



Critical account of the criminal justice system

Belgium

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**Towards Effective Criminal Defence Rights:
An Opening Debate**

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1. Introduction¹

1.1 The Belgian Penal Code and Criminal Procedure Code

The Belgian criminal justice system is primarily based on the French (Napoleonic) Penal and Criminal Procedure Codes. At its founding in 1830 the Belgian constitution meant to revise all codes, including the Penal Code and Criminal Procedure Code (cf. the former article 139 Constitution that was only repealed from the Constitution in 1970). This ambitious plan was only executed at the level of the substantive penal law: in 1967 a new Penal Code was introduced. The Criminal Procedure Code however is still the same as the old Napoleonic Code of 1808 (while in France both the Criminal Procedure Code (1958) and the Penal Code (1993) were replaced).

The new Penal Code of 1867 is largely based on its predecessor and, despite some important changes (e.g. less harsh sentences), totally lacks the influence of the new ideas in the field of criminal law at that time (positivism and social defence). In 1985 a proposal for a new Penal Code was presented to the Minister of Justice. The reform project has now been frozen for years which indicates the complexity of this undertaking. Taking into account the difficulties to effectively carry out such reform, it has been questioned whether the penal code should remain to be seen as the linchpin of social reaction and whether it is still the preferred instrument for penal regulation.²

In the meanwhile, more attention is paid to reforming the criminal procedure. The current Criminal Procedure Code (CPC) is totally outdated and deprived of its effect by the jurisprudence. The jurisprudence of the European Court for Human Rights (ECtHR) also plays an important role in this respect. The CPC was partially renewed in 1878 when the 'Prior Title of the CPC' was added to the old code. In 1991 a new commission was appointed (the commission criminal procedural law, also called the commission Franchimont). This commission was assigned to formulate proposals for reforming the pre-trial investigation. Its proposals have led to the most intrusive legislative change in Belgian criminal procedure since Napoleon, namely the Law of 12 March 1998 (the Franchimont Law). In 2002 this commission presented a proposal for a new CPC. The proposal was approved by the Senate on 1 December 2005 and sent to the Chamber of Representatives where it is still pending. Generally speaking, it could be stated that the proposal does not introduce a radical change compared to the current tradition. It nevertheless incorporates a number of innovating elements which have both been

¹ The introductory part was largely based on C. VAN DEN WYNGAERT, *Strafrecht, Strafprocesrecht & Internationaal Strafrecht*, Antwerpen-Apeldoorn, Maklu, 2006, 13-20.

² Y.CARTUYVELS, "Socio-politieke bedenkingen over het strafwetboek", *Panopticon* 1998, 397-412.

welcomed and criticized³: for the first time in Belgian history, a general theory on the nullities in criminal proceedings is incorporated in a law, the admissibility of the complaint of a civil party is more strictly controlled and the judicial expertise in criminal affairs is given a legal basis. The improved legal position of both suspect/defendant and the victim/civil party (e.g. for requesting additional inquiries or for viewing the file) could be seen as one of the ‘red threads’ throughout the proposal. This will inevitably necessitate the input of more resources and human capacity. The lack of budget for Justice reform is however one of the main (political) challenges in Belgium.

1.2 Recent reforms of the Belgian criminal justice system

Since 1998 a number of radical reforms have been made. Some of these legislative changes have been inspired directly by specific cases or social issues which have caused huge public disturbance, such as trafficking in persons, the series of non-solved murders committed by the Nijvel gang and the Dutroux-Nihoul case. The public commotion on the insufficient operation of the judicial authorities formed the incentive for a series of special reforms.

A first reform concerns the organization of the pre-trial investigation and aimed at improving the position of the suspect and victim and to create a greater transparency. This was achieved by the aforementioned Franchimont Law.

A second reform wave followed after the so-called ‘Octopus-consultation’ (named after the eight political parties that negotiated the Octopus-agreement). A new institution was created, the Higher Judicial Council, which intended to ‘depolitisé’ the judicial and prosecuting bodies and to improve the service towards the citizens. The organization of the Prosecutor’s Office was drastically changed, inter alia by introducing a federal prosecutor.⁴ Finally, the ‘police landscape’ was hugely changed by reforming the various (fragmented) police services into an integrated police service, structured at two levels, a federal level and local level.⁵

In 1999 new legislation in the field of substantive criminal law was adopted which also had important criminal procedural implications such as the Law on Criminal Organisations⁶ and the Law on the Criminal Responsibility of Legal Persons⁷. Furthermore, the use of anonymous and threatened witnesses was given a legal framework⁸, the possibility for audiovisual interrogation of witnesses at a distance was introduced⁹ and the use of special investigative methods was finally given a legal basis¹⁰,

³ See, *inter alia*: P. TRAEST and I. DE TANDT, “Het voorontwerp van wetboek van strafprocesrecht: een kennismaking”, *Panopticon* 2004.4, 6-24; F. SCHUERMANS, “Donkere onweerswolken boven het Belgisch strafvorderlijk landschap”, *Panopticon* 2005.5, 39-54; Also see the interview with the academic and judicial expert Armand Vandeplas in ‘*De Juristenkrant*’ of 22 November 2006.

⁴ Law of 22 December 1998 (Statute Book (S.B.) 10 February 1999).

⁵ Law of 7 December 1998 (S.B. 5 January 1999).

⁶ Law of 10 February 1999 (S.B. 26 February 1999).

⁷ Law of 4 May 1999 (S.B. 22 June 1999).

⁸ Law of 8 April 2002 (S.B. 31 May 2002).

⁹ Law of 2 August 2002 (S.B. 12 September 2002).

ending an important lack in the legislation. The rules on seizure and confiscation of crime-related proceeds were adapted to allow a more ‘loot directed’ prosecution¹¹.

The fast-track justice was introduced by the legislator in 2000¹² and partially disposed of by the Constitutional court in 2002¹³. Searches on networks and seizure of data was regulated by the Law on Informatics Crime which also added a number of offences to the Penal Code¹⁴. Other new crimes, also inspired by international and European Law, are torture¹⁵, euro falsification¹⁶ and terrorist offences¹⁷. A general regulation on the extraterritorial application of the criminal law on international offences was adopted (cf. article 12bis of the Prior Title of the CPC)¹⁸. The Genocide Law, with which Belgium (due to the Yerodia ruling of the International Court in the Hague) acquired international reputation, was adapted and later abolished. The traditional extradition was replaced in the EU by the European arrest warrant, due to which the surrender of suspects and sentenced offenders is from now on controlled exclusively by the judicial authorities¹⁹.

The community service was introduced as an autonomous sentence.²⁰ A reform of the legislation on execution of sentences was started with a new Law on Conditional Release and the introduction of commissions for conditional release (in expectation of more fundamental reforms). In 2006 the long awaited courts for execution of sentence were introduced.²¹ A basic law on the internal legal position of detained persons was finally adopted.²²

In 2005 the regulation on the administrative processing of offences by the municipal authorities has entered into force. Most misdemeanors have been removed from the Penal Code and can from now on only be sanctioned through municipal administrative sanctions²³.

A large part of the recent legislative changes have been adopted far too quickly by Parliament, often without taking into account the remarks of the Council of State. As a result, some parts of the legislation have afterwards been annulled by the Constitutional court (e.g. the special investigative methods and the prosecution monopoly of the federal prosecutor in case of extraterritorial application of the Genocide Law). This sometimes implies that certain ‘promises’ made towards the public could not be kept. It has been

¹⁰ Law of 6 January 2003 (S.B. 12 May 2003).

¹¹ Law of 19 December 2002 (S.B. 14 February 2003).

¹² Law of 28 March 2000 (S.B. 1 April 2000).

¹³ Judgment of 28 March 2002 (S.B. 13 April 2002).

¹⁴ Law of 28 November 2000 (S.B. 3 February 2000).

¹⁵ Law of 14 June 2002 (S.B. 14 August 2002).

¹⁶ Law of 4 April 2001 (S.B. 23 June 2001).

¹⁷ Law of 19 December 2003 (S.B. 29 December 2003).

¹⁸ Law of 18 July 2001 (S.B. 1 September 2001).

¹⁹ Law of 19 December 2003 (S.B. 22 December 2003).

²⁰ Law of 17 April 2002 (S.B. 7 May 2002).

²¹ Law of 17 May 2006 (S.B. 15 June 2006).

²² Law of 12 January 2005 (S.B. 1 February 2005).

