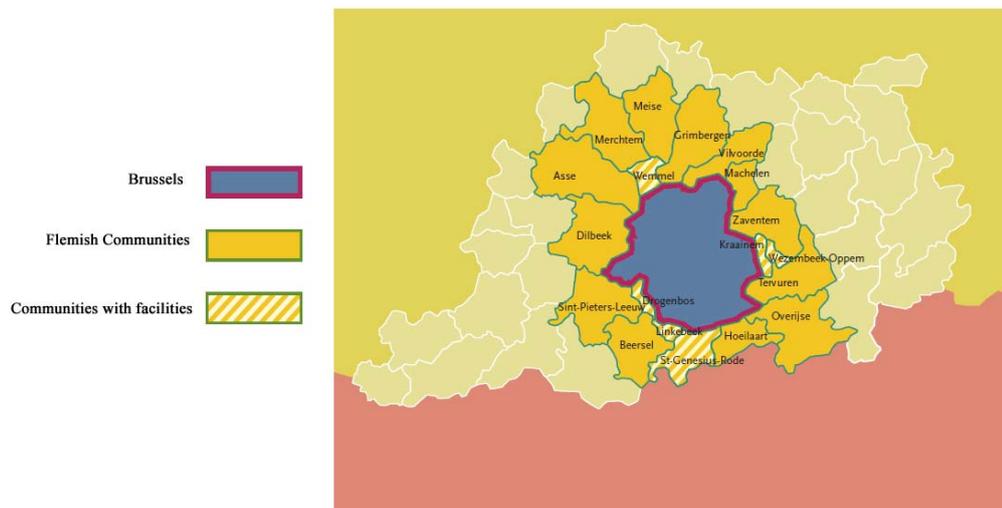
State of Belgium. *De liquidatie van de repressie en het Europees Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele vrijheden: de zaak De Becker (1956-1962)*, in: D. Heirbaut, X. Rousseau *et. al.* (ed.), *Histoire du droit et de la justice: une nouvelle génération de recherche/Justitie- en rechtsgeschiedenis: een nieuwe onderzoeksgeneratie* (2009), 93-108; K. Aerts, " 'Repressie zonder maat of einde?' *De juridische reïntegratie van incivieken in de Belgische Staat na de Tweede Wereldoorlog*, (2011), unpublished doctoral thesis, Ghent, 422-461.

⁴⁰ Act of 30th July 1963 "relating to the use of languages in education", *Belgisch Staatsblad* 22 August 1963.

⁴¹ They based their arguments on article 8 and 14 ECRM and article 2 of the First Protocol.

⁴² The other cities are: Drogenbos, Linkebeek, Sint-Genesius-Rode (Rhode-Saint-Génèse), Wemmel and Wezembeek-Oppem.

with facilities on the periphery of Brussels.⁴³ This ‘victory’ was the signal for the board of editors to proclaim this decision a landmark in the history of the Flemish Movement. The Dutch translation of this decision was published in two complete issues. Anything else had to wait for a later issue.⁴⁴ This case was so symbolic that it had already been a topic in a contribution the previous year.⁴⁵ Here one cannot but notice the firm hand of the editor-in-chief René Victor, who saw his ideals confirmed by a European Court.



Map of Brussels⁴⁶

⁴³ The communities with facilities are a typically Belgian answer to the linguistic problems. In principle these communities belong to Flanders, but their French-speaking inhabitants can ask the local authorities to communicate with them in French. This is a mitigation of the constitutional territoriality principle. Its application often leads to serious problems. According to the Flemish government, the facilities are an instrument of integration for French-speaking inhabitants. Therefore, administrative documents are in Dutch, unless a Francophone citizen asks for a French translation.

⁴⁴ De Redactie, ‘Het arrest van Straatsburg’, *RW* 1968-1969, 1.

⁴⁵ J. Grootaert, ‘De vrijheid van onderwijs in België en...Straatsburg’, *RW* 1967-1968, 631-640.

