

# The French Heritage Put to the Test of Time: History of Criminal Procedure in Belgium (1814-2020)<sup>1</sup>

*A herança francesa posta à prova do tempo: história do processo penal na Bélgica (1814-2020)*

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**ABSTRACT:** The history of Belgium's criminal procedure is deeply related to its French heritage through its *Code d'instruction criminelle* of 1808 still in force nowadays. In order to portray the modern history of Belgium's criminal procedure, this paper aims at emphasizing the evolution of the reform initiatives regarding the most symbolic aspects inherited from the French procedure: the *Code* of 1808 itself, the pretrial investigation focused on the *juge d'instruction's* person and the emblematic popular justice of the *cour d'assises*. Divided into six periods from 1814 to 2020, this historical research will address and contextualize issues such as the replacement or the maintaining of the French Code, the improvement of the *instruction* according to its Napoleonic main features or its transformation into another type of pretrial investigation as well as the limitation or even the abolition of popular justice.

**KEYWORDS:** *Belgium; modern and contemporary history; Code d'instruction criminelle; pretrial investigations; popular justice.*

**RESUMO:** *A história do processo penal da Bélgica está profundamente relacionada à sua herança francesa por meio de seu Code d'instruction criminelle de 1808, ainda em vigor atualmente. A fim de retratar a história moderna do*

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<sup>1</sup> This paper is part of a more general doctoral research focusing on the production of criminal procedure law in Belgium between the 19<sup>th</sup> and the 20<sup>th</sup> centuries, with special attention to the actors and results of reform initiatives.

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*processo penal belga, este artigo visa a enfatizar a evolução das iniciativas de reforma em relação aos aspectos mais simbólicos herdados do processo francês: o próprio Código de 1808, a investigação preliminar focalizada na pessoa do juge d'instruction e a emblemática justiça popular da cour d'assises. Dividida em seis períodos de 1814 a 2020, esta pesquisa histórica abordará e contextualizará questões como a substituição ou a manutenção do Código francês, a melhoria da instruction de acordo com suas principais características napoleônicas ou sua transformação em outro tipo de investigação pré-julgamento, bem como a limitação ou mesmo a abolição da justiça popular.*

**PALAVRAS-CHAVE:** *Bélgica; História moderna e contemporânea; Code d'instruction criminelle; investigação preliminar; justiça popular.*

**SUMÁRIO:** Introduction; I. Reforming in regard to France and the revolutionary heritage: criminal procedure under the United Kingdom of the Netherlands (1814-1830); II. A new legislation for a new nation (1831-1879); III. The pretrial stage between failures and diversity (1879-1914); IV. The interwar period between stagnation and transformation (1918-1939); V. The calm before the storm (1945-1998); VI. An era of unprecedented reforms (1998-2020); Conclusion; Bibliography.

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## INTRODUCTION

Looking over Belgium's criminal procedure, one might be surprised to note that its main body of rules is still the "*Code d'instruction criminelle*" ("*C.I.Cr./Wetboek van strafvordering*"<sup>3</sup>) of 1808<sup>4</sup>, dating from Belgium's occupation by France between 1795 and 1814. This occupation left many marks on Belgium's history and the imperial legislation was no exception, having deeply permeated the Belgian legal

<sup>3</sup> Due to the linguistic differences between Dutch speaking and French speaking regions in Belgium, the main vocabulary of criminal procedure will also be translated in Dutch whenever possible.

<sup>4</sup> *Code d'instruction criminelle* : édition conforme à l'édition originale du Bulletin des lois. Paris: Imprimerie De Mame Frères, 1810.

culture<sup>5</sup>. As an historic synthesis between the justice of the *Ancien Régime* and of the French Revolution<sup>6</sup>, the *Code d'instruction criminelle* was therefore used as the main infrastructure upon which further historic reforms of Belgium's criminal procedure could be implemented.

As a consequence, an interesting way of portraying Belgium's criminal procedure history over nearly two centuries could be to analyze how its French heritage has been addressed over time. Accordingly, this paper aims at emphasizing this evolution through a study of the reform initiatives regarding the most symbolic aspects inherited from the French criminal procedure: the *Code d'instruction criminelle* as a national body of rules, the pretrial investigation focused on the *juge d'instruction's* person and the emblematic popular justice of the *cour d'assises*. The main issues addressed by these reform initiatives can be summarized as the replacement or the maintaining of the French Code, the improvement of the *instruction* according to its Napoleonic main features or its transformation into another type of pretrial investigation as well as the limitation or even the abolition of popular justice. For the sake of completeness, minor themes such as pretrial detention, police regulations, accelerated procedures and linguistic discrimination will also be addressed as far as possible.

To do so, this paper will essentially rely upon sources such as enacted laws, bills, legislative drafts and law journals (especially the *Journal des Tribunaux* and the *Revue de Droit Pénal et de Criminologie*). Since reform initiatives took different forms and addressed different procedural matters over time, the content of these various sources will be analyzed, contextualized and linked in an historical perspective.

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<sup>5</sup> On the history of Belgium's criminal procedure before 1814, see: MONBAL-LYU, Jos. *Zes eeuwen strafrecht: de geschiedenis van het Belgische strafrecht (1400-2000)*. Leuven: Acco, 2006.

<sup>6</sup> On the criminal procedure of the *Ancien Régime*, see: CARBASSE, Jean-Marie. *Histoire du droit pénal et de la justice criminelle*. 3<sup>rd</sup> ed. Paris: Presses Universitaires de France, 2014, p. 188-235. On the criminal procedure of the French Revolution, see: ALLEN, Robert. *Les tribunaux criminels sous la Révolution et l'Empire (1792-1811)*. Rennes: Presses universitaires de Rennes, 2005 and BERGER, Emmanuel, *La justice pénale sous la Révolution : les enjeux d'un modèle judiciaire libéral*. Rennes: Presses universitaires de Rennes, 2008.

Accordingly, this paper will be structured in six sections representing six historical periods from 1814 to 2020. Beginning with the period of the United Kingdom of the Netherlands (1814-1830), rich in lessons concerning Belgium's attachment to the Code of 1808 and to popular justice<sup>7</sup>, and ending with the 21<sup>st</sup> century period (1998-2020), interesting regarding the questioning of this attachment, the paper will treat each of the covered periods as a particular moment in the history of Belgium's criminal procedure. Furthermore, when appropriate, the analysis of these periods will be structured in subsections. These subdivisions will either be based on the content of the reform initiatives, especially regarding pretrial and trial stages<sup>8</sup>, or on their chronological arrangement when specific historical events deeply influenced these initiatives within the same period. As for the basic material of the reforms, the content of the *Code d'instruction criminelle* will be divided and explained in a functional way as an introduction to Belgian reforms<sup>9</sup>.

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<sup>7</sup> The choice to begin the periodization in 1814 instead of 1808 is justified by the specific importance of the 1814-1830 period. It must be noted that, while the periods covering the years 1830 to 2020 constitute the main sections of this paper on Belgian legal history, the Dutch period represents a "prologue" and has been added in order to provide a meaningful contextualization of the constitutional and legal choices of 1830 regarding criminal procedure. On the contrary, the period between 1808 and 1814 does not provide a similar explanatory potential and consequently seems of rather secondary importance.

<sup>8</sup> However, despite the choice to separate the two stages deriving from the specific character of the reforms themselves, it must be kept in mind that the pretrial stage can have significant effects on the trial stage, especially in the case of reforms enabling the prosecution to conduct pretrial investigations.

<sup>9</sup> Another possibility would have been to dedicate an introductory section to the description of the original French criminal procedure deriving from the *Code d'instruction criminelle*. Nonetheless, despite the inherent logic of this potential structure, a more functional one was preferred due to its clarity and synthetical potential. Accordingly, by dividing the explanation of the Code on the basis of the reform in question (pretrial investigations, popular justice, pretrial detention, etc.), the reader will directly note the significant and precise changes brought by Belgian reforms, instead of the less practical solution of having to systematically check an introductory section.

## I. REFORMING IN REGARD TO FRANCE AND THE REVOLUTIONARY HERITAGE: CRIMINAL PROCEDURE UNDER THE UNITED KINGDOM OF THE NETHERLANDS (1814-1830)

As a consequence of Napoleon's defeat against the sixth Coalition, the Southern (Belgian) provinces were first subjugated to the Northern Netherlands provinces in 1814 and then united with them by the Congress of Vienna in 1815. Even if the future King William of Orange maintained the *Code d'instruction criminelle* on a provisional basis, he decreed the removal of the military judges from the Napoleonic special courts on August 31, 1814<sup>10</sup>, and especially the abolition of both publicity of criminal proceedings and trial by jury on November 6, 1814<sup>11</sup>. Another decree of September 9, 1814, introduced the use of mitigating circumstances in order to reduce the severity of criminal sentences<sup>12</sup>. Afterwards, debates on criminal justice reforms were essentially focused on a national codification and the fate of the jury as a product of the French Revolution<sup>13</sup>.

### I.1. THE CODIFICATION PROCESS BETWEEN SECRECY AND PUBLICITY

First of all, the Constitution of the kingdom required new codes in order to provide a set of laws better adapted to the habits and customs of its

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<sup>10</sup> NYPELS, Jean Servais Guillaume. *Commentaire du Code de procédure pénale*. Brussels: Bruylant-Christophe & C<sup>ie</sup>, 1878, p. xiv. These special courts had been created to try specific offenders (soldiers, vagrants and felonious recidivists) as well as specific offences such as armed rebellion against the military (Art. 553 and 554 *C.I.Cr.*). See: CARBASSE, Jean-Marie. *Op. cit.*, p. 462.

<sup>11</sup> These measures had already been applied to the Northern provinces since December 11, 1813: *ibid*; VOORDUIN, Justinus Cornelius. *Geschiedenis en beginselen der Nederlandsche wetboeken*. 6<sup>th</sup> vol. Utrecht: Robert Natan, 1839, p. 520. On a minor note, the decree also entrusted the prosecution to ask questions of guilt, aggravating and mitigating circumstances instead of the presiding magistrate of the criminal court: *Journal officiel du gouvernement de la Belgique*, 3<sup>rd</sup> vol. Brussels: Weissenbach, 1814, n° 120, p. 489-491.

<sup>12</sup> *Ibid.*, n° 36, p. 92-93.

<sup>13</sup> Due to the particular jurisdiction of the jury over felonies, political offences and press offences, minor offences tried by professional judges such as misdemeanors and infractions will not be treated.

citizens<sup>14</sup>. Drafts of the new codes were prepared and submitted early 1815 by a legislative commission appointed by the king in 1814 and composed only of Northern (Dutch) members. As for the Code of criminal procedure, its first draft was a clear continuation of the king's policy, characterized by an anti-French feeling<sup>15</sup> and the will to depart from the revolutionary legacy, as it confirmed the suppression of both jury and public trials<sup>16</sup>. However, the suppression of the latter was strongly criticized by the Southern members of the commission in charge of reviewing the draft, since they perceived it as a return to the secret procedure of the *Ancien Régime*<sup>17</sup>. As a consequence of their advocacy in favor of the public and oral procedure, which they had applied since the French occupation in 1795, the draft was eventually withdrawn. Years went by before another draft eventually made it to the Second Chamber of the Dutch Parliament on October 23, 1828. This new attempt of a national codification was imbued with a growing admiration for the logic and clarity of the French legislation in the Northern Provinces and led accordingly to a reformative approach based on the *Code d'instruction criminelle*. One of its key features was precisely a partial opening to the publicity of criminal proceedings which was later widened by the Parliament<sup>18</sup>.

Nonetheless, even if the 1828 draft could please the Southerners on the publicity issue, the drafters' choice not to restore jury trial in the most serious matters contributed to irritate the Southern opposition to the Orangist regime, since jury trial had gradually become a key political claim in the Southern provinces.

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<sup>14</sup> GILISSEN, John. Codifications et projets de codification en Belgique au 19<sup>ème</sup> siècle (1804-1914). *Belgisch Tijdschrift voor Nieuwste Geschiedenis*, 1-2, p. 203-285, 1983, p. 210 and 213-214 (quoting VOORDUIN, Justinus Cornelius. *Op. cit.*, 1<sup>st</sup> vol., p. 73).

<sup>15</sup> This could only be a source of conflict between the Northern and the Southern provinces since the latter were imbued with a French legal culture. On the origins of this culture, see: MARTYN, Georges. O juiz e as fontes formais do direito: de "servo" a "senhor"? A experiência belga (séculos XIX-XXI). *Revista da faculdade de direito da universidade de Lisboa*, vol. LXI, n<sup>o</sup> 2, p. 317-346, 2020, p. 323.

<sup>16</sup> BRANTS, Chrisje. Legal Culture and Legal Transplants. *Electronic Journal of Comparative Law*, vol. 14.3, 72 p., December 2010, p. 25.

<sup>17</sup> VOORDUIN, Justinus Cornelius. *Op. cit.*, 7<sup>th</sup> vol., p. 4.

<sup>18</sup> BRANTS, Chrisje. *Op. cit.*, p. 26.

## 1.2. A DIVIDED KINGDOM: POPULAR JUSTICE AT STAKE

Deeply entwined with the freedom of the press, the participation of laymen in the administration of justice fully became a political issue around 1819 when a Flemish merchant, Ferdinand Van der Straeten, was put in pretrial detention twice and was convicted by professional judges for a book in which he criticized the kingdom's economic policy while depicting the Dutch regime as despotic<sup>19</sup>. Adding to the fact that Van der Straeten literally died because of the expression of his ideas, since he did not survive his second detention, the injustice felt by the Southerners was aggravated by the fact that his lawyers were prosecuted and temporarily suspended from the bar for defending him<sup>20</sup>.