²³ Law of 7 May 2004 (S.B. 25 June 2004), Law of 17 June 2004 (S.B. 23 July 2004) and Law of 20 July 2005 (S.B. 29 July 2005).

pointed out that there is an urgent need for a systematic legislative (*ex ante* as well as *ex post*) evaluation.²⁴

1.3 The application of the European Convention on Human Rights

The European Convention on Human Rights and Fundamental freedoms (ECHR) plays an important role in the Belgian judicial system since its provisions are directly applicable before the Belgian courts. Moreover, in case of a conflict between a human right with direct application and an internal legal provision, the former will have priority.²⁵ Furthermore, a citizen can file a complaint at the European Court of Human Rights (ECtHR) against Belgium for violation of his/her Convention rights (Belgium has accepted the individual ECHR complaint mechanism). Recently, the possibility for reopening a criminal procedure following a judgment of the ECtHR convicting the Belgian state has been introduced in the law (articles 442bis-442octies CPC)²⁶.

Especially for the Criminal Procedure, the ECHR has proven a useful mechanism to adjust the outdated criminal procedure and to improve respect for the defence rights. The Belgian legislation has been found contrary to the ECHR in several judgments in the field of criminal procedure.²⁷

1.4 Areas of concern

In the 20th century, the Belgian criminal justice system has (just like many other European states) become partly more but also partly less humane. On the one hand, the legal position of the defendant in the criminal proceedings has improved and sentences have generally become more lenient. On the other hand, the scope of application of criminal law has continuously expanded: at present criminal law is applied in many sectors which used to be (largely) out of its scope such as traffic, economy, public health, the environment, labour relationships, etc. Criminal law has become one of the instruments of the social welfare state and, as a result, suffers from the diseases of this welfare state, in particular non-transparency, insufficient capacity and clogging of its structures.²⁸

Another weak point in the Belgian criminal justice system is the coordination between the different actors which sometimes appears to fail. The police, the prosecutors' office, the Bench and the authorities responsible for executing sentences are, despite continuing efforts, not coordinated sufficiently. A number of public scandals (often partly caused by

²⁴ A. DE NAUW, "Naar een juridische ex post wetsevaluatie in het strafprocesrecht?", *Academiae analectica* nr. 12, Brussel, Koninklijke Vlaamse Academie van België voor wetenschappen en kunsten, 2002, 31p.

²⁵ M. BOSSUYT, "The direct applicability of international instruments in human rights", *Rev. belge D. int.* 1980, 317-343.

²⁶ Law of 1 April 2007 (which entered into force on 1 December 2007).

²⁷ For an overview see C. VAN DEN WYNGAERT, *o.c.*, p. 71, footnote 285.

²⁸ A.C. 'T HART, *Strafrecht en beleid*, Zwolle/Leuven, Tjeenk Willink/Acco, 1984, 2^e druk, 473p.

this lack of coordination) has profoundly shaken public faith in some parts of the criminal justice system.²⁹

2. Crime in its social and political context

2.1 Geo-political information

In 2007, Belgium had a total population of 10,584,534 (5,181,408 men and 5,403,126 women). The Flemish region had a population of 6,117,440, the Walloon region 3,435,879 and the Brussels Capital region 1,031,215. The general population density at national level was 342,2 inhabitants per square kilometer (on 1 January 2005), with the highest number in the Brussels Capital region (6,238), followed by the Flemish region (446,9) and the Walloon region (201,6). The total number of foreigners in Belgium for the year 2007 was 932,161 divided as follows: 283,527 for the Brussels Capital region, 331,694 for the Flemish region and 316,940 for the Walloon region.³⁰

2.2 Crime levels and criminal justice statistics

It is not easy to give a detailed description of crime levels in Belgium. Crime is measured in first instance by the federal police but only a limited amount of data is accessible.³¹ A comparison between the number of reported offences over the years 2004-2007 shows a significant rise of drug-related crime, informatics crime and trafficking in persons.

Furthermore, data on the level of the Public Prosecutor's Office, the various courts, investigating judges, etc. have been gathered for some years now. These figures give a picture of the amount of criminal proceedings initiated in a particular year and the outcome of these proceedings. There is at present no linking between these data so there is no information, for example, on the percentage of arrested persons who have afterwards been given a custodial sentence.

Conviction statistics have been available since 1995. These are drafted on the basis of the conviction reports which are the representation of the judgments. The conviction reports are drafted by the court registries and are brought – in paper – to the Central Criminal Record Office (CCRO). It should be noted that the CCRO only works with convictions, suspension of sentences and internments that are final (decisions which are subject to opposition or appeal are not taken into account) and that acquittals (reports) are not systematically communicated to the CCRO (and even then nothing is done with them).³²

²⁹ Also see A. PLEYSIER, G. VERVAEKE and S. PARMENTIER, "Het vertrouwen in 'de' instelling: enkele beschouwingen, *Panopticon* 2000, 63-79; C. FIJNAUT, "Eenheid en verdeeldheid in de strafrechtspleging", *Panopticon* 2001, 119-122.

³⁰ Source: Federal Public Service for Economics, General Direction for Statistical and Economic Information, Service Demographics (www.statbel.fgov.be).

³¹ <http://www.polfed-fedpol.be/>

³² W. DE PAUW, S. DELTENRE, C. HENDRIKX and M. WILLEMS, "Tien jaar veroordelingstatistiek", *Panopticon* 2004.4, 83.

A final remark regarding the availability of criminological data in Belgium concerns the difficulty of acquiring such data on low aggregation levels (facts, suspects,...) for scientific research. The situation has recently worsened with the entry in force of the Royal Decree of 27 April 2007 on the general regulation on the judicial costs in criminal affairs.³³ Article 96 of this Decree has replaced the former article 125 which stated that in order to get access to procedural documents, permission had to be asked to the Prosecutor-general at the Court of Appeal. Since 8 January 2007, this monopoly of the Prosecutor-general has disappeared: from now on, scientists and researchers who want to view (or take copy of) criminal files and documents should address their requests to “*the investigating judge, the Prosecutor, the prosecutor at the labour court, the federal prosecutor or the prosecutor-general depending on the state of the procedure*”. This means that getting access to such documents has in practice become even less user-friendly.³⁴ Compared to, for example, the Netherlands, this situation can be regarded as nothing more but “*sad*”.³⁵

Although there is much room for improvement in the field of (availability of and access to) data on crime (note that the reported crime is only a proportion of the total committed crime), it can generally be stated that crime is rising.³⁶ Whether this is a result of the failure of the criminal justice system or the fact that other social control mechanisms (family, school, religion, the local community) do not longer have the same control function as before is not clear.

2.3 Prison overcrowding and recidivism

Prison overcrowding is one of the most prominent problems in the Belgian criminal justice system.³⁷ On 1 March 2007, 10,008 persons were incarcerated in Belgian prisons. On 1 September 2006, there was only room for 8,457 detainees which meant an occupancy level of 117.9%. The Belgian imprisonment rate is 95 per 100,000 citizens³⁸ (which puts it in the middle compared to the European countries). This rate has risen gradually over the last 15 years (from 71 in 1992 to 81 in 1998 and 88 in 2004). A remarkably high percentage of the prison population consists of foreigners (41.6% on 1 September 2006).³⁹ One of the causes for the prison overcrowding is the high number of pre-trial detainees (44.3% on 1 March 2007). Several solutions have already been suggested in order to decrease the number of pre-trial arrests.⁴⁰

³³ S.B. 25 May 2007.

³⁴ T. VANDERBEKEN, “Toegang tot data van politie en justitie: nog moeilijker dan het al was”, *Panopticon* 2007.6, 80-82.

³⁵ P. PONSAERS and L. PAUWELS, “Naar een optimalisering van de toegankelijkheid van criminografische data op lage AGGREGATIE NIVEAUS in België?”, *Panopticon* 28 (3), 1-5.

³⁶ C. VAN DEN WYNGAERT, *o.c.*, 51.

³⁷ See, *inter alia*: K. BEYENS, S. SNACKEN and C. ELIAERTS, *Barstende muren. Overbevolkte gevangenissen: omvang, oorzaken en mogelijke oplossingen*, Kluwer, Antwerpen, Gouda Quint, Arnhem, 1993, 326p. T. DAEMS, “Strafuitvoeringsrechtbanken, overbevolkte gevangenissen & compatibele slachtoffers”, *Panopticon* 2007.3, 41-57.

