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Trials by Peers: The Ebb and Flow of the Criminal Jury in France and Belgium

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Book chapter

Abstract

The participation of lay jurors in criminal courts has known much ebb and flow both in France and in Belgium. These two countries belong to the civil law tradition, where juries are the exception rather than the rule in criminal trials, and they only exist in criminal cases, not civil cases. In spite of some similarities, there are substantial differences between the two countries, and their systems will be examined in turn.

In France, the *Cour d'assises* itself was inherited from the French Revolution. Since a law of 1941, it is a mixed jury system, meaning that lay citizens sit together with professional judges, The *Cour* adjudicates severe crimes only, mostly rapes and murders. A pilot program extended lay participation to criminal courts beyond the *Cour d'assises*, but was stopped and resulted in the reduction of the number of lay citizens on the *Cour d'assises*.

In Belgium, the institution of the criminal jury in the *Cour d'assises* is enshrined in the Belgian Constitution. Up until 2016, it functioned as a "true" jury, in the sense that only lay citizens sat on the jury, without the participation of professional judges. A 2016 reform allowed for the reclassification of crimes into lesser offenses within the competence of the criminal courts, with very few exceptions. Additionally, from February 2016 on, judges deliberate with lay citizens on the guilt of the accused.

The paper will explain the reasons for these changes and evolution of the participation of lay citizens in the criminal jury in France and Belgium, and include a few remarks about the future for lay participation in these two countries, since there are several current proposals on the table, both in France and in Belgium.

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INTRODUCTION

The participation of lay jurors in criminal courts has known much ebb and flow both in France and in Belgium. These two countries belong to the civil law tradition, where juries are the exception rather than the rule in criminal trials, and they only exist in criminal cases, not civil cases. In spite of some similarities, there are substantial differences between the two countries, and their systems will be examined in turn.

In France, the *Cour d'assises* itself was inherited from the French Revolution. Originally, jurors sat alone, but the institution became a mixed jury system with a law of 1941, and since then, lay citizens sit together with professional judges. The *Cour* adjudicates severe crimes only, mostly rapes and murders. A pilot program extended lay participation to criminal courts beyond the *Cour d'assises* in 2011, but was stopped in 2013 and, as a collateral damage, resulted in the reduction of the number of lay citizens on the *Cour d'Assises*.

In Belgium, the institution of the criminal jury in the *Cour d'assises* is enshrined in the Belgian Constitution. Up until the 2016 reform, it functioned as a "true" jury, in the sense that only lay citizens sat on the jury, without the participation of professional judges. A 2016 reform allowed for the reclassification of all crimes to be judged by the criminal courts, with very few exceptions. Additionally, from February 2016 on, judges deliberate with lay citizens on the guilt of the accused.

The chapter will retrace the history of the French criminal jury, its recent reforms, the short experiment, and the current situation, including a comparative note with the U.S. legal system. It will then turn to the history of the Belgian criminal jury, its recent reforms which almost abolished the *Cour d'assises*, and the current situation which may lead to a resurrection of the jury. It will then explain the reasons for these changes and evolution of the participation of lay citizens in the criminal jury in France and Belgium, and include a few remarks about the future for lay participation in these two countries, since there are several current proposals on the table, both in France and in Belgium.

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FRANCE

I. History

The French criminal jury system is embodied in the *Cour d'assises*, which adjudicates severe crimes only, mostly rapes and murders. Its composition has changed many times (for a general overview, *see* Hans & Germain, 2011). The French *Cour d'assises* itself was inherited from the French Revolution as a reaction against the judges of the time who resisted any reform attempts ("Etude d'Impact," 2011). Concurrently, the standard of proof was changed, and the concept of *intime conviction* (inward conviction) replaced the rigid system of legal proofs used previously to convict people. The respective roles of judges and jurors also have evolved over the years. At first, lay jurors sat and decided cases independently. However, in the 19th and early 20th centuries, they were perceived to show too much leniency, the rate of acquittal rising to 40%, because they were afraid that the sentence would be too severe (Salas, 2001). With the Law of 1941, the jury became a mixed jury system, composed of professional judges sitting together with lay citizens to determine guilt and sentencing (Hans & Germain, 2011, 745). The *Cour* adjudicates severe crimes only. This mixed jury model of lay citizens and law-trained judges is referred to as *échevinage*. (Hans & Germain, 2011, 745)

The *Cour d'assises* is not a permanent court, but sits at regular intervals (Redon, 2013). The procedure for a jury trial begins when the Chamber of Indictment sends an indictment (*mise en accusation*) to the *Cour d'assises* in the department or geographical location in which the offense occurred. The 102 individual *Cours d'assises* hold court sessions every three months (Redon, 2013). They can judge all offenses connected to the principal crimes. The *Cour* judges only the most serious crimes, principally rapes, thefts with violence, and murders, ranging between 3,000 and 3,200 cases every year (Statistiques pénales 2005; Les Chiffres clés de la justice, 2016). A common practice has been the "correctionalization" or reclassification of crimes into lesser offenses which go to a criminal court with professional judges only (Hans & Germain, 2011, 748-49).

The *Cour d'Assises* is composed of six jurors, randomly drawn from the general population, and three professional judges (one being the president with special powers over the file and to direct the trial). Lay jurors and judges deliberate on the facts and the law and decide both the verdict of guilty or not guilty, as well as the sentencing. Any decision of guilt requires a two-third

majority of six votes by secret ballot if the decision is unfavorable to the accused. The sentencing decision is taken with the absolute majority of the votes, at least five votes, but the maximum sentence can only be given with a majority of six votes (Déroulement, 2018). After the *Cour d'assises* decides on the culpability, the professional judges, without the jurors, rule on the request for damages, if they have been requested by the *partie civile* against the accused, or by the defendant against the *partie civile*. This is because in France, the victim can join in the criminal trial as *partie civile.* (Hans & Germain, 2011, 157).