The growing discontent in the Southern provinces became fiercer during the 1820's, especially when the two main southern political wings, Catholics and Liberals, formed the so called « Monstrous Alliance » in 1828 in order to gain weight in their opposition to the Dutch regime. Trial by jury and the freedom of the press had both a very special status in their political program, since all their other claims<sup>21</sup> would remain unheeded if they could not share them with the public opinion, on the one hand, and especially if they could be convicted for doing so by a professional judge, dependent on the criticized government, and not by the public opinion itself as the « true interpreter of the feelings and opinions of the country », on the other hand<sup>22</sup>. Accordingly, since the heart of the southern opposition, formed by the intellectual middle class and especially lawyers, used influential political journals, newspapers and

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<sup>19</sup> DELBECKE, Bram. "Le fruit du terroir ?". The Debate on Trial by Jury in the United Kingdom of the Netherlands (1814-1831). In DELIVRÉ, Emilie; BERGER, Emmanuel (org.). *Popular Justice in Europe (18<sup>th</sup>-19<sup>th</sup> Centuries)*. Bologna/Berlin: Il mulino/Duncker & Humblot, 2014, p. 100-101. See also: BERGMANS, Paul. Straeten (Ferdinand Van der). *Biographie nationale de Belgique*, 24<sup>th</sup> vol. Brussels: Bruylant, 1926-1929, p. 121-123.

<sup>20</sup> VANDER MEERSCH, Auguste. Doncker (Philippe-François-Joseph). *Biographie nationale de Belgique*, 6<sup>th</sup> vol. Brussels: Bruylant, 1878, p. 120-121.

<sup>21</sup> Including direct election, ministerial responsibility, language freedom and educational freedom connected with religious freedom: MABILLE, Xavier. *Nouvelle histoire politique de la Belgique*. Brussels: CRISP, 2011, p. 75-76.

<sup>22</sup> DELBECKE, Bram. *Op. cit.*, p. 106-108.

petitions to the Parliament, several leading journalists were convicted by professional judges during the late 1820's, including prominent figures of the future Belgian revolution such as Louis de Potter<sup>23</sup>.

More fundamentally, jury trial debates derived from a deep controversy over the ideal administration of justice in a constitutional monarchy. On the Southern provinces' side, influenced by its French revolutionary heritage, there was a strong belief that the jury could be implemented "*ex nihilo*" and develop itself harmoniously in the country's institutional framework, since popular justice for criminal matters and also press and political offences was "perfectly compatible with its long-standing traditions of rights and liberties"<sup>24</sup>. On the Northern provinces' side, despite a briefer French occupation and some support for the jury restoration, the jury was perceived as a "*fruit du terroir*" that could only grow if it was part of the customs and habits of a nation. On the contrary, in the case of the Netherlands' context, the justice administration did not experience similar absolutism and judicial arbitrary excesses as in France. Professional judges were then perceived as well connected to society and much more trustworthy than laymen, thanks to their experience, knowledge and rational approach. Hence, jury trial was conceived as a "foreign body" unfit for implementation in the Dutch judicial system<sup>25</sup>.

In time, the question arose in Parliament between 1828 and 1829 due to the submission of the aforementioned draft of a new criminal procedure Code. On April 13, 1829, all forms of laymen justice, regarding both grand and petty jury<sup>26</sup>, in criminal matters and press offences were

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<sup>23</sup> *Ibid.*, p. 106-107, 111 and 113. On the intellectual middle class leading the southern opposition, see: WITTE, Els; CRAEYBECKX, Jan. *La Belgique politique de 1830 à nos jours: les tensions d'une démocratie bourgeoise*. French translation by Serge GOVAERT. Brussels: Labor, 1987, p. 6-8.

<sup>24</sup> DELBECKE, Bram. *Op. cit.*, p. 114.

<sup>25</sup> *Ibid.*, p. 101-106 and 113-114.

<sup>26</sup> The difference between these two types of juries in Belgian history lies in the two phases of criminal procedure. On the one hand, the grand jury's function is to examine charges against offenders suspected of the most serious crimes at the end of the pretrial investigations and to formally accuse them through an indictment procedure. Better known as the "*jury d'accusation*" in the Belgian territories, this jury had already been abolished by the *Code d'instruction criminelle* of 1808 as a product of the French revolutionary

rejected by a large majority. This rejection not only meant a division among the Southern representatives but also displayed the gap between both regions' mentalities since all but one Northern representative voted against the principle of the jury<sup>27</sup>. Eventually, the *Code d'instruction criminelle* was abrogated on May 16, 1829. Both Chambers of the Parliament finally approved the new national Code and its promulgation followed on June 5, 1830<sup>28</sup>.

### **I.3. THE BELGIAN REVOLUTION AND THE RESTORATION OF THE FRENCH HERITAGE**

However, the growing process of protest and repression during the 1830 Summer finally led to the Belgian Revolution and the declaration of independence of the new State on October 4, 1830. Two major consequences quickly followed regarding criminal procedure.

On the one hand, Belgium's Provisional Government repealed on January 14, 1831, the law of May 16, 1829, that abrogated the French Codes and the royal order of July 5, 1830, that set the Dutch Codes' entry into force<sup>29</sup>. The Belgian rules of criminal procedure were thus once again provided by the Napoleonic Code of 1808, which especially provided the publicity of criminal proceedings.

On the other hand, trial by jury was restored by Article 98 of the Belgian Constitution<sup>30</sup> on February 7, 1831, and its procedural aspects were based for the most part on the French *Code d'instruction criminelle*

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legislation. On the other hand, the petty jury, also known as "petit jury" or "trial jury", is involved in the trial stage and tries offenders charged with the most serious crimes.

<sup>27</sup> *Ibid.*, p. 111 and GILISSEN, John. *Op. cit.*, p. 224.

<sup>28</sup> Its entry into force was planned on February 1, 1831; see: GILISSEN, John. *Op. cit.*, p. 228.

<sup>29</sup> On the dubious lawfulness of such a repealing and the restoration of the French Codes by the Executive power, see: VAN DE VOORDE, Johan. *Zijn de Belgen Napoleons trouwste onderdanen? Een onderzoek naar de mogelijke opheffing van de Code Napoléon in België en zijn vervanging door het Burgerlijk Wetboek van het Verenigd Koninkrijk der Nederlanden. Pro Memoria*, p. 233-266, 2017, p. 233-266.

<sup>30</sup> Current Article 150. On a minor note, another constitutional provision prohibited any form of special courts in the Kingdom; thus, officially abolishing

by a National Congress decree of July 19, 1831<sup>31</sup>. Provided for political and press offences and eventually for criminal matters<sup>32</sup>, trial by jury in Belgium<sup>33</sup> was imbued with a political vision inherited from the French revolution. This political aspect of the judiciary, deriving from popular sovereignty, involved both a political right for the citizens to be part of the jury and a subjective right for the accused to be judged by his peers<sup>34</sup>.

## II. A NEW LEGISLATION FOR A NEW NATION (1831-1879)

Despite its affinity for the French criminal procedure, the new Belgian State needed to adapt, improve or even transform its legal heritage in the matter. Thus, the first decades since the 1830 independence were dedicated to a reform process which can be categorized in two ways. On the one hand, concerning the material aspect of the reforms, both main stages of the criminal process in Belgium (pretrial and trial stages) were addressed by lawmakers. On the other hand, regarding the formal aspect of the reforms, the legislative process involved a codification attempt as well as specific laws.

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Articles 553-600 *C.I.Cr.* as well as the Napoleonic special courts that they provided (Article 94 of the original Constitution and current Article 146).

<sup>31</sup> Another consequence of the reintroduction of this Code was the return of the presiding magistrate's responsibility to ask questions over the guilt and circumstances to the jury instead of the prosecution (Art. 336-340 *C.I.Cr.*).

<sup>32</sup> Since the Constitution's draft only provided that "the institution of the jury [would] be restored", members of the National Congress still had to decide in which cases jury trial had to be implemented. If its application to political and press offences seemed to be generally accepted, popular justice as an ordinary jurisdiction for felonies required more debates before being officially written in the Constitution. See: HUYSSENS, Émile. *Discussions du Congrès national de Belgique (1830-1831)*. 2<sup>nd</sup> vol. Brussels: Société typographique belge, 1844, p. 229-236.

<sup>33</sup> Only the petty jury (trial stage) was restored and not the grand jury (pretrial stage): *ibid.*, p. 236. The latter, better known as *jury d'accusation* in the Belgian territories, was a product of the French revolutionary legislation and had already been abolished by the *Code d'instruction criminelle* of 1808.

<sup>34</sup> BEHRENDT, Christian *et al.* *La notion de "jury" en droit constitutionnel belge*. Brussels: Belgian House of Representatives, 20 p., 2018, p. 4-7.

## II.1. CODIFICATION PROCESS AND PRETRIAL STAGE: TOWARDS A BALANCED SEARCH FOR THE TRUTH?

Just like the Dutch regime before, the new kingdom's Constitution required a set of new codes to be provided to the nation<sup>35</sup>. In the matter of criminal procedure especially, a reform of the pretrial stage was strongly recommended because of its excessive inquisitorial character.

Indeed, the drafters of the *Code d'instruction criminelle* conceived a mixed criminal trial in a conciliation of the procedural benefits of the *Ancien Régime* and the French Revolution<sup>36</sup>. On the one hand, the trial stage corresponds to the adversarial revolutionary reforms, in which the truth is supposed to result from the debates between the prosecution, led by the "*ministère public*" ("*openbaar ministerie*"), and the defense, in front of a rather passive judge. On the other hand, the pretrial stage, focused on the preliminary investigation, was a faithful application of the inquisitorial procedure *d'Ancien Régime* deprived of its most radical aspects, like torture. Secret, written and unilateral, the preliminary investigation was devised around the person of the examining magistrate ("*juge d'instruction/onderzoeksrechter*"), and not around the public prosecutor<sup>37</sup>, as an active seeker of the judicial truth. Furthermore, far from being strictly separated from each other, the trial stage depends on the pretrial stage since the inquisitorial character of the latter implies that the main sources for the trial findings would come from the *juge d'instruction's* investigations. Accordingly, the original Code provides that the indictment ("*acte d'accusation/akte van beschuldiging*"), resulting from the double degree of jurisdiction exercised by the "*chambre du conseil*" ("*raadkamer*") and the "*chambre*

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<sup>35</sup> Former Article 139, 11° of the Constitution.

<sup>36</sup> CARBASSE, Jean-Marie. *Op. cit.*, p. 461-462.

<sup>37</sup> During the discussions about the *Code d'instruction criminelle*, the French lawmakers debated on the strict separation of functions between the prosecution and the *juge d'instruction*. Their compromise was to deprive the *ministère public* from any investigative powers, except in the case of a *flagrante delicto*. See: HÉLIE, Faustin. *Traité de l'instruction criminelle ou théorie du Code d'instruction criminelle*, 1<sup>st</sup> vol. Brussels: Bruylant-Christophe & Cie, 1863, p. 215-217, n° 640-643.

*des mises en accusation*” (“*kamer van inbeschuldigingstelling*”), shall be the starting point of the procedure before the jury<sup>38</sup>.

However, this fundamental role of the *juge d’instruction* was also the biggest flaw in the Napoleonic criminal procedure. Acting as the “prosecution’s agent”, by looking for the evidence supporting the prosecution and not the judgment<sup>39</sup>, his function provided no sufficient guarantee that the judicial truth ascertained from his investigations would not only be one-sided and in favor of the prosecution. Furthermore, besides the truth-seeking finality of the *instruction*, the means of investigation suffered few limitations from the law regarding their effects on the charged person’s liberties. In general, these two characteristics of an unbalanced procedure were caused by the proximity of the *juge d’instruction* to the prosecution, the lack of limitations, control and sanctions to the means of investigation and the exclusion of the defense from all the steps of the pretrial stage<sup>40</sup>. More specifically, the concrete procedural aspects which needed to be addressed in Belgium were the pretrial detention abuses, and especially the incommunicado measure, as well as the lack of contradiction in the pretrial investigations<sup>41</sup>.

In order to address this issue, two general types of reform were devised in regard of the original choices made by the French lawmakers in 1808. On the one hand, a “continuity pattern” can be identified in reforms aiming at improving the pretrial stage in its current form. Their main purpose is to come closer to an ideal inquisitorial procedure, objectively led by the *juge d’instruction*, and where the truth-seeking process would be facilitated by the confrontation of the prosecution’s

<sup>38</sup> Former Articles 313 and 314 of the *C.I.Cr.* On the indictment process, see its former Art. 133, 231 and 241.

<sup>39</sup> HÉLIE, Faustin. *Traité de l’instruction criminelle ou théorie du Code d’instruction criminelle*, 2<sup>nd</sup> vol. Brussels: Bruylant-Christophe & Cie, 1865, p. 193, n° 1975.

<sup>40</sup> DELRÉE, Édouard. En quête de vérité : l’instruction pénale entre rupture et continuité (1830-2020). *Revue de la Faculté de droit de l’Université de Liège*, n° 2020/2, p. 287-341, 2020, p. 296, n° 11.

<sup>41</sup> DE LARUWIÈRE, Julien. La réforme et l’instruction préparatoire au point de vue de la défense, *Revue de droit pénal et de criminologie*, p. 527-572, 1912, p. 531.

and the defense's points of view<sup>42</sup>. On the other hand, other reforms can rather be categorized in a “rupture pattern” and happen to be more influenced by English institutions than by a French heritage. These reforms tend to transform the pretrial stage into an adversarial process with the removal of the hybrid figure of the *juge d'instruction* and with new functions allocated to its participants: secret inquiries by the police and the *ministère public* in order to support the prosecution, a general right of the defense to ask for complementary investigations and a judge whose main role would be to guarantee the legality of each party's means of truth-seeking<sup>43</sup>.

Nevertheless, the first reform initiatives were long awaited, especially the most fundamental ones. Despite being mentioned by the liberal Minister of Justice Joseph Lebeau in 1833, the first steps towards the revision of the Code were truly taken in 1850, right after parliamentary pressure was put on the government in the matter of pretrial detention, with the establishment of a special commission in charge of the revision<sup>44</sup>. Initially composed of four high magistrates and two university professors, its rapporteur was the Liège university professor Jean Servais Guillaume Nypels (1803-1886).

As a result, the members of the commission began their work by drafting a bill reducing the most authoritarian and discretionary aspects of pretrial detention. Indeed, the original version of the Code provided that pretrial detention was mandatory for both felonies and misdemeanors and that a bail was only possible in the case of the latter, as long as the offender was no vagrant or recidivist and if he could pay a minimal amount of 500 *francs*. Furthermore, the incommunicado measure was completely left to the discretion of the judge<sup>45</sup>. As a consequence, the bill introduced in Parliament in 1851 and enacted in 1852 stated that pretrial

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<sup>42</sup> DELRÉE, Édouard. *Op. cit.*, p. 302, n° 26.