³⁸ Based on an estimated national population of 10.59 million at the beginning of March 2007.

³⁹ See <http://www.prisonstudies.org> (“world prison brief”).

⁴⁰ See E. MAES, P. DAENINCK, S. DELTENRE and A. JONCKHEERE, ‘Oplossing(en)’ gezocht om de toepassing van de voorlopige hechtenis terug te dringen, *Panopticon* 2007.2, 19-40.

Despite the various efforts, the grade of recidivism has remained relatively unchanged (around 42%), while for some offences such as drug-related crimes it amounts to anxiously high proportions (according to some sources even up to 80%). It has been questioned whether the punishment in itself may not be one of the main causes of this recidivism.⁴¹

2.4 Perceptions of crime, victimization and feelings of insecurity

Regarding the perception of crime, since the 1970s the theme of insecurity due to crime has gradually taken a more prominent place in the broad social debate, the political speech and the media coverage. In the Belgian context, the rise of crime and feelings of insecurity have from the start been associated with the (increased) presence of (particularly) Turkish and Moroccan migrants and from the 1990s also illegal persons and asylum seekers. The electoral breakthrough of the “Vlaams Blok” political party (now “Vlaams Belang”) in 1991 (as a result of centralizing the themes of foreigners and insecurity by crime) led to the development in Flanders and Belgium of a ‘security speech’ and a ‘security logics’ which influenced (criminal) policy.

A number of research reports were published on the relationship between crime and migrants, some of which were highly criticized.⁴² Some researchers pointed on the possible significance of cultural factors for explaining criminal behavior of migrants.⁴³ Others emphasized factors of a more structural nature (deviant behavior is said to result from a process of social-economic deprivation in various social sectors such as education, housing, employment, etc.).⁴⁴

An interesting question in this respect is to explore the possible differences in victimization, feelings of (in-)security, social annoyance and perceptions of police and other criminal justice actors between groups of a different ethnic background. Although research (carried out in one particular Belgian province ‘Limburg’) has pointed out that the probability of victimization is not equally divided among the various ethnic groups in (Belgian) society (persons of Turkish origin being the most vulnerable according to this particular research), the research concluded that there is currently a huge lack of empirical research data on the differences in perception among (native and non-native) citizens in Belgium of the criminal justice system and its actors.⁴⁵

Regarding feelings of insecurity, an interesting research project pointed out that this has much to do with feelings of powerlessness and the incapacity to do something about it.

⁴¹ G. KELLENS, “Croît-on encore au traitement des délinquants et à la résocialisation? Les idées en Belgique et ailleurs”, *Les objectifs de la sanction pénale. En hommage à Lucien Schlachmuylder*, Brussel, Bruylant, 1989, 29.

⁴² See e.g. M. VAN SAN and A. LEERKES, *Criminaliteit en criminalisering. Allochtone jongeren in België*, Amsterdam, Amsterdam University Press, 2001.

⁴³ *Ibid.*

⁴⁴ P. HEBBERECHT, K. DUCHATEAU and B. VAN POECK, “Het levensverhaal van jongens en jonge mannen van Turkse en Marokkaanse origine met een instellingsverleden”, *Panopticon* 2005.5, 10-31.

⁴⁵ J. ACKAERT and M. VAN CRAEN, “Onveiligheid en etnische afkomst”, *Panopticon* 2005.4, 11-29.

The research concluded that ‘insecurity’ relates to restrictions of freedom caused by others without being able to do something about it.⁴⁶

2.5 Perceptions of the criminal justice system and its actors

The rather negative attitude of the average Belgian citizen towards the (criminal) justice system has been a ‘hot item’ for some years now. Several measurements have been made in this respect both at the level of the government and scientific research. In 2004 the Universities of Leuven and Liège developed a ‘justice barograph’ to map the average citizen’s attitude towards the judicial system. This instrument is now used by the Higher Judicial Council to measure the social climate towards Justice (in the broad sense). The barograph research involves a telephonic inquiry of a representative sample of the Belgian population.

The first results of this research (2002) showed that the confidence in the judicial authorities in Belgium was low (57% of the questioned citizens declared to have little or no trust). Nearly half of the respondents regarded the outcome of a trial as being generally not fair. The majority of the respondents disagreed with the idea that it should be possible for a defendant to be acquitted if the procedure had not been respected. The respondents were also asked to give an opinion on three categories of justice actors: lawyers, judges and prosecutors. With regard to the equal treatment of citizens, lawyers got the most negative evaluation⁴⁷, prosecutors the best and judges in between.⁴⁸

On 19 October 2007 the results of the second justice barograph were presented.⁴⁹ The results concerning criminal law and the actors within the criminal justice system deserve special attention. The general view on justice has improved significantly since 2002: 66% of the respondents stated to trust Justice. The satisfaction of the operation of Justice knows a similar rise (from 43% in 2002 to 60% in 2007). This tendency could partially be explained by the efforts that were made in several departments, but one should not be blind for the specific time period during which the barographs were organized (the first edition took place when the social wounds of the Dutroux-Nihoul case were still fresh and the trust in Justice was at an absolute low). It could be that the 2007 measurement should thus be regarded as the starting point and real evolutions could only be detected after the following edition (planned for 2010).⁵⁰

⁴⁶ E. DE WREE, T. VANDERBEKEN and P. PONSAERS, “Help, ik voel mij onveilig”, *Panopticon* 2006.2, 5-29. Also see the general report on feelings of insecurity published by the King Baudouin Foundation (‘Luisteren naar mensen over onveiligheid’, March 2006, www.kbs-frb.be).

⁴⁷ The results of a study of the Flemish lawyer association in 2003 indicated however that the general bad image of lawyers is not (necessarily) true: those citizens who have used the services of a lawyer made a relatively positive evaluation (L. VAN EYLEN and R. BOONE, “Cliënten hebben positief beeld van advocaat”, *Juristenkrant* 21 May 2003 (nr. 70).

⁴⁸ S. PARMENTIER, G. VERVAEKE and others, *Justitie doorgelicht. De resultaten van de eerste Belgische « justitiebarometer »*, Gent, Academia Press, 2004, 118p.

⁴⁹ See HOGE RAAD VOOR DE JUSTITIE, *De Belgen en justitie in 2007. Resultaten van de tweede justitiebarometer*, Brussel, Bruylant, 2007, 76p.

⁵⁰ J. DE HERDT and A. MONSIEURS, “Na regen komt zonneschijn? De resultaten van de tweede justitiebarometer”, *N.C.* 2007, afl. 6, 448.

Perhaps even more important than the general rise of trust in Justice, is the finding that 79% of the respondents believes that if he/she would be involved in a judicial procedure, they would get a fair trial (only 65% believed this in 2002). The trust in the judicial actors (lawyers, judges, prosecutors) has also significantly improved since 2002 (the % in Flanders being higher than in Walloon). Although the concept of a jury (Assise cases) is still popular (although less popular than in 2002) a majority of the respondents resisted the extension of such a model to correctional or police affairs (only 45% was in favor of such an evolution). More than 75% of the respondents has a positive attitude towards alternative sentences⁵¹ (although this is lower than in 2002 (79%)). The popularity of mediation between offender and victim (article 216 CPC) is rising (85% has a positive attitude towards this).

An important aspect of the research is the view on the severity of sentencing. For five of the six groups of offences which were measured (organized crime, sexual offences, murders, drug-related crime and financial crime) a large majority (sometimes up to 87%) finds that judges are too lenient (only for the sixth category, the traffic offences, a majority is opposed to more severe sentencing). Furthermore, according to 68% of the respondents disrespect for criminal procedure rules cannot legitimate an acquittal (especially elders and young people, persons professionally tied to Justice and those who had already experienced a criminal trial favored a more severe sanctioning of violation of criminal procedure).

A clear conclusion can be made concerning the execution of sentences: 60% of the respondents find that convicted persons should be obliged to execute their full sentence (in 2002 this was only 53%); only 35% favours a conditional release (especially people aged 26 to 45 and people with a lower or secondary education call for a more strict prison policy). Regarding youth delinquency, 80% of the respondents wishes to preserve the model that place young offenders in an institution where education and guidance are central (this is a rise compared to 2002 (76%)) despite the increased media attention for youth delinquency cases such as the Joe Van Holsbeek murder).