⁴⁶ Vlaams Parlement, *De Taalwetwijzer. Welke taal wanneer?*, (<http://www.taalwetwijzer.be>) available at <http://brussel.vlaanderen.be/documenten/53776Brussel.pdf> (last visited 1 May 2012).

On its own, this case explains the higher rate of contributions during the decade 1960-1970 and the small amount of published case law. The judgment at the end of that period was the most important factor. The 1970s were not exceptional, because there were no important Belgian cases before the European Court, but at its end a child turned the Belgian legal world upside down.

II. How a baby changed the focus in the legal periodicals

On 13 June 1979 the European Court decided the famous Marckx-case⁴⁷ by which Belgium was condemned for the third time in history.⁴⁸ Not only Belgian law had to change, but also other European States were confronted with possible problems. The story starts in 1973 when Ms. Paula Marckx gave birth to a daughter: Alexandra. In itself, this was not very special, if it was not that Mrs. Marckx was unmarried. According to Belgian law the newborn infant was “illegitimate”. The 1804 Civil Code, still stated that only children born in wedlock were legitimate and, hence, had a full legal affiliation with their parents which enabled them to fully inherit. To give her child rights equal to those of ‘legitimate children’, mother Marckx had to adopt her own daughter, which had its effects on both the extent of the child’s family relations and the patrimonial rights of both the child and her mother. The European Court of Human Rights ruled on June 13, 1979 that such discrimination was a violation of Articles 8 and 14 of the European Convention on Human Rights and Article 1 of the First Protocol.

Before the judgment there were already voices to treat all children equal, regardless of their parents’ marital status, but Parliament barely heard them.⁴⁹ Throughout history, children born out of wedlock, often referred to

⁴⁷ From a legal historian’s point-of-view see: B. Debaenst, ‘Moeder Marckx maakt geen bastaard’, 14 *Pro Memoria* (2012) 1.

⁴⁸ In 1968 in the Belgian Linguistic Case and also in the case of *De Wilde, Ooms & Versyp v. Belgium*, ECHR (1971), Appl. No. 2832/66; 2835/66; 2899/66, known as the Vagrancy Cases. In the latter detention ordered by decisions of magistrates at Charleroi, Namur and Brussels in compliance with the Belgian Act of 27 November 1891 for the suppression of vagrancy and begging, was found to be against human rights.

⁴⁹ J. Gerlo, ‘Is hercodificatie van het familierecht wenselijk?’, in J. Erauw *et al* (eds), *Liber Memorialis François Laurent 1810-1887* (1989), 517; J. Gerlo, ‘Hiërarchie der afstammingen of gelijkheid der statuten’, *RW* 1972-1973, 1889-1914; J. Gerlo, ‘De ontwerpen Vrancks, Vanderpoorten en Van Elslande betreffende de afstamming’, *RW*

as ‘bastards’, were discriminated because they were the result of a ‘sinful’ sexual relationship.⁵⁰ Even though discrimination was the rule, there were exceptions, nobility in Flanders where the principle ‘mother makes no bastard’ was held i.e. a child is never seen as a bastard in its relationship with its.⁵¹ The French Revolution improved the situation for the illegitimate child. The *Déclaration des droits de l’Homme* was clear: ‘*Les hommes naissent et demeurent libres et égaux en droits*’.⁵² Moreover ‘*Tous les enfants sont des enfants de la patrie*’ (all the children are children of the fatherland). November, 2 1793 a law was enacted turning these lofty principles in practice.⁵³ However, the Napoleonic code of 1804 turned back the clock in France and its Belgian provinces. Neither the Dutch nor the 1830 revolution made any change in this. In 1879, the liberal Minister of Justice Bara invited the famous jurist François Laurent to revise the Civil Code. Six years later, he finished his draft which abolished the discrimination between legitimate and illegitimate children. Unfortunately his text was seen as too progressive and it was banished to the archives. During the 20th Century, the legislator tried to diminish the inequality between children, but the whole process had been rather slow before the Marckx case. The judgment fully opened the discussion amongst Belgian lawyers. Some felt that the Court had gone beyond its powers⁵⁴ by

1978-1979, 193-203; J.M. Pauwels, ‘Het wetsontwerp Van Elslande betreffende de afstamming en adoptie’, *RW* 1978-1979, 1201-1212.