<sup>43</sup> *Ibid.*, p. 309-310, n° 35. See also: SASSERATH, Simon. Procédure pénale. Troisième partie: exposé critique. In : *Les Nouvelles (procédure pénale)*. Vol. I.2. Brussels: Larcier, 1946, p. 849-856.

<sup>44</sup> In the meantime, another commission was set up in 1848 in order to revise Belgium's criminal Code: GILISSEN, John. *Op. cit.*, p. 229, 243 and 252.

<sup>45</sup> Former Articles 93 (pretrial detention principle), 113-115 and 119 (bail) and also 613 (incommunicado) of the *C.I.Cr.*

detention was only mandatory in the case of felonies and could be applied to misdemeanors only in serious and exceptional circumstances and with a judicial confirmation within five days. The bailing measure was also eased by removing its pecuniary mandatory character and by adapting its amount to the misdemeanor at stake. As for the incommunicado measure, it was provided with a legal framework involving a time-limit of ten days and a legal remedy in the case of its renewal<sup>46</sup>. Afterwards, another law was passed in 1874 in order to provide more guarantees to the detainee<sup>47</sup>. Deepening the principle of personal freedom, this law abolished the mandatory character of the pretrial detention in any case and extended the motives added in 1852 to all offences with a special focus on the interest of public security. Far from only extending the judicial confirmation within five days to felonies, it also provided a monthly judicial review of the detention. Finally, the detainee's communication with its counsel was now the rule after his first interrogation; an incommunicado measure being only possible for an unrenovable three-days period if the investigation required it<sup>48</sup>.

As for the new code of criminal procedure, the executive commission's works were nearly completed when its first part was introduced as a bill in Parliament in 1877. Focused on jurisdiction matters and actions, which were considered as a distinct part of criminal procedure justifying a separate submission<sup>49</sup>, this introductory part to the code was quickly adopted in 1878 and is still in force nowadays<sup>50</sup>.

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<sup>46</sup> Loi du 18 février 1852 sur la détention préventive, *Moniteur belge (M.B.)*, February 20, 1852. See Articles 2 (pretrial detention for a misdemeanor), 9 and 12 (bailing possibility) and also 29-31 (incommunicado).

<sup>47</sup> Even if this law did not come from the executive commission in charge of drafting a new code of criminal procedure, its content was mostly in accordance with the commission's plans: *Pasinomie*, 4<sup>th</sup> series, 9<sup>th</sup> vol. Brussels: Bruylant Christophe & Cie, 1874, p. 108, 2<sup>nd</sup> note.

<sup>48</sup> Loi du 20 avril 1874 relative à la détention préventive, *M.B.*, April 22, 1874. See Articles 1-2 (pretrial detention principle), 3 (communication with the counsel) and 4-5 (judicial review).

<sup>49</sup> Code de procédure pénale (titre préliminaire), exposé des motifs, *Doc.*, Ch., 1876-1877, n° 70, p. 1.

<sup>50</sup> Loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale, *M.B.*, April 25, 1878.

The body of the commissioners' work, which we will refer to as the "Nypels draft", was eventually submitted to Parliament during the year 1879 in the form of three books respectively concerning the pretrial stage, the trial stage and particular procedures<sup>51</sup>. The main achievements were especially to be looked for in the pretrial matter, since Nypels considered that the main flaw of the *Code d'instruction criminelle* was its "utmost denial of the defense rights" during the pretrial stage<sup>52</sup>. Recognizable because of its "continuity pattern" features, the draft aimed at resolving this inequity by providing an inquisitorial procedure built upon a stronger examining magistrate, acting more objectively, and new rights for the defense. Firstly, these new rights ensured more contradiction and publicity during the investigation of the *juge d'instruction*, allowing the defense to request forensic examinations, witness examinations and confrontation with a witness for the prosecution<sup>53</sup>. After the investigation, the defense could also submit a brief and be informed of the evidence before the indictment hearing in front of the *chambre du conseil* and the *chambre des mises en accusation*<sup>54</sup>. Secondly, the draft addressed the proximity between the prosecution and the examining magistrate on two grounds. On the one hand, his impartiality was legally provided with an obligation to conduct the investigation for both the prosecution and the defense. On the other hand, his independence from the prosecution was reinforced thanks to the legal recognition of his liberty not to follow the prosecution's requests<sup>55</sup>. Finally, the secrecy of the investigation was maintained

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<sup>51</sup> Code de procédure pénale, livres I et II du 5 mars 1879 ainsi que le livre III du 24 juillet 1879, exposé des motifs, *Doc.*, Ch., 1878-1879, n<sup>os</sup> 88 and 238.

<sup>52</sup> NYPELS, Jean Servais Guillaume. *Op. cit.*, p. xvii.

<sup>53</sup> Art. 69, 95, 98 and 106 of the first book of the draft. A legal remedy was also provided if the defense's requests had to be rejected (Art. 70 and 74).

<sup>54</sup> Art. 184-185 and 198 of the draft.

<sup>55</sup> Art. 64 and 65 of the draft. However, his obligation of impartiality during the investigation lacked a proper sanction which could be reviewed by a court. Furthermore, his independence from the prosecution was not complete since the *juge d'instruction* was under the surveillance of the *procureur général* who could set a punishment in motion if the examining magistrate improperly conducted his investigation (Art. 6, 7 and 8 of the draft). This surveillance was already provided by former Articles 279-282 of the *C.I.Cr.*

and even reinforced in the interest of its objectivity. Its maintaining concerned the defense counsel who was still excluded from his client's interrogation and also the charged individual who could suffer from a renewable ten-day incommunicado measure and was also excluded from the witness examination. However, its reinforcement also concerned the prosecution which was therefore excluded from the interrogation and the witness examination<sup>56</sup>. Altogether, this objective but rather authoritarian investigation built upon the person of the *juge d'instruction* allowed this reform to be called a "moderate opening to the defense"<sup>57</sup>.

## II.2. SPECIFIC REFORMS AND TRIAL STAGE: EARLY LIMITATIONS TO POPULAR JUSTICE

In spite of the craze for popular justice during the revolutionary process occurring under the Dutch occupation, the first reforms addressing the trial stage aimed at, or had the effect of, limiting popular justice extent in criminal matters. Indeed, once the principle of popular sovereignty in the most important judicial matters had been recognized by the Constitution, the next step was to set some limits to it in order to provide an efficient justice system.

First and foremost, a brief overview of the criminal courts' system in early Belgium seems necessary to fully understand the extent of such limits. The judiciary structure provided by the *Code d'instruction criminelle* involved, and still involves, two types of trial procedure depending on the offence at stake.

On the one hand, most common offences are to be tried by professional judges in the *tribunal de police* (*politie rechtbank*), regarding infractions, and in the *tribunal correctionnel* (*correctionele rechtbank*), regarding misdemeanors<sup>58</sup>.

On the other hand, the highest first instance criminal court (*cour d'assises/hof van assisen*), which has a general jurisdiction over

<sup>56</sup> Articles 106, 127, 139 and 142 *et seq.* of the draft concerning the defense, and Articles 106 and 127 concerning the prosecution.

<sup>57</sup> DELRÉE, Édouard. *Op. cit.*, p. 338, n° 71. See also: *ibid.*, n°s 27-29.

<sup>58</sup> See Articles 137 and 179 of the *C.I.Cr.*

felonies and a special jurisdiction over political and press offences<sup>59</sup>, is composed of twelve jurors and three professional judges<sup>60</sup>. Perceived as the “highest expression of the criminal system” and as involving “all the guarantees that can protect the justice system against its errors”<sup>61</sup>, this court is also characterized by the subordination of the professional judges to the lay jurors. Indeed, the judging process is symbolically divided between the judgment over the offender’s guilt (fact), reserved for the jury, and the judgment over the sentence to be inflicted (law), reserved for the magistrates<sup>62</sup>. This division is directly derived from the French revolutionary ideals, consisting of a people’s justice representing the sovereign Nation and judging only in their intimate conviction (Art. 342 original *C.I.Cr.*). On the contrary, the role of professional judges is reduced to be a “*bouche de la loi*”, strictly limited to a formal deduction according to the law (Art. 357 *et seq.* original *C.I.Cr.*)<sup>63</sup>. On the procedural aspect, this criminal court is conceived as the most complete application

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<sup>59</sup> See the aforementioned former Article 98 of the Constitution and Article 231 *C.I.Cr.*

<sup>60</sup> The original Articles 252 and 253 *C.I.Cr.* provided that five judges would compose the seat of the *cour d’assises*. This number was reduced to three by the first Article of a statute of May 15, 1849 (*M.B.*, June 21, 1849).

<sup>61</sup> HÉLIE, Faustin. *Traité de l’instruction criminelle ou théorie du Code d’instruction criminelle*, 3<sup>rd</sup> vol. Brussels: Bruylant-Christophe et compagnie, 1869, p. 330, n° 4557.

<sup>62</sup> This distribution of functions is characteristic of this court’s original type of decision-making. The clear separation between factual and legal questions is quite typical of the traditional role of the jurors, which can be distinguished from the lay judges system (‘*échevinat*’) in which citizens and professional judges decide together on factual issues and, in some countries, on legal issues. See: HELM, Rebecca K.; HANS Valerie P. Procedural Roles: Professional Judges, Lay Judges and Lay Jurors. In: BROWN, Darryl K.; TURNER, Jenia Iontcheva; WEISSER, Bettina (org.). *The Oxford Handbook of Criminal Process*. New York: Oxford University Press, 2019, p. 212-216.

<sup>63</sup> See: SALAS, Denis (org.). *La cour d’assises : actualité d’un héritage démocratique*. Paris: La Documentation française, 2016, p. 13. However, two important exceptions were provided by the Napoleonic Code in order to avoid the excesses of such a strict separation of functions: participation of the judges to the deliberation of the jury in the case of a simple majority among the jurors (Art. 351) and retrial of the case if the judges unanimously consider that the jury was mistaken about the conviction of the accused (art. 352).

of the adversarial system through its orality, publicity and contradiction<sup>64</sup>. Finally, the presence of the jury and the oral procedure of the *cour d'assises* were historically deemed sufficient enough as guarantees, making it unnecessary to provide a proper appeal procedure<sup>65</sup>. The main remedy against this court's judgments is to be exercised before the *Cour de cassation*, the highest judicial authority in Belgium, and can only concern legal questions<sup>66</sup>.

The first limit set to popular justice aimed at improving the efficiency of the administration of justice in general. Indeed, the heaviness as well as the financial, human and time costs of the proceedings involved in such a judicial institution are a major obstacle to a swift and proper justice. Accordingly, a useful way of relieving the *cour d'assises* of a part of its jurisdiction was to convert the characterization of felonies to misdemeanors by a process of "correctionnalisation" ("correctionnalisering").

The application of this limit occurred in 1838<sup>67</sup> with the enactment of an important law, primarily focused on a new organization for the jury, which provided the *correctionnalisation* in an incidental way in its 26<sup>th</sup>

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<sup>64</sup> The lower courts (*tribunal de police/tribunal correctionnel*) are also characterized by adversarial features, but the obligation for the parties to convince a seat of twelve laymen in the *cour d'assises* particularly accentuates these features. Besides, this relation between the jury and procedural forms has sometimes led scholars to consider the institution of the jury to be a core element of the adversarial system in itself. See: LANGER, Maximo. *The Long Shadow of the Adversarial and Inquisitorial Categories*. In DUBBER, Markus D.; HÖRNLE, Tatjana (org.). *The Oxford Handbook of Criminal Law*. Oxford: Oxford University Press, 2014, p. 893-895 and 899-900.

<sup>65</sup> The purpose of the second examination of a criminal case was strictly considered by some as a means of compensation for the professional judges' imperfection: HÉLIE, Faustin. *Op. cit.*, 1869, p. 281, n° 4371. See also: VON SAVIGNY, Friedrich Carl. *Die Prinzipienfragen in Beziehung auf eine neue Strafprozessordnung*. Berlin : 1846, p. 23, quoted in PRINS, Adolphe. *De l'appel dans l'organisation judiciaire répressive : étude historique et critique*. Brussels: Muquardt, 1875, p. 100.

<sup>66</sup> See Articles 408 to 412 of the original *C.I.Cr.* It must be noted that, even if factual questions are reserved to the sovereignty of the lay jurors, an exceptional remedy is provided in the case of a miscarriage of justice: the revision procedure (Art. 443 *et seq.* *C.I.Cr.*).

<sup>67</sup> Even if it was mainly inspired by the royal decree of September 19, 1814, enacted during the Dutch regime, and the following judicial practice (see Art. 26 of the law of May 15, 1838).

Article<sup>68</sup>. The legal mechanism consists in a unanimous recognition of mitigating circumstances by the pretrial judges, in the case of a formal judicial investigation (*instruction*) and that the felony at stake could be punished with a sentence normally applicable to misdemeanors<sup>69</sup>. Thus, this recognition allows to refer the indicted to the lower *tribunal correctionnel* and its professional judges instead of the *cour d'assises* and its jury. Thereafter, besides a law of 1849 which instituted the same mechanism for misdemeanors to be treated as infractions<sup>70</sup>, the law of October 4, 1867, confirmed this limit to popular justice and even extended the power of professional judges by excluding the jury from any appreciation over mitigating circumstances<sup>71</sup>.

Concerning the *ratio legis* of this mechanism, its primary aim is the efficiency of the procedure in two ways. On the one hand, the deprivation of popular jurisdiction allows to avoid the jury's commiseration with a person who does not seem to deserve a highly severe felonious punishment. On the other hand, an economy made over judicial expenses was also expressly mentioned by the lawmakers. However, it must be noted that a secondary preoccupation was related to the guarantees offered to the defense, since the process of *correctionnalisation* could prevent cases of pretrial detention, the application of sentences too severe in regard of a less serious offence *in casu* and also the damage to the reputation resulting from the highly public hearings before the *cour*

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<sup>68</sup> Loi du 15 mai 1838 sur le jury, *Bulletin officiel*, XVI, n° 57, p. 216 *et seq.* One of its other accomplishments was to enact the secrecy of the jury's deliberations (Art. 18).

<sup>69</sup> The lawmakers originally intended to apply this mechanism only in the case of felonies against property, but an amendment made it also applicable to all felonies, thus including offences against persons. See: *Pasinomie*, 3<sup>rd</sup> series, 8<sup>th</sup> vol. Brussels: Société typographique belge, 1838, p. 73.