2.6 Current political priorities

The current political perceptions about crime and the proposals to fight it in the Belgian context are indicated in the National Security Plan 2008-2011 (approved by the Council of Ministers on 1 February 2008).⁵² The following crime phenomena (especially those with an organized character) are regarded as priority areas which will be tackled through annual integrated action plans: serious violent crime, property crime, serious economic-financial crime, drug-related crime, serious informatics crime, serious environmental crime, violence within families or against partners, terrorism, trafficking in and smuggling of persons, youth crime, traffic insecurity, annoyance and street crime. According to the Plan, current tendencies that require specific attention are the increased use of violence, a growing professionalism among offenders, an increasing use of the

⁵¹ For the purpose of the research this was understood as all sentences executed outside prison.

⁵² www.polfed-fedpol.be/pub/pdf/NVP2008-2011.pdf

internet as a facilitating factor, a greater mobility and a further internationalization. Two future tendencies are indicated as having a potential important influence on security: migration and the technological revolution.

One of the top priorities on the current political agenda is the combating of circulating offender groups. This phenomenon got in the picture at the end of the 1990s when Eastern and Central-Eastern gangs were increasingly responsible for serial burglaries in residential areas, shops and companies and certain forms of car thefts. These gangs are extremely well organized and have a considerable impact on feelings of insecurity.⁵³

Youth delinquency is increasingly present in the public debate on crime and criminal justice. The call for a more severe approach towards serious youth delinquents is high on the current political agenda. Various research publications have stated however that (youth) delinquency is increasingly present in the media without there necessarily being a ground for it. According to this research, persistent and serious youth delinquency is exceptional and is limited to a small group of youngsters.⁵⁴

3. The structure and processes of the criminal justice system

3.1 The basic tradition and characteristics of the Belgian criminal justice system

The (continental) inquisitorial criminal procedure was spread throughout Europe (and beyond) under the influence of the French Code d'Instruction Criminelle of 1808. This Code is still in effect in Belgium. Although it does no longer appear in its pure form, the procedure of many West-European countries, including Belgium, still has many inquisitorial characteristics.

The Belgian criminal justice system consists of two main stages. The pre-trial phase (investigation phase) is said to be inquisitorial because the investigation is in writing, secret and non-accusatorial. The pre-trial investigation is not executed autonomously by the police but is led by a magistrate, the public prosecutor. For issuing enforcement orders (arrest warrant, telephone tap, house search,...) a specially competent investigating magistrate is foreseen, the investigating judge which, in many cases, actively leads the investigation. In this stage, the suspect is not expected to actively participate in the evidence gathering. Using private detectives for tasks which are normally assigned (exclusively) to the police is even forbidden.⁵⁵ The investigative proceedings are put in writing and are bundled in a criminal file which will serve as the basis for the second stage, the trial stage.

The trial stage is said to be accusatorial because its proceedings are public, oral and accusatorial. The judge plays a more passive role than during the pre-trial stage and the

⁵³ For the specific policy on this issue see: FOD Justitie, *De aanpak van rondtrekkende dadergroepen: een actualisatie*, 22 March 2007.

⁵⁴ C. ELIAERTS, *Ernstige jeugddelinquentie: mythe of realiteit?*, Brussel, VUB, 2006, 280p.

⁵⁵ Law of 19 July 1991 regulating the profession of private detective (S.B. 2 October 1991).

equality of arms is guaranteed to a large extent. Nevertheless, the trial proceedings still have considerable inquisitorial characteristics. The trial stage is based mainly on the investigative proceedings executed during the pre-trial stage and bundled in the criminal file. The judge will usually already have prepared the case on the basis of the file: on this basis the judge will lead the trial and will determine if certain additional inquiries are necessary. As a result, the information gathered during the pre-trial stage will weigh considerably at the trial stage.

Compared to the judge in a purely accusatorial procedure, the Belgian judge will be more active during the trial stage than his common law colleagues. He will usually lead the (trial) investigation himself and can order additional inquiries *ex officio*. The defendant will not have the right to interrogate witnesses himself: it is the judge who does this. Belgium does not know a genuine cross-examination in the Anglo-Saxon meaning. Especially in Assise case, the President of the court has far-reaching competence: the law gives him the power to do whatever he deems useful for finding the truth (article 268 CPC). As a result of the ECtHR jurisprudence, Belgium has been obliged to adjust some aspects of its inquisitorial system.⁵⁶

3.2 The structure and functions of the criminal courts

The criminal courts can be divided in three categories: investigative courts, trial courts and courts for execution of sentences.

The investigative courts are chambers of the court of first instance and the court of appeal which have certain functions in the judicial investigation (investigation led by an investigating judge). They form the interface between the pre-trial investigation and the trial stage (the arrangement of the procedure according to article 127 CPC is done at this level). They generally have two sorts of tasks: firstly, controlling whether there are sufficient indications of guilt to bring the suspect before the trial judge (this does not imply a merits test), and secondly controlling the regularity of the investigative actions (this involves a check prior to that of the trial judge; irregular evidence can be removed from the file in this way).

A final important function of the investigative courts is to control the pre-trial detention. Suspects who have been placed under arrest by the investigating judge appear before the investigative court in first instance within five days: at this moment the legality of the arrest will be checked and a decision will be made on the necessity of extension of the arrest. This necessity check will be repeated every month (three months for the most severe crimes such as murder). The investigative court in appeal has similar competences (in degree of appeal) but also has a specific competence: to refer suspects to the Assise court (article 217 CPC); to control the investigating judges (e.g. by giving suspect the right to view the file or to order additional inquiries when the investigating judge has refused such a request); to control the regularity of the use of special investigative methods (observation and infiltration) by checking the 'confidential file' (which contains

⁵⁶ The Law of 20 July 1990 on the pre-trial custody and the adjustments of the Law on the Protection of Society by Law of 17 July 1990 were both the result of cases brought before the ECtHR.

information regarding the concerned informants and undercover agents or information regarding the special police techniques that were used) which is kept by the Prosecutor and which cannot be viewed by the parties (defence, civil party).

The trial courts are competent for judging the merits of the case: whether the facts are proven and which sentence should be imposed. The trial courts are divided into normal and special trial courts (a division which is based on the criteria used for determining the competence of the trial courts, namely the nature of the offence (*ratione materiae*), the capacity of the defendant (*ratione personae*) and the place where the offence was committed (*ratione loci*)). The normal trial courts (in first instance) are the police court, the correctional court and the Assise court (for the small number of most serious crimes, de facto involving murder or attempted murder)⁵⁷. Some (normal) trial courts act as appellate body, namely the correctional court (against the police court) and the court of appeal (against the correctional court). The special trial courts are the youth courts (first instance and appeal), the military courts in time of war, the court of appeal regarding cases against magistrates and ministers and the court of cassation (which supervises the correct application of laws and procedural guarantees and which can quash judgments, after which the case will be (fully or partially) retried before another court).

Since the Law of 17 May 2006⁵⁸, control on the execution of sentences is now in the hands of penitentiary courts. These courts will replace the former Commissions for the Protection of Society (which supervised the internment of mentally disordered delinquents), the Probation Commissions (which followed persons who had been given a suspended sentence or a suspension of sentence with probation) and the Commissions for Conditional Release (which took the decision on conditional release of convicted persons and supervised those conditionally released). The decisions of the new penitentiary courts will not be subject to appeal (only an appeal to the Cassation court).

3.3 Classification of offences

The classification of offences in the Belgian criminal justice system is based on the codification tradition. No person can be punished for an act which was not made punishable by law (*nullum crimen, nulla poena sine lege*). Although the different regions in Belgium (Flanders, Walloon, Brussels Capital) have legislative competence, criminal law has largely remained a federal issue (except for some specific domains such as youth protection law). The (federal) penal code consists of two books: the first book contains the general principles on offences and their punishment, the second book lists the separate offences and the sanctions. Both books are subdivided in titles and chapters.

The titles of the second book (offences) are as follows: I. Crimes against the state's security, Ibis. Serious violations of international humanitarian law, Iter. Terrorist offences, II. Crimes violating the rights protected by the Constitution, III. Crimes against public

⁵⁷ The public, political and academic debate on reforming the Assise court proceedings have been going on for several years with, up till now, very little progress (see e.g. P. DE HERT, "Hervorming van het Assisenhof: België blijft Slow", *Panopticon* 2006.1, 1-11).