⁵⁰ According to the Catholic Church they were the defiance of the sacrament of marriage. Nevertheless, reality forced the Church to be pragmatic in case of ‘lovechildren’ whose parents could still marry and wash their sin away. Other ‘illegitimate children’ could not be accepted by Catholic Faith, though the King could legitimate them. J. Gilissen, *Historische inleiding tot het recht* (1981), 571; A. Teillard, ‘L’enfant naturel dans l’ancien droit français’, in: *Recueils de la société Jean Bodin pour l’histoire comparative des institutions*, XXXVI, *L’enfant*, II, *Europe médiévale et moderne* (1976), 266-267.

⁵¹ J. Gilissen, *supra* note 48, 571; J. Monballyu, ‘De toepassing van de regel ‘Moeder maakt geen bastaard’ in de interpretatie van een schenkingsakte. De zaak Philips Despieres, alias van der Poorte, contra Jan de Grendele’ (1580-1587), in: A.M.J.A. Berkvens & G.H.A. Venner (eds), ‘*Om daarmede vrijelijk te doen naer wil ende welgevallen*’ *Rechtshistorische opstellen aangeboden aan Prof. Mr. A. Fl. Gehlen*, Werken LGOG nr. 16, (1998), 76-84.

⁵² This was repeated in article 6: ‘All civilians are legally equal’.

⁵³ J.-G. Locré, *La législation civile, commerciale et criminelle de la France, ou commentaire et complément des codes français*, (1827), III, 141.

⁵⁴ F. Rigaux, “La loi condamnée. A propos de l’arrêt du 13 juin 1979 de la Cour européenne des droits de l’homme”, *Journal des Tribunaux* 1979, 513-524.

interpreting article 8 in “*a whole code of family law*”.⁵⁵ Whatever the truth in that, Belgium had to amend its legislation. Nevertheless, in 1983 the Court of Cassation, the highest Court in Belgium, had the opportunity to follow the Marckx-ruling. However, most doctrine suggested abandoning the distinction between ‘illegitimate and legitimate children’ since only Belgium, France and the Netherlands still had it.⁵⁶ A minority found otherwise.⁵⁷ The abolition of any discrimination between children, whether born within or without wedlock, did not take place before March 31, 1987, when the law was finally changed. The decision and its aftermath was an important source of inspiration for books and articles, also in the *Rechtskundig Weekblad*.⁵⁸

Consequently, the rise of published European case law can be explained by the growing workload for the Court. At that time, the Court did not hold permanent sessions which made it harder to cope with the influx of cases. To solve the problem, the Council of Europe introduced two new important procedural protocols to the 1950 European Convention.

III. The adoption of the 11th and 14th Protocol

On May 11, 1994, Protocol No. 11 to the European Convention on Human Rights was signed in Strasbourg after years of discussion and it came into force on November 1, 1998.⁵⁹ It created a single and permanent

⁵⁵ Dissenting opinion of judge Sir Gerald Fitzmaurice, *Marckx v. Belgium*, June ECHR (1979.), Appl. No. 6833/74.

⁵⁶ M.-T. Meulders Klein, ‘Le statut juridique des enfants adultérins et incestueux’, in J. Pauwels (ed.), *La réforme au droit de la filiation : perspectives européennes* (1981), 237-254.

⁵⁷ See F. Rigaux, *supra* note 54.