<sup>70</sup> Loi du 1<sup>er</sup> mai 1849 sur les tribunaux de police simple et correctionnelle, 4<sup>th</sup> Art., *M.B.*, June 21, 1849.

<sup>71</sup> Loi du 4 octobre 1867 sur les circonstances atténuantes, 1<sup>st</sup> Art., *M.B.*, October 5, 1867. It was considered that, despite their effects on the guilt, mitigating circumstances have more to do with the sentence in itself, since their application could reduce it. See: projet de loi relatif à l'attribution aux cours et tribunaux de l'appréciation des circonstances atténuantes, exposé des motifs, *Doc.*, Ch., 1866-1867, n° 161, p. 1-2.

*d'assises*<sup>72</sup>. Nonetheless, this preoccupation would not be long-standing in regard of the future use of mitigating circumstances.

The second limit to popular justice aimed at improving the justice of the *cour d'assises* by changing the nature of the jury. As opposed to the former alternative between popular jury and professional judges in which the first one was favored, a new alternative arose between a popular jury and an elitist jury, either tax-based and capable<sup>73</sup>, in which the latter prevailed.

It should be noted that the popular jury reintroduced by the Belgian revolutionaries, according to the *Code d'instruction criminelle*, was popular only in theory. Regarding its French imperial origins, the right to be a juror was essentially reserved to the best taxpayers, very educated people, members of the political bodies, and willing citizens chosen by the emperor's officials (former Art. 381 and 386 *C.I.Cr*)<sup>74</sup>. After the Belgian Revolution, the decree of July 19, 1831, extended the composition of the jury list in regard of the voters' list, even if Belgium's electoral system was based on *census suffrage*<sup>75</sup>. However, the aforementioned law of 1838 raised the *census* value in the matter of the jury in a significant way; thus, reducing its popular character<sup>76</sup>. Accordingly, the small number of jurors

<sup>72</sup> Projet de loi relatif au jury, rapport, *Doc.*, Ch., 1836-1837, n° 119, p. 5 ; *Pasinomie*, 3<sup>rd</sup> series, 8<sup>th</sup> vol. Brussels: Société typographique belge, 1838, p. 73.

<sup>73</sup> 'Jury capacitaire', see: TROUSSE, Paul-Émile. Rapport. In: *Le jury face au droit pénal moderne : travaux de la troisième journée d'études juridiques Jean Dabin (19-20 mai 1967)*. Brussels: Bruylant, 1967, p. 54.

<sup>74</sup> This lack of popular sovereignty in judicial matters, also noticeable in the legislative bodies, was due to the significant importance of administrative arbitrariness in jury composition. See: SCHNAPPER, Bernard. Le jury français aux XIX et XX siècles. In: Antonio PADOA-SCHIOPPA (org.), *The trial Jury in England, France, Germany 1700-1900*. Berlin: Duncker & Humblot, 1987, p. 176-177 and also SANTUCCI, Marie-Renée. Être ou ne pas être juré au XIX-ème siècle. In: MARTINAGE, Renée; ROYER, Jean-Paul. *Les destinées du Jury criminel*. Lille: l'Espace juridique, Hellemes, Ester, 1990, p.140-142.

<sup>75</sup> This decree also entrusted elected officers and judges with the formation of the jurors' list (Art. 4) instead of entrusting executive authorities with it, like the prefects in former Article 387 *C.I.Cr*.

<sup>76</sup> 1<sup>st</sup> article of this law. By comparison, the electoral *census* amount in 1848 was 20 *francs* in the whole country while the *census* to be a juror oscillated between 110 *francs* in the poorer provinces and 250 *francs* in Brussels and Ghent. Then, if only 2% of the Belgian population was able to vote from 1848

were to be chosen either on a high *census* basis or on an occupation basis, including members of some political bodies and of certain high-standing professions. Eventually, a law of 1869 confirmed these principles and even raised the minimum age to be a juror to 30 years<sup>77</sup>.

Considered a burden rather than a right, the juror's function was to be distinguished from the elector's function<sup>78</sup>. So, the capacity of the juror was the primary purpose of these laws which emphasized two criteria according to the *census* principle: the instruction and the independence of the juror<sup>79</sup>. Such an independence aimed at improving the efficiency of the *cour d'assises*, by assuring that the fate of an accused citizen would be in the hands of the country's most capable men and by relieving the people for whom this function would involve personal sacrifices<sup>80</sup>.

As for the codification draft of 1879, no substantial changes were made concerning the composition of the jury nor its jurisdiction<sup>81</sup>.

### III. THE PRETRIAL STAGE BETWEEN FAILURES AND DIVERSITY (1879-1914)

If the first decades of the young State revealed themselves to be fruitful regarding the criminal procedure reforms, the next decades,

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to 1893, the potential jurors were even less numerous. See: STENGERS, Jean. Histoire de la législation électorale en Belgique. *Revue belge de philologie et d'histoire*, 82<sup>nd</sup> vol., n° 1-2, p. 247-270, 2004, p. 248-249.

<sup>77</sup> On a minor note, the minimal *census* was reduced to 90 *francs* in the poorer provinces: Loi du 18 juin 1869 sur l'organisation judiciaire, Art. 97-98, *M.B.*, June 26, 1869.

<sup>78</sup> *Pasinomie*, 3<sup>rd</sup> series, 8<sup>th</sup> vol. Brussels: Société typographique belge, 1838, p. 63-64.

<sup>79</sup> SCHNAPPER, Bernard. *Op. cit.*, p. 176; projet de loi relatif au jury, exposé des motifs, *Doc.*, Ch., 1833-1834, n° 171, p. 1-2.

<sup>80</sup> *Pasinomie*, 3<sup>rd</sup> series, 8<sup>th</sup> vol. Brussels: Société typographique belge, 1838, p. 64. Unfortunately, the jury's history in Belgium lacks a study about the effects of the jury's composition on its judgments. For an illustration of this issue in France, see: DONOVAN, James M. Justice Unblind: The Juries and the Criminal Classes in France, 1825-1914. *Journal of Social History*, 15<sup>th</sup> vol., n° 1, p. 89-107, Autumn 1981.

<sup>81</sup> Code de procédure pénale, livres I et II du 5 mars 1879, exposé des motifs, *Doc.*, Ch., 1878-1879, n° 88, p. 47-64 and 415-445.

until the First World War, can be considered as a period of failures but also as a display of the most diverse opinions on the reformation patterns regarding the pretrial stage. On the one hand, the failures began with the unfulfillment of the “Nypels draft” and its legislative process, which lasted for approximately twenty years, and continued with the non-completion of every other reform initiative that occurred afterwards. On the other hand, the advent of new actors in the debates and the will for in-depth transformations of the procedure led to a great diversity among these initiatives, promoting both continuity and rupture patterns in different ways.

First of all, it must be noted that the trial stage was also criticized during this period regarding the inequities and inequalities that it involved. Firstly, the procedure before the *cour d’assises* was questioned from a fair trial perspective regarding the advantageous position of the prosecution and the excessive discretionary power of its presiding judge. These inequities could especially be observed in the prominence of the indictment used as an exclusive basis for the proceedings, the sometimes-biased interrogation of the accused by the presiding judge and the unbalanced use of the evidence favoring the prosecution<sup>82</sup>. Nonetheless, no concrete reform emerged from these criticisms<sup>83</sup>. Secondly, the composition of the jury was also questioned<sup>84</sup> in the continuation of the constitutional revision of 1893, which introduced the universal male suffrage tempered by plural

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<sup>82</sup> See: DE BURCHGRAEVE, Amandine. *Le crime de sang à la cour d’assises de Brabant (1893-1913) : une histoire judiciaire, politique et médiatique* (prom: Xavier ROUSSEAU). Université catholique de Louvain, 2018, p. 115-168. For a contemporary criticism of these inequities, see: SPEYER, Henri. *Les vices de notre procédure en cours d’assises : étude de législation comparée*. Brussels: Bruylant-Christophe, 1898.

<sup>83</sup> A Private Member’s bill introduced in 1911 eventually addressed these issues but was never properly discussed and voted: proposition de loi du 21 novembre 1911 modifiant certains articles du Code d’instruction criminelle du 27 novembre 1808 (...), développements, *Doc.*, Ch., 1911-1912, n° 10.

<sup>84</sup> It is interesting to note that Belgium did not experience the anti-jury movement which spread across other European countries like Germany, France and Italy at the end of the nineteenth century. See: KUCHEROV, Samuel. The Jury as Part of the Russian Judicial Reform of 1864. *The American Slavic and East European Review*, 9<sup>th</sup> vol., n° 2, p. 77-90, 1950, p. 85.

voting<sup>85</sup>. As a consequence, progressive liberal lawyers and politicians, such as the socialists Edmond Picard and Henri La Fontaine<sup>86</sup> as well as the progressive liberal Paul Janson, promoted a truly popular jury in the Senate in 1896 as well as in the *Fédération des Avocats Belges* in 1899<sup>87</sup>. Their goal was the “democratization” of the jury by bypassing or abolishing the *census* and, hence, the admittance of the working class in the jury. However, these reform attempts turned out to be unsuccessful before the War since no complete legislative initiatives were taken to enact this reform<sup>88</sup>. Finally, a linguistic inequality also had to be addressed since the linguistic freedom provided by former Article 23 of the Constitution granted the discretionary power of choosing the trial language to the judges themselves. This situation led to significant cases of unfair trial in some provinces where Dutch speaking accused were prosecuted, defended and tried in French, especially before the *cour d’assises* of Brussels<sup>89</sup>. As a result, several laws were adopted and gradually the issue was solved. The first one imposed the use of the Dutch language in criminal trials held in Flemish provinces, unless the accused asked for a procedure in French, and in the lower criminal courts in Brussels if the accused did not speak French (1873)<sup>90</sup>. Afterwards, these measures were applied to

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<sup>85</sup> STENGERS, Jean. *Op. cit.*, p. 252-254.

<sup>86</sup> See: ARON, Paul; VANDERPELEN-DIAGRE, Cécile. *Edmond Picard (1836-1924): un bourgeois socialiste belge à la fin du dix-neuvième siècle. Essai d’histoire culturelle*. Brussels: Musées royaux des Beaux-Arts de Belgique, 2013, p. 96 and 98-101.

<sup>87</sup> Proposition de loi du 25 mars 1896 modifiant le recrutement des jurys des cours d’assises : mise en harmonie du corps des jurés et du corps électoral ; admission des ouvriers aux fonctions de juré, *Doc., Sén., 1895-1896*, n° 41; GHEUDE, Charles. *La réforme du jury. Journal des tribunaux*, p. 545-553 and 561-567, 1899.

<sup>88</sup> The lack of support of the Minister of Justice Victor Begerem (Parti catholique) to the idea of admitting the working class in the jury, which he firmly disapproved, undoubtedly contributed to the unsuccessfulness of the reform. See: Discussion du budget du ministère de la Justice pour l’exercice 1895, *Ann. Parl., Sén., 1894-1895, séance du 19 février 1895*, n° 12, p. 145.

<sup>89</sup> WILS, Lode. L’emploi des langues en matières judiciaires et administratives dans le royaume de Belgique. *Revue du Nord*, 73<sup>rd</sup> vol., n° 289, p. 51-71, January-March 1991, p. 54-56.

<sup>90</sup> *Ibid.*, p. 59, 7<sup>th</sup> note. See: loi du 17 août 1873 sur l’emploi de la langue flamande en matière répressive, *M.B.*, August 26, 1873.

the written evidence, the pretrial stage and the pleadings (1889), and were also extended to the courts of appeal of Brussels and Liège (1891) and finally to the *cour d'assises* of Brussels (1908)<sup>91</sup>.

Concerning the pretrial stage reform, the “continuity pattern” continued to be supported after 1879 and came to be differently represented depending on the extent of the counsel’s role during the investigation. The “moderate opening to the defense” had remained the only institutional reform option for many years before the eventual abandoning of the “Nypels draft” in 1900 due to the lack of parliamentary activity on this matter<sup>92</sup>. Nevertheless, in the meantime, new solutions were discussed outside of Parliament by lawyers who sought a better recognition of

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<sup>91</sup> Loi du 3 mai 1889 concernant l’emploi de la langue flamande en matière répressive, *M.B.*, May 11, 1899 ; loi du 4 septembre 1891 étendant aux cours d’appel de Bruxelles et de Liège la loi du 3 mai 1899 sur l’usage de la langue flamande en matière répressive (...), *M.B.*, September 20, 1891 ; loi du 22 février 1908 sur l’emploi de la langue flamande en matière répressive dans l’arrondissement de Bruxelles, *M.B.*, March 1, 1908. These laws were coordinated in 1935 by the law of June 15, 1935, which provided that each linguistic region would use its own language in judicial procedure, except in Brussels where the language of the procedure would depend on the accused’s language: loi du 15 juin 1935 concernant l’emploi des langues en matière judiciaire, Art 11-23, *M.B.*, June 22, 1935. As for the German language, which progressively became an issue after the annexation of the German linguistic region in 1919, a legal adaptation in 1985 aimed at preventing discriminations against German speaking accused: loi du 23 septembre 1985 relative à l’emploi de la langue allemande en matière judiciaire et à l’organisation judiciaire, *M.B.*, November 5, 1985.