⁵⁸ S.B. 15 June 2006.

faith, IV. Crimes against the public order, committed by public servants while exercising their function, V. Crimes against the public order committed by special persons, VI. Crimes against public security, VIbis. Crimes concerning the taking of hostages, VII. Crimes against the family and public morality, VIII. Crimes against persons, IX. Crimes against property, IXbis. Crimes against the confidentiality, integrity and availability of informatics systems (and the data contained in them), X. Misdemeanours.

A large number of offences are not defined in the penal code but in special laws. It often concerns laws on various subjects including technical matters (fiscal fraud, traffic regulation, the law on drugs, environmental crime, etc). The fact that there are thousands of laws containing criminal offences leads to a great complexity in practice and a very low transparency of the Belgian criminal law.

3.4 Initiation and processing of criminal proceedings

Criminal proceedings can be initiated in different ways. Firstly, a fundamental distinction has to be made between the investigation led by the prosecutor (which is the standard) and the investigation led by the investigating judge (judicial investigation). The police have the authority to deprive a person who has committed an offence or who is suspected of having committed an offence of his liberty for 24 hours. After this period the person has either to be released or to be placed into custody. If the prosecutor decides that the person should be placed into custody, he will request the investigating judge to issue an arrest warrant. The investigating judge is not obliged to follow this. He can decide to release the person (with or without conditions). When the investigating judge decides to place the person in pre-trial custody, the investigation automatically becomes a judicial investigation (the same rule applies when the investigating judge is requested to issue a warrant for a house search, a warrant for a telephone tap or to grant a witness full anonymity)⁵⁹.

At the end of an investigation, the prosecutor will decide whether, in his view, there are enough indications of guilt to bring the suspect before a trial court. In the case of a normal investigation (led by the prosecutor) the case will then be brought before the police courts or correctional courts by a 'direct summons'.⁶⁰ A direct summons can also be done by a civil party (which automatically brings the case before a trial court). A direct summons is only possible when there has been no judicial investigation. A judicial investigation can only be closed by an investigating court, which can refer the defendant to the trial court by a referral order.

⁵⁹ The Prosecutor has the possibility according to article 28septies CPC to request the investigating Judge to order another investigative measure (than these four) for which the judge is exclusively competent without initiating a judicial investigation. After the investigative measure has been executed, the investigating judge decides freely whether he sends the file back to the prosecutor or whether he continues the investigation himself (in that case it becomes a judicial investigation).

⁶⁰ In theory, persons can also be called to appear before a police court or correctional court through a 'notification by minutes' (article 216quater CPC) or an notification for immediate appearance (article 216quinquies CPC).

The most serious offences (*de facto* those where murder or attempted murder is involved) are brought before a jury (the Assise court). The investigating court in first instance cannot in itself refer a person to the Assise court but can refer the file to the Prosecutor-general (article 133 CPC). The Prosecutor-general then has the task of bringing the case before the investigating court in appeal. If the ‘accused’ is referred by the investigating court in appeal by an indictment, the Prosecutor-general has to make the formal ‘act of indictment’ in which the nature of the offence, the underlying fact and all possible aggravating or mitigating circumstances are contained.

When the case has been brought before the trial court, a date will be determined on which the case will be pleaded (the importance of the plea in criminal cases should not be underestimated; during the pleas one can often get a good indication of the court’s opinion).

Belgium does not have a guilty plea or expedited proceeding as in common law countries. Recently, however, the support for the introduction of such simplified proceedings has increased. The Antwerp Public Prosecution Office together with the Antwerp bar have been thinking and consulting quite some time on a ‘plea bargaining’ procedure. It concerns a simplified procedure for suspects who confess the facts, in exchange for which – with their consent – the trial stage would be limited to a debate on the sentence. Informal negotiations on the sentence would then be possible. Although this initiative has gained much support among practitioners, it is also criticized, especially among politicians (who do not see a legal framework for negotiating with criminals).

3.5 Administrative sanctioning of criminal conduct

The possibility for dealing with criminal conduct by administrative means in Belgium has existed for a long time in the special criminal legislation (e.g. administrative fines in the field of social legislation).⁶¹ Recently it was also introduced for a number of offences in the Penal Code which can now be punished by administrative sanctions.⁶² Some misdemeanours from Title X of the second book of the Penal Code were even removed entirely from the Code and can only be prosecuted if the communities have made these acts punishable in their regulations (e.g. not cleaning streets, fireworks abuse, vandalism, graffiti,...).

The administrative sanction is a fine with a maximum of 250 euro (125 euro for minors of 16 or older). The administrative procedure respects the rights of defence to a large extent (the administrative sanctions are punishments which fall under the scope of article 6 ECHR).⁶³ Apart from the fact that the sanctioning civil servants (who act as prosecutor and judge at the same time) do not offer the same guarantee of independence and

⁶¹ See generally: T. VANDERBEKEN, “Meer met minder? Over administratieve handhaving en strafrecht light”, *Orde van de Dag* 2003, afl. 24, 65-73.

⁶² Law of 17 June 2004 (S.B. 23 July 2004) which entered into force on 1 April 2005 and the Law of 20 July 2005 (S.B. 29 July 2005).

⁶³ P. DE HERT, K. MEERSCHAUT and S. GUTWIRTH, “Democratie en rechtsbescherming bij zeer lichte administratieve sancties”, *Panopticon* 2008.1, 1-10.

impartiality, it is generally accepted that the legal protection offered in this system is more than good. According to some the guarantees are somewhat exaggerated which complicates the procedure (to the same extent as a criminal procedure).⁶⁴

3.6 The immediacy principle

The Belgian criminal procedure respects, at least in theory, the immediacy principle: according to article 190 CPC the evidence must be produced at trial. In practice, the principle has little application however since the trial stage is often restricted to a verification of the evidence procured during the pre-trial investigation.⁶⁵ The proceedings before the trial court starts from and is based on the criminal file, which was drafted in a secret and non-accusatorial way. The (Franchimont) Law of 12 March 1998 improves this a bit, especially when the pre-trial investigation was carried out by an investigating judge, but the investigation at trial is still almost entirely dependent on the criminal file. The system of “purification of nullities” (see *infra*) during the pre-trial stage could strengthen this tendency even more. Only in Assise cases the immediacy principle still fully applies, but even then the criminal file dominates the proceedings, because the President will base himself on the file while leading the trial.

3.7 Mechanisms for excluding illegally or unfairly obtained evidence

When the judicial authorities abuse their authority or exceed their competence in procuring evidence, several sanctions are possible. The concerned investigators could be disciplinary prosecuted. The trial judge could allow a reduction of the sentence. Moreover, irregularly procured evidence can be excluded from the debate. In case of police provocation, the entire prosecution could be declared inadmissible (article 30 of the prior Title of the CPC). The most frequently used type of sanction in Belgium is the exclusion of evidence. Before 2003, the exclusion of evidence was strictly and frequently applied.⁶⁶

In a judgment of 14 October 2003, the Cassation court radically changed its view. The issue of irregularly procedure evidence in criminal affairs has since that moment been dominated by the Cassation jurisprudence, which is based on the following rules⁶⁷: in principle, the use of evidence (by the judicial authorities) that was produced through committing a crime, or by violating a criminal procedural rule, through violating the right to privacy or the right to human dignity, is not allowed. The judge can however only exclude irregularly achieved evidence if (1) the disrespect for certain formalities is sanctioned (by the law) by nullity or (2) if the irregularity affects the credibility of the evidence or (3) if the use of the evidence violates the right to a fair trial. According to this doctrine, the judge decides freely on the admissibility of irregularly obtained evidence in

⁶⁴ C. VAN DEN WYNGAERT, *o.c.*, 712.

⁶⁵ B. DE SMET, “Het onmiddellijkheidsbeginsel in het strafproces: een anachronisme of een waarborg voor een kwalitatief goede rechtspleging?”, *R.W.* 1996-67, 65-76.

⁶⁶ There was established case-law of the Cassation court since 1923.

⁶⁷ See, *inter alia*: Cass. 14 October 2003, *NjW* 2003, 1367; Cass. 23 March 2004, *Arr. Cass.* 2004, 518; Cass. 31 October 2006, *T. Strafr.* 2007, 53.

the light of the articles 6 ECHR and 14 ITCPR, taking into account the elements of the case as a whole, including the way in which the evidence was obtained and the circumstances in which the irregularity was committed.