⁵⁸ A. Heyvaert & H. Willekens, *Beginselen van het gezins- en familierecht na het Marckxarrest: de theorie van het Marckxarrest en haar weerslag op het geldend recht*, (1981), 142; M. Bossuyt, ‘Publiekrechtelijke aspecten van het arrest Marckx’, *RW* 1979-1980, 929-970; K. Grimonprez, ‘Het Hof van Cassatie en vijftientig jaar E.V.R.M.’, *RW* 1981-1982, 2657-2674; W. Pintens, ‘Het erfrecht van het natuurlijk kind en het E.V.R.M.’, note to Court of First Instance Brussels 29 March 1983, *RW* 1983-1984, 454; J. Pauwels, ‘De Marckx-interpretatie van het Europees Verdrag voor de Rechten van de Mens: België geen koploper’, *RW* 1983-1984, 2795-2806; P. Senaeve, ‘Het Marckx arrest, de directe werking en het Hof van Cassatie’, *RW* 1985-1986, 1823-1838.

⁵⁹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 155, entered into force 1 November 1998. Belgium

Court and ended the filtering mechanism of the former European Commission of Human Rights. The aim was to finish cases in a shorter time and to guarantee the Court's efficiency. Nevertheless, these measures failed because of the expansion of the territory in which the ECHR is applicable and the obligatory complaint filing by citizens. In five years, complaints doubled. Barely ten years after the 1998 reform, the Court had delivered its 10,000th judgment.⁶⁰ Its output is such that more than 90% of the Court's judgments since its establishment had been delivered between 1998 and 2008.⁶¹ This was the signal that something had to change and a 14th protocol was approved in 2004.

On February 18, 2010 the 14th Protocol of the ECHR was ratified, entering into force on June 1, 2010.⁶² It tried to offer a solution for the enormous workload of the Court and to improve its capacity. The most important innovation was the introduction of the *unus iudex* who has the competence to declare a case non-admissible if it is plainly inadmissible. Committees of three judges were allowed to issue judgments, whereas previously only 7-judge Sections of the Court had been allowed to do so.⁶³ Even though, this protocol is only in force for one year, in reality the caseload has not diminished, on the contrary. Recent data show a 5% increase of filed applications between 2010 and 2011.⁶⁴ The rise of the caseload is indeed traceable in the *Rechtskundig Weekblad*.⁶⁵ The number of cases from the ECtHR or based on the Convention rose by more than 300% in the decade 2000-2010.⁶⁶ The doctrine focused on the procedural changes

approved the 11th Protocol by law on November 27, 1996 and ratified it on January 10, 1997.

⁶⁰ *Takhayeva and Others v. Russia*, ECHR (2008), Appl. No. 23286/04.

⁶¹ X, *50 Years of Activity. The European Court of Human Rights. Some Facts and Figures*, 3; X, *The European Court of Human Rights. Some Facts and Figures (1998-2008)*, 5, available at <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf> (last visited 1 May 2012).

⁶² Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention

⁶³ Y. Haeck & L. Zwaak, 'De Hervorming van het Europees Verdrag en het Europees Hof voor de Rechten van de Mens ingevolge het 14^e Protocol: pompen of verzuipen?', *TBP* 2006/1, 3-17.

⁶⁴ European Court of Human Rights, *Statistics 2011* available at http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5DEDD8C160AC1/0/STATS_20102011_EN.pdf (last visited 1 May 2012).

⁶⁵ See Van Oevelen, *supra* note 26.

⁶⁶ See graph 2

caused by the implementation of the new protocols⁶⁷ but also on important cases such as *Taxquet*⁶⁸ and more recent *Salduz*.⁶⁹

IV. A Change of mentality in the Belgian legal world

Another explanation for the growing interest in the case law of the European Court of Human Rights, is the growing popularity of international and human rights law in Belgian universities. Nevertheless, according to some stories, even in the early 1990s Belgian judges made fun of attorneys who used the European Convention in their pleadings, for the Belgian constitution provided all the direct applicable human rights one needed. A procedure before the European Court was until the late 1990s too complicated and there were fewer judgments too take into account.