<sup>92</sup> Parts of the draft were voted in 1887 and 1890 by the House of representatives and/or by the Senate, but the dissolution of the Parliament in 1892 invalidated the process. Introduced again in 1894, the draft was never examined: J. GILISSEN, *op. cit.*, p. 254. Even if the reasons presiding the failure of the Nypels draft are still unclear, the legal historian John Gilissen partially explained it due to the slowness of the legislative process and the lack of parliamentary interest caused by other pressing matters, parliamentary dissolutions as well as a potential feeling of inadvisability regarding the codification process itself; thus, preferring to enact specific complementary laws such as the introductory part of the Code in 1878: *ibid.*, p. 276-277. Furthermore, it must be noted that the specific part of the draft concerning the revision of wrongful convictions was mostly modified by another draft submitted by the Minister of Justice Jules Le Jeune (Parti Catholique) and was adopted in 1894: loi du 18 juin 1894 contenant le titre IX du livre III du Code de procédure pénale, *M.B.*, June 24, 1894.

their role during the investigations and a strong extension of the defense rights. The *Fédération des Avocats Belges* especially distinguished itself in 1899 by voting a pretrial stage draft providing a “complete opening to the defense”. Inspired by a French law of 1897 which strengthened the defense by allowing the counsel to be present during the interrogation of his client<sup>93</sup>, this draft aimed at making the lawyer a counter-power to the *juge d’instruction* by systematically proposing another interpretation of the facts<sup>94</sup>. Therefore, the main reforms provided by the draft were the mandatory presence of the defense counsel at all the main steps of the investigation including the interrogation, the mandatory communication of the investigation documents, the possibility of a legal review concerning the *juge d’instruction*’s orders and a contradictory indictment hearing<sup>95</sup>. “Continuity pattern” drafts were eventually brought again in Parliament with the introduction of a Private Member’s bill providing a complete opening of the investigation to the defense in 1901 as well as a bill providing a moderate one similar to the Nypels draft in 1902<sup>96</sup>. However, none of them were discussed before the War.

As for the “rupture pattern”, this reform type began to be publicly supported in 1871 in a book written by two lawyers<sup>97</sup> and was later advocated for in another professional organization of lawyers called the *Conférence du Jeune Barreau de Bruxelles*. In response to the *Fédération*’s support to the “opened investigation”, members of the *Conférence*

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<sup>93</sup> This law also abolished the incommunicado measure in the case of the defense counsel: loi du 8 décembre 1897 ayant pour objet de modifier certaines règles de l’instruction préalable en matière de crimes et délits, Art. 8-9, *Journal officiel de la République française*, December 10, 1897.

<sup>94</sup> BODDAERT, Henri; HIRSCH, Arthur. Projet de loi substituant le principe de la contradiction au principe du secret en matière pénale. *Journal des tribunaux*, p. 405-411, 1899, p. 406 ; DELRÉE, Édouard. *Op. cit.*, p. 306-307, n<sup>os</sup> 32-33.

<sup>95</sup> Articles 2, 4, 9, 12, 13, 14, 15 and 19 of the draft.

<sup>96</sup> Proposition de loi du 29 mars 1901 sur l’instruction criminelle contradictoire, développements, *Doc.*, Ch., 1900-1901, n<sup>o</sup> 143 ; projet de loi du 26 février 1902 comprenant les titres II et III du Livre 1<sup>er</sup> du Code de procédure pénale, exposé des motifs, *Doc.*, Ch., 1901-1902, n<sup>o</sup> 71.

<sup>97</sup> One of them would later be famous for his works relating to social defense: PRINS, Adolphe; PERGAMENI, Hermann. *Instruction criminelle. Réforme de l’instruction préparatoire en Belgique*. Paris-Brussels: Durand et Pedone Lauriel-Claassen, 1871.

promoted a “contradictory investigation” embedded in an adversarial structure<sup>98</sup>, thus abolishing the *juge d’instruction*’s office. One of its members’ draft from 1898 clearly shapes the characteristics of this rupture with the Napoleonic Code<sup>99</sup>. The draft divides the hybrid role of the *juge d’instruction* between the prosecution regarding the investigative function and the new *juge de l’instruction*<sup>100</sup> regarding the judicial function. Therefore, the prosecution can secretly conduct its investigation unless it could impair fundamental freedoms. In that case, the more serious parts of the prosecution’s investigation must be authorized by the *juge de l’instruction*. Furthermore, the defense is well reinforced thanks to the extended publicity of the procedure and the possibility to ask the new judge for inquiries. The logic of this system is eventually provided by the separation of functions between the *juge de l’instruction* in charge of reviewing the legality of the investigation and the pretrial courts in charge of reviewing the investigated facts regarding the indictment<sup>101</sup>.

Such a rupture with the *Code d’instruction criminelle* came to be supported in a different way by the government itself just before the War. An executive commission, composed among others of the Brussels university professor Adolphe Prins and the magistrate Jean Servais as its rapporteur, drafted a reform similar to the *Conférence*’s draft regarding the adversarial features but with a quite different approach regarding the importance of the prosecution<sup>102</sup>. Introduced in Parliament in 1914 by the Minister of Justice Henry Carton de Wiart (Parti Catholique), the “Servais

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<sup>98</sup> SPEYER, Henri; HENNEBICQ, Léon. Réforme de l’instruction préparatoire: note présentée au nom de la Commission d’études du Jeune Barreau de Bruxelles. *Journal des Tribunaux*, p. 419-424, 1899, p. 424.

<sup>99</sup> HENNEBICQ, Léon. La contradiction dans l’instruction criminelle. *Journal des tribunaux*, p. 1169-1180 and 1185-1196, 1912.

<sup>100</sup> The French nuance between “*juge d’instruction*” and “*juge de l’instruction*” could be translated in English by using the terms “examining magistrate/investigating judge” as opposed to the expression “judge of the investigation”; the latter expressing that the judge examines the lawfulness of the investigation rather than conducting it.

<sup>101</sup> See: DELRÉE, Édouard. *Op. cit.*, p. 312-313, n° 39.

<sup>102</sup> *Ibid.*, p. 314-318, n°s 41-47. For a former analysis, see: VERSELE, Severin. Het niet te verwaarlozen 1914-Ontwerp over de Hervorming van het Vooronderzoek. *Rechtskundig Weekblad*, p. 641-651, 1948-1949.

draft” provided a full recognition of the prosecution’s secret investigative function as a remedy for the flaws of the “opened investigation” provided by the French law of 1897, consisting of illegal police investigations appointed by the *juge d’instruction*<sup>103</sup>. The functions of the defense and of the *juge de l’instruction* during the investigation were essentially the same as in the *Conférence’s* draft. However, the importance of the judicial counter-power to the prosecution depended on the seriousness of the case. On the one hand, in the case of felonies, press and political offences as well as pretrial detentions of more than five weeks, a public and contradictory indictment hearing had to be held before the *juge de l’instruction*. On the other hand, in the case of less serious offences, the prosecution could directly charge the suspect with no indictment hearing nor any legal remedy. This important difference between the two rupture drafts allowed them to be categorized as an “idealistic rupture” in the case of the *Conférence’s* draft and as a “pragmatic rupture” in the case of Servais’s<sup>104</sup>. Nonetheless, these reforms were never debated in Parliament since the War began a few months later.

#### **IV. THE INTERWAR PERIOD BETWEEN STAGNATION AND TRANSFORMATION (1918-1939)**

After the War, the reform process of criminal procedure resumed thanks to the initiatives of the new Minister of Justice Emile Vandervelde (Parti Ouvrier Belge). However, the reforms until the Second World War appear to be contrasted. On the one hand, the pretrial stage underwent some improvements but no reform comparable to the drafts of the previous period would emerge during the interwar period. On the other hand, the trial stage was deeply transformed regarding the jury and the decision-making process of the *cour d’assises*.

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<sup>103</sup> Projet de loi du 24 avril 1914 comprenant le livre premier du Code de procédure pénale, exposé des motifs, *Doc.*, Ch., 1913-1914, n° 237, p. 47-48. On illegal police investigations in France at that time, see: FARCY, Jean-Claude. L’enquête pénale dans la France du XIX<sup>e</sup> siècle. In: FARCY, Jean-Claude; KALIFA, Dominique; LUC, Jean-Noël (org.), *L’enquête judiciaire en Europe au XIX<sup>e</sup> siècle*. Paris: Creaphis, 2007, p. 35-36.

<sup>104</sup> DELRÉE, Édouard. *Op. cit.*, p. 339, n° 71.

#### IV.1. THE STAGNANT PRETRIAL STAGE: IMPROVEMENTS WITHOUT OFFICIAL RUPTURE

The year 1919 revealed itself to be one of the most important years in Belgian criminal procedure regarding the number of reforms carried out. The pretrial stage underwent some significant changes concerning both the effectiveness of the procedure and its guarantees for the defense and the victim. Firstly, with regard to the effectiveness, the law of April 7, 1919<sup>105</sup>, created a proper judicial police (“*police judiciaire/gerechtelijke politie*”) in charge of conducting judicial investigations under the authority of the public prosecutor. This new police force was a long awaited solution regarding the inefficiency of the municipal police and the *gendarmérie* due to their own functions and limited territorial jurisdiction, on the one hand<sup>106</sup>, and regarding the specific context of the War which resulted in an increased criminality to be investigated and prosecuted, on the other hand<sup>107</sup>. Secondly, with regard to guarantees, the law of October 25, 1919, improved the impartiality of the *chambre du conseil* thanks to the removal of the *juge d’instruction* from its seat, reducing it to one judge instead of three as provided by former Article 127 of the C.I.Cr. Furthermore, this law provided a contradictory indictment hearing and a better publicity before this court in favor of the defense<sup>108</sup>. It is interesting to note that unlike

<sup>105</sup> Loi du 7 avril 1919 portant certaines dispositions statutaires relatives aux officiers et agents judiciaires près les parquets, *M.B.*, April 12, 1919.

<sup>106</sup> WELTER, François. Quand l’intérêt public se heurte aux obstacles institutionnels et matériels : une police judiciaire près les parquets, solution aux défis de la police judiciaire en Belgique (1830-1922) ? *Cahiers d’histoire du temps présent*, n° 24, p. 35-63, 2011, especially p. 38.

<sup>107</sup> Projet de loi instituant des commissaires, des commissaires adjoints et des agents de police judiciaire, discussion générale et vote par appel nominal, *Ann. Parl.*, Ch., 1918-1919, séance du 26 février 1919, p. 390.

<sup>108</sup> Loi du 25 octobre 1919 modifiant temporairement l’organisation judiciaire et la procédure devant les cours et tribunaux, Art. XV, *M.B.*, November 9, 1919. These guarantees were also provided for the victim by a law of July 22, 1927. Furthermore, the monthly review regarding the pretrial detention performed by the *chambre du conseil* was also improved: loi du 23 août 1919 sur la détention préventive, les circonstances atténuantes et la participation du jury à l’application des peines, Art. 1, *M.B.*, August 25-26, 1919. Finally, these improvements were also provided for the *chambre des mises en accusation* in favor of the defense and the victim: loi du 19 août 1920 modifiant l’article 223 du Code d’instruction criminelle, *M.B.*, August 26, 1920.

these improvements brought to the *chambre du conseil* in order to make it a proper counter-power to the *juge d'instruction*'s investigation, the French lawmakers abolished this pretrial court in 1856; thus, granting more power to the examining magistrate as the first and potentially sole judge of the facts of his own investigation and the legality of the pretrial detention<sup>109</sup>.

Afterwards, no significant reform initiatives occurred until the end of the 1930's. However, as the years went by, the criminal procedure tended to become more customary than legal due to the inappropriate character of the old-fashioned *Code d'instruction criminelle*, leading to illegal and unofficial investigation practices<sup>110</sup>. Indeed, the investigation had not been improved and was still conceived around the single person of the *juge d'instruction* by a Code adopted in the early 19<sup>th</sup> century for a mainly rural society with an embryonic and local police force<sup>111</sup>. This investigation was thus unsuited regarding the importance of urban crime, new technologies and potential offenders' mobility across jurisdictions. Thus, unofficial investigations, unhampered by the gaps or the old limitations of the Napoleonic Code, were a pragmatic solution to improve the effectiveness of criminal justice.

As for the general reform of the investigation, despite an unsuccessful review of the "Servais draft" in 1924<sup>112</sup>, three private initiatives led to the abandonment of the "rupture pattern" between 1936 and 1939<sup>113</sup>. Firstly, both "opened investigation" and "contradictory investigation" drafts were discussed among the members of the *Union belge de droit pénal* between 1936 and 1937<sup>114</sup>. They eventually ruled out the suppression of the examining magistrate and favored a moderate opening

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<sup>109</sup> ESMEIN, Adhémar. *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIII<sup>e</sup> siècle jusqu'à nos jours*. Paris: Larose et Forcel, 1882, p. 574-575.

<sup>110</sup> CORNIL, Léon. De la nécessité de rendre à l'instruction préparatoire, en matière pénale, le caractère légal qu'elle a perdu. *Revue de droit pénal et de criminologie*, p. 809-827, 1931, especially p. 810 and 816.

<sup>111</sup> SALAS, Denis. *Du procès pénal*. Paris: Quadrige-Presses Universitaires de France, 2010, p. 196.

<sup>112</sup> GILISSEN, John. *Op. cit.*, p. 269.

<sup>113</sup> DELRÉE, Édouard. *Op. cit.*, p. 319-321, n° 50. See also: BUCH, Henri. *La réforme de l'instruction pénale*. Brussels: Bruylant, 1950, p. 53-58.

<sup>114</sup> The *Union* was an important think tank aiming at improving criminal law in its various aspects. This private organization was composed of lawyers, law and

of the investigation to the defense “taking into account the needs of social defense”<sup>115</sup>. Secondly, the annual assembly of the *Fédération des Avocats Belges* in 1938 gave the opportunity to its members to reject the “rupture pattern” by fear of autonomous police investigations<sup>116</sup> and to unanimously favor a complete opening of the investigation to the defense<sup>117</sup>. Finally, another think tank called *Centre d’études pour la réforme de l’État (C.E.R.E.)* addressed the same issue and stood for a greater opening to the defense than in the “Nypels draft”<sup>118</sup>, especially thanks to the presence of the counsel during the interrogation of his client, but still moderate due to the absence of legal remedy for the defense if its inquiry requests were to be dismissed by the *juge d’instruction*<sup>119</sup>.

Nonetheless, these drafts were never introduced in Parliament before the Second World War. Thus, a clear contradiction can be noticed between the official forced continuity of the Napoleonic investigation, due to the inability to reform it, and the unofficial rupture caused by the customary police investigations led on behalf of the prosecution.

#### **IV.2. THE TRANSFORMED TRIAL STAGE: TOWARDS A TRULY POPULAR JURY WITH MORE RESPONSIBILITIES**

Another reform enacted during the year 1919 deeply changed the decision-making process within the *cour d’assises* by involving the

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high-ranking magistrates, university professors and former ministers such as Henry Carton de Wiart (Parti Catholique) and Henri Jaspar (Parti Catholique).

<sup>115</sup> LUI, S. Union belge de droit pénal. *Revue de droit pénal et de criminologie*, p. 312-318, 1937, p. 314 and 318.