This settled case-law (also called the Antigoon doctrine) is subject to much criticism (both among criminal defence lawyers and academic experts).⁶⁸ The legislator has not yet taken the initiative to codify the rules on exclusion of evidence in criminal cases.⁶⁹ The proposal for a new CPC has (for the first time) introduced a general regulation of exclusion of evidence which is far more strict than the current Cassation doctrine (a system of absolute and relative nullities would be codified - the number of absolute nullities would be much higher than at present - and the trial judge would be deprived of any margin of appreciation except for relative nullities).

It should be noted that there has been a recent tendency to exclude irregular evidence as early as in the pre-trial phase. A complex procedure for ‘purifying’ the criminal file has been introduced in this respect (articles 131, 135 and 235bis CPC). The most important actor in this procedure is the investigative court in appeal. The *ratio legis* for this procedure is logical: by clearing the file of manifestly illegal evidence, the debate on this issue is moved from the trial phase to the pre-trial phase (which is supposed to speed up criminal proceedings). The purification procedure in the pre-trial stage did not meet the high expectations and is even said to be counter-productive in practice.⁷⁰ The fact that the purification procedure has been maintained in the proposal for a new CPC has therefore been criticized.⁷¹

3.8 Producing evidence and interrogation of witnesses at trial

The prosecutor decides which evidence is to be produced, although the defence has the right to submit evidence of its own (which is then added to the criminal file). The defendant (as well as the civil party) has the right to ask additional inquiries to the Public Prosecutor (after the pre-trial stage has been closed but before the court hearing) or to the court itself. The court decides freely whether it orders the Public Prosecutor to execute the additional inquiry. If the court does not accept the request, the defendant has no possibility to appeal.

A suspect or defendant has always the possibility to gather evidence (*à décharge*) at their own initiative which can then be used in the criminal proceedings. The defence has the right to consult and use the reports of (unilaterally appointed) experts (e.g. psychiatrists) but the value of these reports cannot be compared to those of judicial experts. When the

⁶⁸ P. DE HERT, “De soevereiniteit van de mensenrechten: aantasting door de uitlevering en het bewijsrecht”, *Panopticon* 2004, 229-238; S. DE DECKER, Onrechtmatig verkregen bewijs in strafzaken: privaat domein?”, *Panopticon* 2007.2, 8-18.

⁶⁹ Although in December 2004 (without a qualitative public debate) the current Cassation doctrine was codified in regard of evidence procedure abroad, cf. article 13 of the Law of 9 December 2004 on the international mutual legal assistance in criminal matters (S.B. 24 December 2004).

⁷⁰ See e.g. R. VERSTRAETEN, “Recente ontwikkelingen in het vooronderzoek”, in D. VAN DAELE AND R. VERSTRAETEN (ed.), *Themis Straf(proces)recht, 2003-2004*, Brugge, Die Keure, 2004, 46 (108p.).

⁷¹ F. SCHUERMANS, *l.c.*, 40.

court orders a counter-expertise on request of the defence, the report of that expertise will count as a judicial expertise.

With regard to witnesses, the judge decides freely on the necessity and opportunity of hearing witnesses *à charge* and *à décharge* at trial⁷² (in principle the criminal file should contain all necessary evidence including statements of witnesses). The judge is obliged to indicate the reasons why he denies a request for hearing witnesses. The Assise court is an exception to this general rule: the defence and the prosecutor have an equal right to call witnesses. The defence thus has the right to call witnesses (any person can be summoned as a witness), but the court decides freely whether or not to hear the witness. If the witness is heard, the judge can determine which questions are allowed and firmly controls the examination of witnesses by the parties. This means that the judge usually asks the questions suggested by the parties, although in practice the judge sometimes allows direct examination of witnesses by the parties.

It can be questioned whether the fact that the President of the trial court has such an active role in the interrogation of witnesses (comparable to that of an investigating judge), is not incompatible with the duty of the court to make an impartial and unbiased judgment. Moreover, the fact that the interrogation of witnesses at trial by the defence is subject to such strict conditions, could be seen as incompatible with article 6.3.d ECHR.

4. Criminal justice professionals and institutions

4.1 The police

Before the police reform in 1998, the Belgian police was fragmented with various police corps with partially overlapping competences. This resulted in useful information concerning ongoing investigations not being shared between the police services. Several parliamentary investigative commissions revealed the manifest malfunctioning of the police services and urged that they were profoundly reformed. The Law of 7 December 1998 on the integrated police service⁷³ reformed the existing police corps into an integrated police service structured on two levels (local and federal).⁷⁴ This was combined with a general national database to which all police officials have access (article 44/4 Law on the police post⁷⁵).

The local and federal police function autonomously and depend on different public authorities. The local police are responsible for community policing. The Belgian territory has been divided into police zones which consist of one or more communities. The local police is led by the mayor (in case of single community zone) or the police

⁷² Cass. 3 October 2000, *Arr. Cass.* 2000, 1470.

⁷³ S.B. 5 January 1999.

⁷⁴ See W. BRUGGEMAN, "De politiehervorming: een (de) grote (grootste) uitdaging in de Belgische politiegeschiedenis", *Panopticon* 2001, 215.

⁷⁵ Law of 5 August 1992 (S.B. 22 December 1992) profoundly changed by the Law on the integrated police service.

college (in case of multiple community zones). The federal police are responsible for the specialised and national police tasks. It also prepares the national security plan. It consists of a commissary-general, a number of general directions and some decentralised services. It is led by the ministers of Internal Affairs and Justice. Besides the local and federal police, there are various other investigating civil servants competent under special laws (e.g. civil servants of the ministry of Agriculture, the ministry of Economic Affairs, the customs). These civil servants do not belong to the integrated police service.

The police have a double task: police officials have both administrative and judicial tasks. Their administrative tasks can be situated in the preventive supervision exercised by the police: maintaining public order, preventing crime and protecting people and their goods. The judicial police tasks aim at tracking and detecting offences and gathering evidence which can later be submitted to a judge. These tasks have a repressive nature, although the distinction with administrative tasks is not always easy. Police officers who detect an offence are not allowed to prosecute themselves: this is the monopoly of the Public Prosecutor's Office. In tracking and detecting crime, police officers will always act under the supervision of a prosecutor or an investigating judge (see *supra*). In some clearly defined cases (of light offences) however, there is a possibility for autonomous police action.

The police services are (internally) supervised by their respective public authorities for their administrative tasks and by the judicial authorities for their judicial tasks. A general inspection of the federal and local police has also been installed under the supervision of the Ministers of Internal Affairs and Justice.⁷⁶ Besides the internal supervision, there is also an external control on the police services by the Fixed Committee of Supervision on the police services (Committee P)⁷⁷ which is connected to a special investigative service. The Committee P can operate on its own initiative, on request of the parliamentary chambers, the competent ministers or competent public authority.

4.2 The Public Prosecution

Until the mid-1990s, the local public prosecutor's offices were largely independent from the executive power, functioned nearly autonomously and their policy was non-transparent. This was highly criticized and a number of parliamentary investigative commissions formulated a series of reform proposals (which resulted in the Laws of 22 December 1998)⁷⁸. The execution of these initiatives was far from easy to accomplish: the Higher Judicial Council was installed and the federal prosecutor was introduced; the horizontal integration was not realised and the vertical integration only in a weakened form.

The Public Prosecutor's Office (PPO) is competent for the general application of the criminal law. It is in charge of the pre-trial investigation and decides whether or not to

⁷⁶ See Royal Decree of 20 July 2001 (S.B. 18 August 2001).

⁷⁷ Law of 18 July 1991 regulating the supervision on the police and intelligence services (S.B. 27 July 1991).

⁷⁸ S.B. of 10 February 1999 and S.B. of 2 February 1999.

start criminal prosecution. It is responsible for evidence gathering (once the case has been brought before the trial judge) and it is responsible for the execution of the judgments. Members of the PPO are appointed and dismissed by the King (article 153 of the Constitution). Due to the fact that they are dismissible and relocatable and that they are part of a hierarchic corps, they are less independent than judges (which according to article 152 of the Constitution are appointed for life and non-relocatable).

Members of the PPO are obliged to follow the orders and instructions of the Minister of Justice. The hierarchic accountability of members of the PPO towards their superiors is limited to their superiors' written instructions. At trial, they are free and request the application of the law conscientiously (*"The pen is slave, the word is free"*). In practice this means that the hierarchical dependency of the prosecuting magistrate is most present during the pre-trial stage (where all requests have to be made in writing). The function of the PPO is said to be "one and indivisible": its members can replace each other during the course of a criminal procedure (this is different from the judge who has to be the same during the whole trial). In practice, a different assistant public prosecutor will be responsible for the qualification, the treatment of the case before the investigative court and the treatment at trial.