Today, partly because of the implementation of above-mentioned protocols, no jurist will question the use of the European Convention or Court. In universities, the attention for international law and human rights has gradually taken on more importance for the students. In that way the Belgian practitioners no longer need to be convinced that the supranational level is important. Consequently, the editors of the *Rechtskundig Weekblad* wanted to give more attention to it. However, not only the readers played a significant role, but also the changes in the board of editors can explain the phenomenal rise of attention for the European Court.

D. Internal changes: the Editorial Board

Until 1984, René Victor was editor-in-chief, a title to be taken very literally: he decided whether something should be published or not. The *Rechtskundig Weekblad* was his creation, and until his death he was the determining factor. When Boonen and Caenepeel made their entry in the

⁶⁷ Y. Haecck & J. Vande Lanotte, 'Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw. Analyse van de nieuwe samenstelling, structuur en procedureregels', *RW* 1999-2000, 1417-1448; C. Van de Heyning, 'Vijftig jaar Europees Hof voor de Rechten van de Mens: van Hercules naar Sisyphus', *RW* 2009-2010, 602-614.

⁶⁸ *Taxquet v. Belgium*, ECHR (2010), Appl. No. 926/05.

⁶⁹ E.g. E. De Bock, 'Het arrest-Taxquet en de motivering van het verdict van het hof van assisen', *RW* 2008-2009, 1272-1276; M. De Swaef & A. Vandeplas, 'De Salduz-story: lof der redelijkheid?', *RW* 2011-2012, 89-92; J. Meese & P. Tersago, 'Het recht voor elkeen die wordt verhoord op consultatie van en bijstand door een advocaat na de Salduz-wet van 13 augustus 2011', *RW* 2011-2012, 934-952.

editorial board, they formed a real triumvirate deciding which texts were published. When Victor died, he was succeeded by his close colleague and friend Edgar Boonen, who respected the legacy of his predecessor. The most important change in the editorial board came only in the early 1990s. For the first time a magistrate, Camiel Caenepeel, was head of the *Rechtskundig Weekblad*. These three persons were all practitioners so one can assume that more practical topics were taken into account. Since the procedure before the European Court only changed from 1998 onwards, it became more important for legal periodicals. But there is another aspect which can be assumed as important: the scientification of the board of editors.

Since the late 1990s the board of editors has been mainly composed of academics such as professors, assistants and researchers. In 1998 the Antwerp professor, Aloïs Van Oevelen, was appointed as editor-in-chief. During his tenure, the *Rechtskundig Weekblad* has been taken to a higher scientific level and tried to broaden the spectrum of legal topics. Young researchers get the opportunity to present their research. Since international law and international human rights have become more important for national legal systems, it is not strange that there is greater attention for it in the legal periodicals.

E. Conclusion

After WWII Belgian (Flemish) jurists had little interest in 'human rights'. Despite the atrocities of the war, human rights were seen as self-evident. There was no real need for international human rights. Most of them were embedded in the Belgian constitution, one of the most progressive when it was written in 1831. This explains the slow growth of attention for the European Convention and European Court for Human Rights. External factors, such as leading Belgian cases, procedural changes of the Court and a growing interest in international law, made it compulsory for the practitioner to stay abreast of the evolutions in the field of human rights. Internal factors also explain the change of interest in Belgian legal periodicals. The *Rechtskundig Weekblad* was established in a reaction against the use of French in Flemish courts. It is no coincidence that the first case on European human rights published was the Belgian Linguistic case. New members in the editorial board broadened the scope of the review. Thus the periodical finds itself on the crossroads of the legal world (i.e. practice), the points of interest of an editorial board and the needs of the readers. As long as it keeps this - sometimes delicate - equilibrium, the ongoing success of the periodical is guaranteed.