<sup>116</sup> SASSERATH, Simon. Réforme de l’instruction préparatoire. Rapport présenté à l’assemblée générale de la Fédération des Avocats, le 25 juin 1938 (section française). *Revue de droit pénal et de criminologie*, p. 779-796, 1938, p. 782.

<sup>117</sup> *Ibid.*, p. 795-796 and WYNEN, M. Traduction du rapport présenté à la section flamande par M<sup>e</sup> Wynen, avocat au barreau d’Anvers. *Revue de droit pénal et de criminologie*, p. 797-812, 1938, p. 810-812.

<sup>118</sup> SCHUIND, Gaston. Centre d’études pour la réforme de l’État. Réforme de l’instruction criminelle : I. L’organisation de la défense au cours de l’instruction préparatoire. *Revue de droit pénal et de criminologie*, p. 1069-1113, 1939, p. 1074-1075.

<sup>119</sup> *Ibid.*, p. 1102 (Art. 2) and p. 1105-1106 (Art. 10, 11 and 13).

jury in the judgment over the sentence through an absolute majority vote including the twelve jurors and the three professional judges<sup>120</sup>. This partial infringement to the symbolic division between fact and law was referred to as an attenuated lay judges system (“*échevinage atténué*”)<sup>121</sup> and aimed at empowering the jury regarding the consequences of its verdict on the accused’s guilt. Such a responsibility was needed due to the practice of jurors who acquitted guilty offenders because of the severity of the sentence on which they had no influence<sup>122</sup>. Even if one might say that this law formally extended the jurisdiction of the jury<sup>123</sup>, it is difficult to say in essence whether it reinforced or diminished the principle of popular justice. Indeed, even if the jury was henceforth empowered regarding the whole judgment and represented an overwhelming majority of the court concerning the sentencing vote, on the one hand, the involvement of experienced professional judges guiding the jurors in the sentencing vote could potentially be seen as a subjection of the latter, on the other hand.

Nonetheless, popular justice was symbolically reinforced through another reform occurring after the First World War and its consequences on the Belgian electoral system. Since the universal male suffrage without plural voting had been enacted in 1919<sup>124</sup>, the former initiatives to democratize the jury were revived by Belgium’s first socialist Minister of Justice. Through a bill introduced in Parliament on September 18, 1919, Emile Vandervelde intended to align jury legislation with electoral legislation by suppressing the *census* condition and allowing any literate

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<sup>120</sup> Loi du 23 août 1919 sur la détention préventive, les circonstances atténuantes et la participation du jury à l’application des peines, Art. 4, *M.B.*, August 25-26, 1919.

<sup>121</sup> TROUSSE, Paul-Émile. Rapport. In: *Le jury face au droit pénal moderne*. *Op. cit.*, p. 58.

<sup>122</sup> Projet de loi du 9 juillet 1919 sur la détention préventive, les circonstances atténuantes et la participation du jury à l’application des peines, exposé des motifs, *Doc.*, Ch., 1918-1919, n° 225, p. 1 and 4.

<sup>123</sup> BEHRENDT, Christian *et al.* *La notion de “jury” en droit constitutionnel belge*. *Op. cit.*, p. 13, n° 25.

<sup>124</sup> STENGERS, Jean. *Histoire de la législation électorale en Belgique*. *Op. cit.*, p. 254-255.

elector to be part of the jury<sup>125</sup>. Even if the legislative process lasted for a decade, the bill eventually became the law of December 21, 1930<sup>126</sup> and led to two consequences regarding equality among Belgian citizens. Firstly, the jury could therefore be composed of members of the working class thanks to the abolition of the tax-based criterion<sup>127</sup>. Secondly, even if a majority of Belgian women could not be jurors due to their exclusion of the national elections<sup>128</sup>, the law was neutral enough to not necessitate any further reform if women's right to vote were to be recognized. Since Belgium's electoral system became a truly universal suffrage in 1948<sup>129</sup>, women could therefore enter the jury<sup>130</sup>.

## V. THE CALM BEFORE THE STORM (1945-1998)

After the Second World War, a period of calm characterized the criminal procedure reform process, marked by new codification failures and a discrete continuation of limitations brought to popular justice. However, between the 1980's and the 1990's, police practices, a series of criminal attacks on the population and the police as well as a famous criminal case would soon bring criminal procedure ineffectiveness to light and show the urgent need for a major reform.

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<sup>125</sup> Projet de loi du 18 septembre 1919 démocratisant le jury, exposé des motifs, *Doc.*, Ch., 1918-1919, n° 359, p. 2.

<sup>126</sup> Loi du 21 décembre 1930 modifiant certaines dispositions de la loi sur l'organisation judiciaire, du Code d'instruction criminelle et de la loi du 3 mai 1889, Art. 2-3, *M.B.*, March 18, 1931.

<sup>127</sup> It must also be noted that the capacity criterion, maintained in 1930, would eventually be abandoned in 1967: loi du 10 octobre 1967 contenant le Code judiciaire, Art. 217, *M.B.*, October 31, 1967.

<sup>128</sup> Only war widows and female war heroes were allowed to vote in general elections and could be jurors as a consequence: projet de loi modifiant certaines dispositions de la loi sur l'organisation judiciaire (...), rapport fait au nom de la Commission de la Justice et de la Législation civile et criminelle par M. Sinzot, *Doc.*, Ch., 1929-1930, n° 252, p. 3.

<sup>129</sup> Loi du 27 mars 1948 attribuant le droit de vote aux femmes pour les Chambres législatives, *M.B.*, April 22, 1948.

<sup>130</sup> As for other professions within the justice system, women were recognized the right to be lawyers in 1922 (law of April 7, 1922) and to be magistrates in 1948 (law of February 21, 1948).

### V.1. THE CALM: CODIFICATION FAILURES AND A SLOWLY VANISHING POPULAR JUSTICE (1945-1970's)

The first decades of the post-war period were once again dedicated to a new criminal procedure codification with no concrete results. Firstly, an executive commission was appointed by the Minister of Justice Albert Lilar (Parti Libéral) in 1946 with the high-ranking magistrate and Brussels university professor Léon Cornil acting as its president<sup>131</sup>. As a well-known critic of customary police investigations validated by case law<sup>132</sup>, Cornil was a fervent supporter of the “rupture pattern” by praising the “Servais draft” and contemporary reform initiatives in France which tended to grant the investigation to the prosecution and to change the *juge d’instruction* into a *juge de l’instruction*<sup>133</sup>. According to him, this reform was justified by the need of an effective criminal justice able to deal with the increased criminality caused by the repercussions of the War<sup>134</sup>. Nonetheless, the commission abandoned its general reform projects and concentrated itself on specific reforms of more immediate interest, such as introducing probation in Belgian criminal law<sup>135</sup>.

Later on, another executive commission was appointed in 1962 by the Minister of Justice Piet Vermeylen (Parti Socialiste Belge) with another high-ranking magistrate and Brussels university professor, Hermann Bekaert, acting as royal commissioner<sup>136</sup>. His works brought

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<sup>131</sup> Commission pour l’Étude de la Révision du Droit Pénal et de la Procédure Pénale. *Revue de droit pénal et de criminologie*, p. 535-537, 1946, p. 535.

<sup>132</sup> CORNIL, Léon. De la nécessité de rendre à l’instruction préparatoire, en matière pénale, le caractère légal qu’elle a perdu. *Op. cit.*

<sup>133</sup> CORNIL, Léon. Propos sur le droit criminel. *Revue de droit pénal et de criminologie*, p. 1-32, 1946, p. 31-32.

<sup>134</sup> *Ibid.*, p. 4.

<sup>135</sup> BEKAERT, Hermann. Cinquante années de procédure pénale en Belgique et à l’étranger. *Revue de droit pénal et de criminologie*, p. 67-116, jubilee publication 1907-1957, p. 71-72. A bill introduced in Parliament in 1948 seems similar to Cornil’s previous works about probation, especially regarding English and American influences. See: *ibid.*, p. 100; Projet de loi du 18 mai 1948 établissant le régime de probation dans le système pénal, exposé des motifs, *Doc., Ch., 1947-1948, n° 469*. Nonetheless, probation in criminal law would only be adopted in 1964.

<sup>136</sup> BEKAERT, Hermann. *La manifestation de la vérité dans le procès pénal*. Brussels: Bruylant, 1972, p. 41-42.

to light a new pattern of reform by dividing the pretrial stage into two types of investigations. On the one hand, the commissioner noted that the prosecution's investigation had been generalized to the point of representing nine out of ten criminal investigations. As a consequence, Bekaert stood for the legalization of these secret and unilateral investigations with a special attention given to their limits regarding other interests at stake. On the other hand, the commissioner was also in favor of maintaining the traditional investigation led by the *juge d'instruction*, as long as improvements were to be provided regarding defense rights, publicity and legal remedies<sup>137</sup>. Eventually, despite its submission to the Minister of Justice Herman Vanderpoorten (Partij voor Vrijheid en Vooruitgang) in 1976, Bekaert's works were not pursued in Parliament<sup>138</sup>.

As for the trial stage, the procedure before the *cour d'assises* was improved in 1949 thanks to the prohibition of the prosecution's presence during jury deliberations<sup>139</sup>. However, despite the Belgian fondness for popular justice still noticeable in 1955<sup>140</sup> and its improvements, reforms and judicial practice were progressively leading to a clear deprivation of the *cour d'assises*'s jurisdiction. Initiated in 1919<sup>141</sup>, this deprivation movement took the form of a reinforcement of the *correctionnalisation* introduced in 1838. Initially provided for less important felonies depending on the maximal sentence applicable, the *correctionnalisation* progressively became more and more applicable by providing exceptions to this maximum regarding some offences which needed to be addressed quickly and by generally raising the maximal sentence from fifteen years of imprisonment to twenty years in 1977<sup>142</sup>. According to some, this use of mitigating

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<sup>137</sup> BEKAERT, Hermann. La réforme de la procédure pénale. Note sur l'état des études entreprises par le commissaire royal à la réforme de la procédure pénale, *Journal des tribunaux*, p. 141-143, 1964, p. 141-142.

<sup>138</sup> TULKENS, Françoise. *Les limites du secret de l'instruction (document de travail n° 9-1985 du Département de Criminologie et de Droit Pénal de l'Université catholique de Louvain)*, p. 9.

<sup>139</sup> X. La chronique judiciaire. *Journal des tribunaux*, p. 332-333, 1949.

<sup>140</sup> BEKAERT, Hermann. Cinquante années de procédure pénale en Belgique et à l'étranger. *Op. cit.*, p. 96.

<sup>141</sup> Loi du 23 août 1919 (...), Art. 3, *M.B.*, August 25-26, 1919.

<sup>142</sup> Loi du 1<sup>er</sup> février 1977 modifiant la loi du 4 octobre 1867 sur les circonstances atténuantes et le Code pénal, Art. 2, *M.B.*, February 19, 1977. In a similar

circumstances had evolved to become a way to slowly abolish the *cour d'assises* without offending public opinion<sup>143</sup>. As a consequence, eighteen common felonies could only be tried before the *cour d'assises* under the law of 1977<sup>144</sup> and most felonies subject to *correctionnalisation* were tried *in casu* by the *tribunaux correctionnels*<sup>145</sup>.

## V.2. THE STORM: CRISIS, EFFICIENCY AND COMPROMISE (1970's-1998)

The last decades of the 20<sup>th</sup> century saw the criminal procedure, and especially the pretrial stage, enter a period of deep crisis. On the one hand, police investigations had gained an unprecedented autonomy without legal approval since the 1970's and had developed new means of investigation, especially under American influence against drug-related organized crime<sup>146</sup>. Furthermore, the various police forces of the kingdom were involved in a competition for case solving ("*guerre des polices*"), thus leading unofficial parallel investigations, withholding evidence and compromising the general effectiveness of investigations<sup>147</sup>. On the other hand, a need for security as well as a loss of public confidence in police investigations and in criminal justice were caused by a series of crimes occurring between 1980 and 1996. Firstly, attacks on the *gendarmerie*

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way, a draft elaborated within the C.E.R.E. in 1937 provided that less important felonies should become misdemeanors in order to be tried by the lower criminal courts: VAN DER MEERSCH, Ganshof. Un projet de réforme de la compétence de la cour d'assises en matière d'infractions de droit commun. *Revue de droit pénal et de criminologie*, p. 1377-1430, 1939, p. 1425.

<sup>143</sup> SASSERATH, Simon. Procédure pénale. Troisième partie: exposé critique. *Op. cit.*, p. 914, n° 306.

<sup>144</sup> BEKAERT, Hermann. Le législateur a-t-il voulu supprimer la cour d'assises ?. *Journal des tribunaux*, p. 253-256, 1978, p. 253.

<sup>145</sup> DE LE COURT, Étienne. Considérations historiques et d'actualité sur les circonstances atténuantes et la correctionnalisation en Belgique. *Revue de droit pénal et de criminologie*, p. 127-162, 1959-1960, p. 127-128.

<sup>146</sup> CAPELLE, Jan; KAMINSKI, Dan. *L'enquête judiciaire en Belgique : réflexions sur un dysfonctionnement* (document de travail n° 27-1989 du Département de Criminologie et de Droit Pénal de l'Université catholique de Louvain), p. 6-7 and 10-12.

<sup>147</sup> *Ibid.*, p. 7-8.

itself in the year 1980, which could only happen with an inside help, were never solved. Secondly, organized criminals spread terror in the country and increased a need for national security. The “*Cellules communistes combattantes*” (Fighting Communist Cells) orchestrated terrorist attacks between 1984 and 1985, and the “*Tueurs du Brabant*” (Brabant killers) conducted hold-ups between 1982 and 1985, killing twenty-eight people in doing so and hurting dozens of others, and were never arrested<sup>148</sup>. Finally, the shocking unveiling of the world-famous “*Affaire Dutroux*” in 1996, involving child abductions, pedophilic practices and assassinations, aggravated by the lack of police cooperation on the case, marked a point of no return for Belgian justice.