There is a prosecutor's department for each judicial district (27) which is led by a prosecutor. For each of the five court of appeals there is a prosecutor-general which is assisted by a number of advocates-general and assistants-prosecutor-general (which fulfill the role of public prosecutor during trial at the court of appeal). Together they form the Prosecutor General's Office (PGO). The prosecutor-general leads all prosecuting magistrates of his operational area and is also responsible for the general management of the prosecution department within this area (such as the coherent execution and coordination of the criminal policy, the integral quality care and overall support).

Since 1 May 2002, Belgium has a federal prosecutor who, together with his federal magistrates, forms the Federal Prosecutor's Office (FPO).⁷⁹ The federal prosecutor is competent for prosecution in certain cases (see articles 144ter and 144quater Judicial Code), coordinating the prosecution and facilitating international cooperation, and supervising the federal police. He is competent for the entire Belgian territory.

The 1998 Law introduced the principles of horizontal and vertical integration of the PPO. According to the horizontal integration principle, the prosecution in labour, commerce and fiscal cases would be exercised in priority by the prosecutors specialized in these domains. Because of the fierce resistance against this reform this initiative was cancelled.

According to the vertical integration principle, the magistrates of the prosecutor's department (attached to the courts of first instance) would be responsible for the entire prosecution, both in first instance as in appeal ('integral treatment'). The magistrates of the Prosecutor General's Office would, in principle, no longer prosecute but would only fulfill supporting and coordinating tasks. After a series of consultations the Law of 12

⁷⁹ For a detailed description see F. SCHUERMANS, "Naar een verdere uitbouw en professionalisering van het openbaar ministerie: het federaal parket", *Panopticon* 2001, 588-624.

April 2004 on the vertical integration was approved in which the vertical integration principle was almost entirely abandoned.⁸⁰ The magistrates of the Prosecutor General's Office thus continue to prosecute before the courts of appeal. The integrated treatment of individual, complex files by magistrates of the PPO together with magistrates from the PGO has however been made possible (article 138 Judicial Code). Public prosecutors are internally supervised by the prosecutor-general at the court of appeal (article 279 CPC). The external supervision is in the hands of the Higher Judicial Council.

4.3 Judges

Judges are nominated for life (152 Constitution). They are, contrary to public prosecutors, independent in the way that they do not belong to a hierarchic corps and are not accountable to anyone. Unlike public prosecutors, they cannot act *proprio motu*: they can only judge on cases brought before them by the prosecution and then only within the boundaries prescribed by law. The Higher Judicial Council nominates the candidates for appointments in the Bench, organizes exams and generally supervises the functioning of the judicial apparatus. The fact that judges are independent, does not mean that they cannot be evaluated and possibly sanctioned (if they do not function properly). Since the Higher Judicial Council law, judges and prosecuting officers are subject to the same evaluation system.

Investigating judges are appointed by the King out of the judges at the court of first instance (the first appointment being for one year, which can be renewed for two years and afterwards for periods of five years). The investigating judge is thus a normal judge with the same statute as his colleagues of the Bench. The internal supervision on investigating judges has been assigned by the Law of 12 March 1998 to the investigative court in appeal: this chamber supervises *ex officio* the progress of judicial investigations, can ask the investigating judge to deliver a report and can view the criminal files. If necessary, this chamber can even take over the entire investigation.

4.4 Criminal defence lawyers

Practising criminal defence lawyers have to belong to a bar association. At present there are two independent bar associations, one that covers all Dutch speaking local lawyer societies (Orde van Vlaamse Balies) and one that covers all French and German speaking local lawyer societies (Ordre des Barreaux francophones et germanophone). The former 'National bar association' does no longer exist (although some of its regulations are still applicable). Since the Law of 4 July 2001 these two independent bar associations are legally recognized.

In relation to criminal defence work, the provision of legal services is not limited to qualified lawyers and there are no minimum (quality of service) requirements placed on lawyers doing criminal defence work. Especially in the second line legal assistance system, this can be quite problematic since any lawyer-trainee (also those totally

⁸⁰ S.B. 7 May 2004; A. DE NAUW, "De tweede wet op de verticale integratie van het openbaar ministerie: bijna terug naar af", *R.W.* 2004-05, 1081-1089.

inexperienced in or even reluctant to doing criminal defence work) can, during his/her traineeship be appointed to an indigent defendant. This is often criticized due to the fact that some of these lawyers are simply not capable enough to protect the interests of their clients in (often) complicated criminal cases and also due to the fact that (a small number of) these lawyers seem more interested in gathering as many 'points' (read money) as possible instead of getting their client released from pre-trial custody (when a suspect is released from custody, he/she is no longer automatically entitled to legal assistance so the lawyer should get a new appointment on the basis of insufficient income).

Apart from this critical note – which should not be generalized – the competence of the average lawyer doing criminal defence work is good. Only a small group of law firms are capable to specialize (nearly exclusively) in criminal defence work.

5. The organisation of legal aid

The Law of 23 November 1998 has reorganized the legal assistance, which is now divided into first-line and second-line legal assistance. The legal framework consists of the articles 508/1 to 508/23 of the Judicial Code. The first-line legal assistance falls under the competence of the Commission for Legal Assistance and aims to provide a first advice to citizens seeking justice. These citizens can go the 'house of justice' where they are helped by lawyers. When a detailed legal advice is required, the citizens are referred to the Bureau for Legal Assistance (BLA) which is competent for the second-line legal assistance. The legal basis for these bureaus is article 508/7 Judicial Code which states that in order to provide assistance to indigents, the council of the local law society organizes such a bureau.

Every lawyer-trainee is obliged to cooperate with these bureaus during their traineeship (three years). Since 1 September 1997 lawyers who are listed on the roll of lawyers (tableau) can continue to cooperate with the bureau if they are registered. The aforementioned two regional bar associations have overall responsibility for the legal assistance. The decision for granting legal assistance is made by the BLA. The procedure is regulated in the Judicial Code (articles 508/7-508/12). A lawyer is appointed if, following a brief conversation with the person, the case is not manifestly unfounded and the conditions for granting the assistance are complied with.

Legal assistance can be granted following a request from the person concerned, or requests from courts, prison⁸¹, etc.⁸² When legal assistance is refused, the applicant can appeal against this decision before the labour court, within a month after notification of the decision. When legal assistance is granted, the applicant receives a document with the name and address of the appointed lawyer, the category under which he/she is appointed (fully or partially free of costs) and also a brief outline of the rights and duties of the

⁸¹ With regard to legal aid within prisons see: V. VAN DER ELST and F. TAMBORIJN, "Rechtshulp in de gevangenis", *Panopticon* 2003, 486-493.

applicant and, in case of legal assistance partially free of costs, the amount he should pay to his lawyer. The appointed lawyer is informed in writing (or in case of extreme urgency by telephone).

When the case is closed, the appointed lawyers submit a report to the BLA indicating the types of work done. The bureau accords points to the lawyer for each performance (the amount of points per performance are indicated in the aforementioned list of types of work covered by legal aid). The total amount of points of all local law societies are then communicated to the Ministry of Justice. After a possible check, the Minister then orders the payment of the lawyers.

Within the legal aid system in Belgium (especially second-line legal assistance) there is undoubtedly room for much improvement. Although they are the ideal mechanism for narrowing the gap between Justice and indigent citizens, the recent (legislative) efforts do not seem to have significantly improved the legal aid of weaker groups in society.⁸³

6. Rights and freedoms

6.1 The presumption of innocence

In theory the presumption of innocence is regarded in Belgium as one of the fundamental characteristics of the modern criminal justice system.⁸⁴ It applies from the moment on which a person is suspected and continues to apply until the criminal procedure has been closed by a final conviction.⁸⁵ A violation of this principle will however certainly not always lead to the nullity of a procedure. In some cases a violation will be easily remediable; in other cases the remedy will leave damage; in some cases the inadmissibility of the prosecution is the only suitable remedy.⁸⁶ The latter will only be the case when the breach of the presumption of innocence has irretrievably violated the right of defence, in other words when the later or higher jurisdiction can no longer repair the situation.

In some cases the reasons used to motivate a certain decision can disregard the presumption of innocence, for example the issuing of an arrest warrant by the investigating judge or the extension of the pre-trial custody by the investigative court in first instance: such breaches can be solved by the investigative courts (in first instance or in appeal respectively).