At first, particular reforms aimed at addressing specific issues related to the slowness of criminal justice and to the pre-1996 wave of crimes. Firstly, the *correctionnalisation* mechanism was extended in 1985 to felonies connected to the Fighting Communist Cells and the Brabant killers such as hostage taking, armed robberies and property damage in order to accelerate their judicial processing<sup>149</sup>. Secondly, pretrial detention was reformed in 1990 in order to make it more exceptional, to improve the defense rights notably by setting a time limit of twenty-four hours to issue an arrest warrant in case of effective deprivation of liberty and, as a consequence, to address prison overcrowding which was a flagrant indication of a slow justice in that matter<sup>150</sup>. Thirdly, the acceleration of justice administration was the main purpose of the laws of 1994, empowering the prosecution to directly indict traffic offenders and urban

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<sup>148</sup> *Ibid.*, p. 12-13.

<sup>149</sup> Loi du 6 février 1985 modifiant la loi du 4 octobre 1867 sur les circonstances atténuantes, *M.B.*, February 19, 1985.

<sup>150</sup> Loi du 20 juillet 1990 relative à la détention préventive, *M.B.*, August 14, 1990. See: projet de loi relatif à la détention préventive, rapport, *Doc.*, Sén., 1988-1989, n° 658-2, p. 4-6. A law of 1973 had previously introduced a few modifications to pretrial detention in order to reduce its use and to provide a compensation in case of wrongful detention: loi du 13 mars 1973 modifiant la loi du 20 avril 1874 relative à la détention préventive (...), *M.B.*, April 10, 1973. On these laws, see : DEJEMEPPE Benoît; TULKENS Françoise. Chapitre premier : l'esprit de justice, histoire et actualité de la détention préventive. In: DEJEMEPPE Benoît (org.). *La détention préventive*. Brussels: Larcier, 1992, p. 32-40.

offenders and creating criminal mediation<sup>151</sup>. For the same purpose, the criminal settlement possibility was extended in 1984 to more serious misdemeanors punishable by five years of imprisonment<sup>152</sup>. Fourthly, the legalization of wiretapping in 1994 in judicial investigations aimed at fighting organized crime and terrorism<sup>153</sup>. Finally, the need for a more efficient police function and a better cooperation between the police forces provoked the enactment of a law of 1992. However, since the police war was pointed out in the mismanagement of the Dutroux case, another law of 1998 suppressed the former police forces and created a single integrated police service structured on a federal and a local level<sup>154</sup>.

Furthermore, the dramatic chain of criminal events also led to the first general reform of pretrial investigations in Belgium's history. Resulting from the works of an executive commission appointed in 1991 and presided by the lawyer and Liège university professor Michel Franchimont, as an answer to the Brabant killings, this reform was introduced as a bill in Parliament in 1996 due to the pressure resulting from the Dutroux case and was quickly enacted as the "Franchimont law" of March 12, 1998<sup>155</sup>. Pursuing Bekaert's work, this law brought to light a new reform

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<sup>151</sup> Loi du 11 juillet 1994 (...) portant certaines dispositions relatives à l'accélération et à la modernisation de la justice pénale, *M.B.*, July 27, 1994 and loi du 10 février 1994 organisant une procédure de médiation pénale, *M.B.*, April 27, 1994.

<sup>152</sup> Loi du 28 juin 1984 étendant, pour certaines infractions, le champ d'application de l'extinction de l'action publique, moyennant le paiement d'une somme d'argent, *M.B.*, August 22, 1984. The criminal settlement had previously been established in 1935 for infractions and extended in 1949 to minor misdemeanors, see: FERNANDEZ-BERTIER, Michaël; LECOCQ, Arnaud. L'extension de la transaction pénale en droit belge : une évolution en demi-teinte. *Droit pénal de l'entreprise*, n° 2011/3, p. 219-238, 2011, p. 222.

<sup>153</sup> Loi du 30 juin 1994 relative à la protection de la vie privée contre les écoutes (...), Art. 3-4, *M.B.*, January 1, 1995.

<sup>154</sup> Loi du 5 août 1992 sur la fonction de police, *M.B.*, December 22, 1992 and loi du 7 décembre 1998 organisant un service de police intégré, structuré à deux niveaux, *M.B.*, January 5, 1999.

<sup>155</sup> Loi du 12 mars 1998 relative à l'amélioration de la procédure pénale au stade de l'information et de l'instruction, *M.B.*, April 2, 1998. See: VAN DE KERCHOVE, Michel. Les réactions législatives aux disparitions d'enfants. "L'affaire Dutroux", paradigme de l'accélération du temps juridique ?. In: GÉRARD, Philippe; OST, François; VAN DE KERCHOVE, Michel (org.).

pattern characterized by a compromise between continuity and rupture patterns and by a division of the pretrial stage into two phases: the judicial investigation (“*instruction/gerechtelijk onderzoek*”) and the preliminary investigation (“*information/opsporingsonderzoek*”)<sup>156</sup>. On the one hand, the “continuity pattern” elements can be found in the traditional *instruction*, improved thanks to extended rights for the defense and the victim, including contradictory additional inquiries and investigation file disclosure requests, and to a more independent and impartial examining magistrate. The pretrial courts’ review was another important improvement of the judicial investigation, despite its procedural slowdowns and complications. Next to its factual review regarding the indictment, the *chambre du conseil* could therefore exercise a legal review of the *instruction* and annul any illegal inquiry. The *chambre des mises en accusation* became an appeal court regarding the latter’s orders, next to its original indictment role improved with a second-degree legal review regarding felonies and to a new general jurisdiction to control judicial investigations in progress. Finally, the *Cour de cassation* could also exercise a legal review of the latter’s judgments. On the other hand, the influence of the “rupture pattern” can be found in the legalized investigations of the prosecution (*information*), conducted by the public prosecutor who became responsible for the opportunity to prosecute. These secret and unilateral investigations were limited to inquiries without any constraint or impairment of fundamental freedoms, except for some inquiries which could be authorized by the *juge d’instruction* (*mini-instruction*). Furthermore, the prosecution had no obligation to conduct an objective investigation and suffered no control from the pretrial courts, as long as the offence was not formally characterized as a felony and if no serious inquiries were necessary, by being able to directly indict the offender before the lower criminal courts. In brief, this “compromise pattern” had the paradoxical effect of greatly improving the fairness of the traditional *instruction* regarding the most serious offences while transferring its former flaws to a new investigation applicable to the vast majority of cases in practice.

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*L'accélération du temps juridique*. Brussels : Presses de l'Université Saint-Louis, 2000, n° 26.

<sup>156</sup> For an analysis of this law, see: DELRÉE, Édouard. *Op. cit.*, p. 323-327, n°s 53-57.

## VI. AN ERA OF UNPRECEDENTED REFORMS (1998-2020)

The year 1998 marked the beginning of an era of unprecedented reforms regarding Belgian justice<sup>157</sup>. On the one hand, the years 1998 to 2015 were filled with reforms addressing both guarantees and efficiency of criminal procedure. On the other hand, the last years saw a rebirth of codification as well as an explicit attempt to step away from the greatest symbols inherited from the Napoleonic legislation.

### VI.1. WEAVING HARLEQUIN'S SUIT: A MULTITUDE OF REFORMS (1998-2015)

To quote Bekaert who referred to the *Code d'instruction criminelle* as an “Harlequin’s suit” due to the increasing number of complementary laws which changed its provisions in a scattered manner<sup>158</sup>, this trend would only be amplified after 1998 with reforms affecting every aspect of the procedure.

Firstly, the scope of the *information* continued to be extended in the post-9/11 period<sup>159</sup>. New means of investigation exercised by the police under a nearly exclusive supervision of the prosecution were provided by an important law of 2003 and improved in 2005<sup>160</sup>. These measures, especially provided for investigations related to terrorist and other criminal organizations, included police surveillance, undercover

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<sup>157</sup> MULLER, Françoise; ROUSSEAU, Xavier. Politiques et pratiques pénales à l'aune des transformations de l'État belge (1830-2012). In: DE KOSTER, Margo; HEIRBAUT, Dirk; ROUSSEAU, Xavier (org.). *Tweehonderd jaar justitie : historische encyclopedie van de Belgische justitie*. Bruges: Die Keure, 2015, p. 204.

<sup>158</sup> BEKAERT, Hermann. *La manifestation de la vérité dans le procès pénal*. *Op. cit.*, p. 62.

<sup>159</sup> COOLSAET, Rik; STRUYE DE SWIELANDE, Tanguy. Belgium and Counterterrorism Policy in the Jihadi Era (1986-2007). *Egmont Papers*, n° 15, 27 p., 2007, p. 13.

<sup>160</sup> Loi du 6 janvier 2003 concernant les méthodes particulières de recherche (...), *M.B.*, May 12, 2003 and loi du 27 décembre 2005 portant des modifications diverses (...) en vue d'améliorer les modes d'investigation dans la lutte contre le terrorisme et la criminalité grave et organisée, *M.B.*, December 30, 2005.

operations and informants use. It must be noted that these laws contributed to reinforce the prosecution's investigations at the expense of the examining magistrate's investigation who had no control over these new procedures<sup>161</sup>. Furthermore, the use of illegally obtained evidence became admissible in principle following the important case law *Antigoon* of the *Cour de cassation* in 2003. The former rigorous exclusion of these evidence, tempered between the years 1990 and 2003, was finally rejected due to new forms of criminality, "the social need for an efficient repression" and European influences<sup>162</sup>. Thereafter, the teachings of this case law were passed as a law and added to the Napoleonic Code in 2013, providing the principle and three general exceptions<sup>163</sup>.

Secondly, the pretrial investigations and especially the *information* were improved by providing more rights to the defense and the victim. First and foremost, another codification attempt was introduced in Parliament in 2002 aiming at improving the contradiction and publicity of the *information*<sup>164</sup>. However, like the "Nypels draft", its legislative process was not completed and the bill was thus abandoned in 2007 at the end of the legislature. Then, in response to the *Salduz* case law of the European Court of Human Rights<sup>165</sup>, Belgian lawmakers eventually provided a legal framework for the intervention of the defense lawyer at the beginning of the procedure and authorized their presence during the interrogations of their client in 2011<sup>166</sup>. Finally, the publicity of the

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<sup>161</sup> DELRÉE, Édouard. *Op. cit.*, pp. 329-330, n° 61.

<sup>162</sup> Cass. (2<sup>e</sup> ch.), 14 octobre 2003, *Pas.* 2003, pp. 1609 and 1611, concl. Av. Gén. De Swaef. See also: KUTY, Franklin. Le droit de la preuve à l'épreuve des juges. *Journal des tribunaux*, p. 349-355, 2015, p. 349-352.

<sup>163</sup> Loi du 24 octobre 2013 modifiant le titre préliminaire du Code de procédure pénale en ce qui concerne les nullités, Art. 3, *M.B.*, November 12, 2013.

<sup>164</sup> Avant-projet de Code de procédure pénale du 1<sup>er</sup> octobre 2002, exposé des motifs, *Doc.*, Ch., 2001-2002, n° 2043/001.

<sup>165</sup> *Salduz v. Turkey*, [GC], n° 36391/02, § 55, ECHR, 2008.

<sup>166</sup> Loi du 13 août 2011 modifiant le Code d'instruction criminelle (...) afin de conférer des droits, dont ceux de consulter un avocat et d'être assisté par lui, à toute personne auditionnée et à toute personne privée de liberté, Art. 2-9, *M.B.*, September 5, 2011. These provisions were clarified and improved in 2016: loi du 21 novembre 2016 relative à certains droits des personnes soumises à un interrogatoire, *M.B.*, November 24, 2016.

information was addressed in 2012 by granting the defense and the victim a new right of requesting access to the current investigation file<sup>167</sup>.

Thirdly, the efficiency of the trial stage was also improved due to a drastic extension of criminal settlements and accelerated procedures. On the one hand, thanks to a law of 2011 aiming at addressing the slowness of justice concerning white-collar crimes, the prosecution could henceforth propose a criminal settlement at any moment of the procedure for much more serious offences including “correctionnalized” felonies<sup>168</sup>. On the other hand, next to this parallel treatment of judicial matters, a law of 2000 addressed the judgment of common urban delinquency by creating an immediate hearing procedure for simple offences involving an offender in custody<sup>169</sup>. Furthermore, the deprivation of jurisdiction affecting the *cour d’assises* was reinforced concerning press offences as one of its most symbolic functions. Indeed, a constitutional amendment deprived the *cour d’assises* of jurisdiction over press offences inspired by racism or xenophobia because of the publicity that this court provided for these opinions and because of the general inefficiency of their prosecution<sup>170</sup>.

Finally, guarantees and efficiency were also improved in the case of the *cour d’assises*. These modifications began in 2000 with a reform

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<sup>167</sup> Loi du 27 décembre 2012 portant des dispositions diverses en matière de justice, Art. 24 *M.B.*, January 31, 2013. A legal remedy in case of prosecution’s refusal was later provided by a law of 2018: loi du 18 mars 2018 (...), Art. 3, *M.B.*, May 2, 2018.

<sup>168</sup> Loi du 14 avril 2011 portant des dispositions diverses, Art. 84, *M.B.*, May 6, 2011. See: FERNANDEZ-BERTIER, Michaël; LECOCQ, Arnaud. L’extension de la transaction pénale en droit belge : une évolution en demi-teinte. *Op. cit.*, p. 237.

<sup>169</sup> Loi du 28 mars 2000 insérant une procédure de comparution immédiate en matière pénale, Art. 6-7, *M.B.*, April 1, 2000. See: projet de loi du 3 décembre 1999 insérant une procédure de comparution immédiate (...), exposé des motifs, *Doc.*, Ch., 1999-2000, n° 306/1, p. 4-5. It must be noted that this law was partially annulled by Belgium’s Constitutional Court due to its excessive impairments of defense rights and the potential procedural discriminations among offenders caused by the important discretionary power granted to the prosecution: C. arb., March 28, 2002, n° 56/2002, B.5.1.-B.5.14 and B.9.1.-B.9.11.

<sup>170</sup> Proposition de révision de l’article 150 de la Constitution, développements, *Doc.*, Sén., 1998-1999, n° 1231/1, p. 3.

aiming at improving the efficiency of this court's procedure but legalizing in the meantime the reading of an "Acte de défense" ("akte van verdediging") in response to the indictment at the beginning of the trial<sup>171</sup>. Afterwards, an important law of December 21, 2009, brought many changes to the *cour d'assises*, without questioning popular justice, by modernizing its procedure and ensuring to reduce its number of trials due to their expensive nature<sup>172</sup>. One of its key reforms was the eventual justification of the jury's verdict on the accused's guilt which indirectly extended the legal review of the *Cour de cassation*. This important improvement was caused by Belgium's conviction by the European Court of Human Rights in 2009 regarding the absence of justification to the jury's verdict in the trial regarding the assassination of the former minister André Cools (Parti Socialiste) in 1991<sup>173</sup>.