⁸³ See, *inter alia*,: L. DE SOMER, "Schematische weergave van knelpunten inzake kosteloze juridische bijstand", *Panopticon* 2002, 279-281; M. CLARYS, "Evaluatie twee jaar Wet betreffende de juridische bijstand", *Panopticon* 2002, 281-284.

⁸⁴ F. KUTY, *Justice pénale et procès équitable*, Larcier, 2006, Volume 2, nr. 1589.

⁸⁵ Cass. 19 May 1981, *Pas.* 1981, I, 1089.

⁸⁶ R. VERSTRAETEN and P. TRAEST, "Het recht van verdediging in de onderzoeksfase", *N.C.* 2008.2, 90.

Especially in a time where criminal law is a popular media product, it is evident that declarations of guilt in the press are very common.⁸⁷ The question rises whether such press campaigns could have procedural consequences. Although such a thesis could be motivated by jurisprudence of the ECtHR, the Cassation court has ruled – also in famous cases – that respecting the presumption of innocence is an obligation for the judges that have to make a judgment on the merits of the accusation and that this is judged by taking account of the proceedings as a whole; the circumstance that the presumption of innocence has been disrespected in the public opinion, does not imply that the trial judge has violated this same principle.⁸⁸

This viewpoint – that certain excesses or even the manifest negation by the press of the presumption of innocence do not lead as such to the nullity of criminal proceedings – is reasonable. This does not mean however that breaches of the presumption of innocence should not be dealt with.⁸⁹ Interim injunction proceedings could in some cases be an efficient instrument to accomplish this.⁹⁰

6.2 The ‘right to silence’

The right to silence is recognised in Belgium as an aspect of the right of defence.⁹¹ It is said to follow out of article 6.1 ECHR.⁹² This means, *inter alia*, that a suspect cannot be interrogated under oath. The suspect determines to which extent he makes use of this right (he can choose to answer some questions and not to answer other questions). There is no legal obligation requiring persons to be interrogated by the police (or investigating judge) to be informed of the right to silence.

The right to silence has not been found irreconcilable with the use of a polygraph if the concerned person has agreed to this voluntarily, if no pressure or force was used and if the person can decide to stop at any moment.⁹³ The person has to consent after being informed sufficiently. The same rules apply for those DNA analyses where consent of the person is required (which means, *inter alia*, that the person is informed of the reasons for taking the sample).⁹⁴

⁸⁷ See B. TAEVERNIER, “La présomption d’innocence et la médiatisation de la justice: une cohabitation précaire”, *Rev. dr. pén.* 2005, 33.

⁸⁸ Cass. 15 December 2004, A.R. nr. 9.04.1198.F.

⁸⁹ R. VERSTRAETEN and P. TRAEST, *l.c.*, 91.

⁹⁰ See the recent legislative proposal (submitted on 19 December 2007) adjusting article 587 Judicial Code with the aim to protect the presumption of innocence. This proposal intends to introduce the possibility (in the case of a violation of the presumption of innocence) to file an application on the basis of which the judged could demand the cancellation or withdrawal of disrespectful words or images or the publication of a rectifying press release.

⁹¹ Cass. 13 January 1999, Arr. Cass. 1999; F. KUTY, “L’étendue du droit au silence en procédure pénale”, *rev. dr. pén.* 2000, 309.

⁹² Cass. 11 March 1992, Arr. Cass. 1991-92, 657.

⁹³ Cass. 15 February 2006, R.W. 2006-07, 1039; S. VANDROMME, “Cassatie niet afkerig van leugendetector”, *Juristenkrant* of 7 June 2006 (nr. 131).

⁹⁴ Cass. 31 January 2001, Arr. Cass. 2001, nr. 61.

An important question is whether the right to silence can be used by a person who is interrogated in the framework of other procedures that could however lead to a criminal prosecution. The Belgian jurisprudence has repeatedly stated that when cooperation with the government can imply that a person would be forced to confess certain criminally relevant facts, this person can already use his right to silence in the non-penal procedure (in other words outside the framework of a criminal prosecution). This has already been applied in civil, fiscal and social cases. This does not seem to prohibit that the concerned person could no longer be interrogated.⁹⁵ If the investigating (non-judicial) authority would however be aware of a possible interference with a pending or planned prosecution, an explicit information regarding the right to silence seems an essential prerequisite.⁹⁶

6.3 The burden of proof

The prosecution has the principal task of producing the evidence. The burden of proof does not rest with the defendant (cf. the presumption of innocence). The risk of proof also rests with the prosecution: if there is reasonable doubt, the defendant will profit from it (cf. the *in dubio pro reo* principle⁹⁷). If the defendant claims a ground for justification (e.g. legal self-defence) or exclusion of guilt (e.g. coercion), the prosecution should prove the contrary. It is however required that the defendant claims this ground in a credible way: only then the prosecution will have the burden of proving that this claim is unfounded.

An legal exception to the burden of proof principle has been introduced by the Law of 19 December 2002. After a defendant has been found guilty, a special investigation on the criminal profits can be done with the aim of determining the profits for the purpose of a later confiscation (article 524bis CPC). The burden of proof is fundamentally different here. The criminal profits can be confiscated “*if there are serious and concrete indications that these originate from the crime for which the person has been convicted or from identical facts and the convicted person does not prove the contrary in a credible way*”. This does not in fact reverse the burden of proof, but only divides it. Only when the prosecution has made probable that the illegal origin of certain assets is credible, the defence has to prove that this is wrong. The ECtHR has not found this “division of evidence” in breach of the ECHR.⁹⁸

6.4 The right to a reasoned judgement

According to article 149 of the Constitution, judgments should be reasoned. Various legal provisions specify the obligation to make a reasoned judgment concerning the guilt and the sentence. The Cassation court has repeatedly ruled that the obligation of a reasoned judgment also implies that the judge should answer the defence that was brought forward

⁹⁵ R. VERSTRAETEN and P. TRAEST, *l.c.*, 99.

⁹⁶ Cass. 16 February 1996, *Arr. Cass.* 1996, nr. 82.

⁹⁷ Cass. 6 October 2004, *J.T.* 2005, 100.

⁹⁸ PHILLIPS/UNITED KINGDOM, ECtHR 5 July 2001.

in written conclusions.⁹⁹ The essential criterion applied by the Cassation court is that the judgment should meet the specific requirements of the applicable legal provisions: if this is complied with, there can be no reason to quash the judgment on the basis of (violation of) article 149 of the Constitution. The judge should investigate and answer the plea in law of the parties and not the arguments which support this plea.¹⁰⁰ Whether a certain defence is a plea in law or (only) an argument depends on the circumstances.

6.5 The right to appeal

The right to appeal is guaranteed in the Belgian criminal procedure, but is not absolute. Each party principally has the right to appeal but only concerning their own interests. This means, *inter alia*, that the public prosecutor can only appeal in regard of the criminal prosecution and not in regard of the civil claim¹⁰¹; the defendant who was acquitted cannot appeal; the civil party can only appeal in regard of its claim.

The appeal cannot harm the party-appellant. This principle however only applies when that party was the only appellant. If the public prosecutor appeals, then the sentence can become more severe. In that case there is an important exception to the principle that judgments should be made with an absolute majority: the judges can only decide to a harsher sentence by unanimity (article 211bis CPC). The unanimity requirement generally applies to all cases where the defendant's position on appeal is changed in an adverse way (e.g. a conviction after acquittal; an additional sentence is given (such as confiscation); imprisonment instead of internment; an effective sentence instead of a suspended sentence;...).

In principle, all judicial decisions are subject to appeal (provisional judgements as well as final judgments; judgments after trial as well as judgments in absentia). There are some exceptions however such as judgments of the Assise court and decisions of the penitentiary courts.

⁹⁹ F. TULKENS, "L'évolution des droits de la défense depuis un siècle", in H. BOSLY, G. DEMANET, J. MESSINNE and B. MICHEL, *Cent ans de publication de droit pénal et de criminologie*, Bruxelles, La Charte, 2007, 204.

¹⁰⁰ Cass. 18 December 2007.

¹⁰¹ Cass. 23 May 2001, *J.T.* 2001, 716.

7. Conclusions

The major issues and challenges for the criminal justice system over the next few years, including the major issues arising from the desk review and major prospective changes to the criminal justice system and/or processes.

8. Selected bibliography