## **VI.2. THE TWILIGHT OF NAPOLEONIC SYMBOLS: TOWARDS A LONG-AWAITED NEW CODE? (2015-2020)**

The next legislature which began in 2015 marked the greatest criminal procedure upheaval in Belgium's history. The new Minister of Justice at that time, Leuven university professor Koen Geens (Christen-Democratisch en Vlaams), intended to generally improve the efficiency of the Belgian justice system and to support a new codification in many legal fields, including criminal procedure<sup>174</sup>. Accordingly, his policies tended to abolish the Napoleonic *instruction* and the *cour d'assises* as the last vestiges of Belgium's French heritage which had gradually been erased in practice and especially since the end of the 20<sup>th</sup> century. As a result, the draft of the new Code of criminal procedure was introduced

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<sup>171</sup> Loi du 30 juin 2000 (...) visant à rationaliser la procédure devant la cour d'assises, Art. 18, *M.B.*, March 17, 2001.

<sup>172</sup> Loi du 21 décembre 2009 relative à la cour d'assises, *M.B.*, January 11, 2010. See: projet de loi relatif à la réforme de la cour d'assises (...), rapport, *Doc.*, Ch., 2009-2010, n° 2127/008, p. 2-3 and 8.

<sup>173</sup> *Ibid.*, pp. 5-6. See: *Taxquet v. Belgium*, n° 926/05, §§ 61-69, ECHR, 2009.

<sup>174</sup> GEENS, Koen. *La Justice en transition*. État des lieux après quatre ans et demi de politique de réforme, p. 1-2.

in Parliament as a Private Member's bill in May 2020<sup>175</sup>. Since then, the bill has not yet been properly discussed.

Concerning the pretrial stage, the draft can be categorized within the “rupture pattern” but goes beyond any previous propositions due to its authors' explicit confidence in an independent and impartial prosecution, making it the “*alpha and omega*” of the pretrial investigation<sup>176</sup>. Explicitly aiming at making criminal procedure more effective and abolishing the inequalities among offenders subject to the *information* compared to those subject to the *instruction*<sup>177</sup>, its authors conceived a single investigation led by the prosecution in an objective manner but still tempered by requests of the defense and the victim, regarding publicity and contradictory inquiry issues, and by a judge of the investigation (“*juge de l'enquête/rechter van het onderzoek*”) whose role would be to arbitrate each party's requests and to authorize the most serious inquiries. However, the prosecution is the most empowered judicial actor since indictment hearings are abolished by the draft, leaving the prosecution free to directly indict any offender regardless of the felony at stake. To temper this great power, the defense and the victim must be informed of the investigation termination and may ask for complementary inquiries, with a legal remedy provided before the judge of the investigation in case of prosecution's refusal. Nonetheless, this public and contradictory procedure can be bypassed by the prosecution in the case of less serious offences involving short investigations (less than six months) with a secret and unilateral inquiry leading to a direct indictment by the prosecution. Conceived in this way, the intention to accelerate investigations could not be clearer<sup>178</sup>.

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<sup>175</sup> Proposition de loi du 11 mai 2020 contenant le Code de procédure pénale, exposé des motifs, *Doc.*, Ch., 2019-2020, n° 1239/001.

<sup>176</sup> For a more complete overview, see: DELRÉE, Édouard. *Op. cit.*, pp. 330-337, n<sup>os</sup> 62-68.

<sup>177</sup> BEERNAERT Marie-Aude; KENNES Laurent. Du juge d'instruction vers le juge de l'enquête: le projet de réforme. In: KENNES, Laurent; SCALIA, Damien (org.). *Du juge d'instruction vers le juge de l'enquête : analyse critique et de droit comparé*. Limal: Anthemis, 2017, p. 25-29.

<sup>178</sup> It must be noted that a sanction is provided by the draft in the case of an abusive use of this accelerated inquisitorial procedure, consisting of the inadmissibility of the proceedings. The application of this sanction would be decided by the judge of the trial stage in the case of an obviously incomplete

Concerning the trial stage, lawmakers and the government explicitly attempted to abolish popular justice. On the one hand, an important law of 2016 radically extended the *correctionnalisation* by making it applicable to all felonies, thus allowing professional judges to try felonies likely to be sentenced to life imprisonment<sup>179</sup>. Due to executive orders and judicial practice, this reform led to deprive the *cour d'assises* of the few offences it could still exclusively try and thus aimed at the unofficial abolition of popular justice. However, Belgium's Constitutional Court struck down this part of the law because this unofficial abolition violated the Constitution which still enshrines popular justice<sup>180</sup>. Furthermore, this law also empowered professional judges regarding the jury's verdict on the guilt. Indeed, the strict separation between factual and legal judgments was mainly ignored by the lawmakers who allowed the three professional judges to deliberate on the guilt with the jury. It must be noted that the magistrates are not involved in the vote, except in the already provided situations of a simple majority or an obvious mistake made by the jury<sup>181</sup>. Even if their participation in the deliberations cannot be formally characterized as a lay judges system<sup>182</sup>, this "attenuated *échevinage* system"<sup>183</sup> is nonetheless a clear step towards this solution considering the

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investigation which could not be tried without complementary inquiries normally requested in the main adversarial procedure: see Art. 230 of the draft. However, the lack of legal criteria provided for this judicial review and the absence of a legal remedy against it make this guarantee rather uncertain for the defense.

<sup>179</sup> Loi du 5 février 2016 modifiant le droit pénal et la procédure pénale, Art. 6, *M.B.*, February 19, 2016. This law also created a plea-bargaining procedure for minor offences (Art. 97). Later on, new bargain possibilities were provided to the prosecution in its investigations on organized crime and terrorism with promises which can be made to an offender regarding legal proceedings: loi du 22 juillet 2018 (...) en ce qui concerne les promesses relatives à l'action publique, à l'exécution des peines ou à la détention (...), *M.B.*, August 7, 2018.

<sup>180</sup> C. const., December 21, 2017, n° 148/2017, B.10-B.15.2.

<sup>181</sup> See Article 102 *et seq.* of the law of February 5, 2016. On the intervention of the magistrates in the vote, see *supra*, p. 12, s.n. n° 54.

<sup>182</sup> BEHRENDT, Christian *et al.* *La notion de "jury" en droit constitutionnel belge.* *Op. cit.*, p. 15-16.

<sup>183</sup> MAES, Christophe; VANTHIENEN, Stephanie. *Het hof van assisen 2.0. Succesvolle reboot or herhaalde system crash?* Enkele kritische overwegingen

potential influence that professional judges may have on lay jurors and considering the government's general perspectives on criminal procedure reform. On the other hand, going even further than a lay judges system, the draft of a new Code of criminal procedure officially abolishes popular justice in Belgium and replaces the *cour d'assises* with a high criminal court composed of three professional judges with a jurisdiction over felonies sentenced to more than twenty years of imprisonment and over political offenses<sup>184</sup>. As for press offences, its authors justified their treatment by professional judges with the difference of context between Belgium's early years and the current difficulty to prosecute such offenses<sup>185</sup>. Thus, nearly two hundred years after the Belgian revolutionaries' struggle to reinstate popular justice, the kingdom eventually faces the very possibility of losing it again.

## CONCLUSION

After this long-term analysis of criminal procedure reforms in Belgium, one might say that the kingdom's French heritage has been both reduced and respected, except for the last few years. On the one hand, the utmost majority of procedural aspects inherited from the *Code d'instruction criminelle* was reformed in order to provide more guarantees to the parties and to improve the efficiency of criminal procedure. To say the least, Belgium's current criminal justice looks nearly nothing like its Napoleonic basis. On the other hand, symbols of the Napoleonic criminal procedure like the *juge d'instruction*, the *cour d'assises* and the *Code d'instruction criminelle* itself have not been formally abolished yet. As a result of these numerous reforms and the respect for these symbols, Belgium's procedural institutions may seem strange in their current form: an ancient Code with a great historical aura changed in an Harlequin's suit over time, a janusian pretrial investigation and a popular justice

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inzake de Assisenhervorming. *Chroniques de droit public/Publicrechtelijke Kronieken*, p. 232-256, 2018, p. 253, n° 57.

<sup>184</sup> Proposition de loi du 11 mai 2020 contenant le Code de procédure pénale, *cit.*, Art. 334, p. 46-57 and 574. A legal remedy is also eventually provided regarding both factual and legal questions (Art. 353).

<sup>185</sup> *Ibid.*, p. 51-54.

constitutionally valued but to which justice of professional judges is preferred in practice.

Concerning the Belgian codification, the reinstatement of the *Code d'instruction criminelle* of 1808 with the other Napoleonic codes was a major response to the previous Dutch regime by rejecting its new Code of criminal procedure. Afterwards, executive initiatives for a Belgian Code of criminal procedure were taken in 1850 and their result was introduced in Parliament in 1879. However, approximately twenty years later, the “Nypels draft” was eventually abandoned. By that time, partial revisions of the Code were proposed through private initiatives coming from lawyers’ professional organizations, as well as by members of Parliament and another executive commission in 1914. Without any success before the First World War, private initiatives continued to explore potential revisions between 1936 and 1939, especially in the case of the pretrial stage. After the Second World War, new executive initiatives occurred in 1946 and also between 1962 and 1976, still without concrete results. Eventually, the crisis context during the 1990’s pushed an important reform forward concerning the pretrial stage which changed many provisions of the *Code d'instruction criminelle*. Finally, following a failed new codification in the early 20<sup>th</sup> century and numerous modifications brought to the Napoleonic Code, a new Code of criminal procedure was introduced in Parliament in 2020 and has not been adopted nor rejected yet; symbolically maintaining in force a Code elaborated in regard of the 18<sup>th</sup> century society while France itself paradoxically adopted a new Code of criminal procedure in 1958.

Concerning the pretrial stage originally focused on the *juge d'instruction*, its authoritarian aspects and utmost denial of the defense rights led to early reforms of the pretrial detention in 1852 and 1874 and were among the main motives for a Belgian codification. As a response, two reform patterns were conceived between the second half of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century. On the one hand, reform initiatives were conceived in a “continuity pattern” with the main Napoleonic choices, either providing a more objective investigation by the examining magistrate in its moderate form or providing a complete opening of the investigation to the defense through more publicity and contradiction. On the other hand, other reform initiatives can be

categorized in a “rupture pattern” with the main choices made in 1808. These reforms tend to abolish the hybrid figure of the *juge d’instruction* and to provide new procedural roles in a more adversarial manner: a prosecution empowered with the secret investigation, the defense and the victim able to request further investigations and publicity and a judge in charge of arbitrating the parties. Some “idealistic” version of this pattern tended to provide a strong judicial counter-power to the prosecution while more “pragmatic” reforms provided less controls on pretrial investigations for efficiency purposes. Following these patterns, which have been alternately preferred until the second half of the 20<sup>th</sup> century, a “compromise pattern” was eventually chosen by the lawmakers in 1998 under the pressure of the Brabant killers and the Dutroux case and as a response to unofficial investigation practices. The resulting dual pretrial investigation, which provided few guarantees on the *information* side and too little efficiency on the *instruction* side, was gradually improved even though the draft Code of 2020 aims at providing the greatest rupture with the Napoleonic Code to date.

Concerning popular justice and the trial stage, trial by jury came to be one of the key political claims which led to the Belgian revolution in 1830. Accordingly, the Constitution of the kingdom provided that political and press offences as well as felonies would be tried by lay jurors. However, the next decades saw the extent of popular justice reduced through the *correctionnalisation* mechanism, which tempered the rather idealistic repartition of jurisdiction over felonies, and the establishment of a more elitist jury, both tax-based and capable. Thereafter, following Belgium’s steps towards a true democracy, the first half of the 20<sup>th</sup> century was marked by the democratization of the jury, which could soon include every man and woman, as well as by an empowerment of lay jurors over the sentence. As for the second half of the 20<sup>th</sup> century, the deprivation of jurisdiction of the *cour d’assises* would only be amplified in order to try less serious felonies more efficiently. Eventually, the first decades of the 21<sup>st</sup> century saw the lay jurors’ system be transformed into an “attenuated lay judges’ system” where professional judges may not vote on the guilt but deliberate anyway with the jurors. Furthermore, an explicit intention to suppress this heritage dating from the French Revolution was expressed in an unofficial abolition through the *correctionnalisation*

mechanism in 2016, on the one hand, and in an official abolition in 2020 through its replacement with a high court composed of professional judges, on the other hand.

To conclude, it is interesting to note that the motives leading to reform criminal procedure evolved in relation with Belgium's historical context. Firstly, the claims for a public trial held before lay jurors that were followed by Belgium's National Congress in 1831 were a clear response to the oppressions experienced under the Dutch regime. Secondly, considering the flaws of the *Code d'instruction criminelle* regarding defense rights, the reform initiatives between 1831 and 1914 primarily aimed at improving the guarantees provided by criminal procedure without interfering too much with its rather acceptable efficiency. Thirdly, while unofficial investigations led by the prosecution and the police were becoming a customary practice during the 20<sup>th</sup> century, the reform motives progressively leaned towards the legalization of these investigations, seen as a way to officially improve the efficiency of the criminal procedure. With the same concern for efficiency, popular justice was progressively criticized because of its heaviness compared to courts composed of professional judges. Finally, following the legal compromise of 1998 which legalized the most commonly used investigation in practice without much regard to the defense and the victim, reform initiatives tended to either provide them with some guarantees or to further improve the efficiency of the *information* regarding the new criminal challenges of the century and the slowness of Belgian justice. The draft Code of 2020 remains in the same vein by mostly empowering the prosecution and accelerating the trial stage procedures. Hence, a paradigm shift may be observed over time, since the main reform concerns went from *how to improve procedural guarantees without reducing procedural efficiency*, during the 19<sup>th</sup> century, to *how to improve procedural efficiency without reducing procedural guarantees*, during the 20<sup>th</sup> and 21<sup>st</sup> centuries.

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