Also of note, there is a special *Cour d'assises* without lay jurors for terrorist crimes, and also drug trafficking, because of the fear of threats that might be proferred by the accused against the jurors ("Etude d'Impact," 2011).

II. Comparative note

A. Accusatorial vs. Inquisitorial Procedure

A comparative approach may help in providing some perspective and contrast. The French and U.S. jury trials are different institutions operating in different contexts (Garapon, 2003). The American jury is embedded in the Constitution and part and parcel of the fabric of U.S. law. The participation of lay jurors is circumscribed by special, rigid procedures, within the context of the adversarial trial. The American jury is used both for civil and criminal trials. The French jury is only used for the *Cour d'assises*. In France, the role of the trial judge is much more active, following the inquisitorial tradition. Even though the procedure at the *Cour d'assises* is oral and includes debates (*contradictoire*), the presiding judge (*Président*) has extraordinary powers. He/she is the only one with access to the file, has police powers, and acts like the conductor of an orchestra. He/she interrogates the accused and asks most questions. A fundamental part of the trial is that the accused is interrogated by the presiding judge, and encouraged to speak freely about his or her background, circumstances, and views (Hans & Germain, 2011, 752). The lawyers for each party have a much more limited and subdued role.

The *Cour d'assises* has to be considered in the way it fits into the French criminal procedure and court system. Whereas the procedure is adversarial in a common law country like the USA, France has a much more inquisitorial system. (Procédure Accusatoire, 2018). This different criminal procedure changes the dynamic of the court and the roles of the key actors, the lawyers for each side, the judge and the jurors in jury trials. The U.S. trial belongs to the parties. The French trial belongs to the court. In the U.S. trial, the lawyers control the trial with the accusatorial technique. The judge is an umpire. In France, there is no grand jury or oversight of indictment by lay jurors. The *Juge d'instruction,* that is, the investigating judge, plays a major role. (A Quoi Sert, 2012) in criminal and civil proceedings. The investigating judge must seek evidence in a case brought to his attention by the prosecution or a victim, thus beginning a criminal investigation. He/she must determine whether there is sufficient evidence to bring a case to trial either in the *Cour d'assises* or the *Tribunal correctionnel.* The investigating judge assigned to the case collects evidence on behalf of both the prosecution and defense (*à charge et à décharge*) before determining if a trial is warranted. In the United States, as a comparison, the investigation is led by the police and the prosecutor, and only on behalf of the prosecution. Unlike the United States, where criminal and civil proceedings are entirely separate, French

procedure allows for victims to join the criminal proceedings as civil parties in the case (*partie civile*). However , the civil verdicts are decided by the professional judges alone. The lay jurors play no part in it.

B. Mixed Jury/Echevinage

The terms of *échevinage, assesseurs, and jurés,* seem to be used interchangeably to define lay assessors (*citoyens assesseurs*), lay jurors, or even *juge citoyen*. Some commentators make a distinction between the lay juror who is selected at random from various lists, and the *échevin* who is elected and chosen because of a particular interest and competency. Some lay citizens are also recruited on a volunteer basis. The term *Assesseur* can be used to refer to a professional judge other than the President of the Court. *Echevinage* has been defined as a panel of non-professional judges and professional judges. The term comes from the Middle Ages. It is also used for the judges in commercial courts (Criminocorpus, Echevinage; Aubert & Savaux, 2012, 152).

In the French criminal courts, *échevinage* started in 1942 for the Tribunal for Children.(Etude d'Impact, 2011, 11). In that court, *échevinage* is different from the jury (*jury populaire*). It implies the recruiting of persons who show a certain interest and aptitude to judge minors. They apply for the position, are named for four years and chosen from a list of candidates presented by the presiding judge of the Court of Appeals. They are unpaid volunteers, but the days of hearings are reimbursed.

Lay citizens have also participated in another criminal court since the Law of March 9, 2004 instituted a Chamber of Implementation of Sentences at the appellate level. It is composed of career judges, but also of persons representing associations of reinsertion of convicted people and associations to help the victims (C. PR. PEN Art. 712-13, Herzog-Evans ch. 134.32).

In New Caledonia (an overseas territory of France) in the South Pacific, lay citizens sit on the Criminal Court (*Tribunal correctionnel*), probably because of the small population. They are unpaid volunteers, recruited for two year terms after verification of their impartiality and competence. (Le Tribunal Correctionnel, 2017)

III. Recent Reforms

Several important recent reforms have changed the procedure of the *Cour d'Assises*. One is an appeals process, and the other is the need to provide reasoned verdicts. In 2001, under pressure from the European Court of Human Rights (ECHR) for fair trial standards, France instituted a court of appeals, which is not really an appeal in the sense of a review of the verdict given in the *Cour d'assises*, but a new trial in an enlarged different Appellate *Cour d'assises* (Law of June 15, 2000). The presumption of the infallibility of the jury, as expression of popular sovereignty, justified for a long time the absence of a second level of review for crimes. In its reservation in the ratification of the Convention, France had declared that the review by a higher court could be limited to a control of application of the law, such as the review by the *Cour de cassation*

(Redon, nos. 535 et seq., 2013; Pradel, l'Appel, 2001). However, this gap seemed to be contrary to Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocol on the right to appeal, ratified by France in 1988, where Art. 2 stipulates: *« Everyone convicted of a criminal offense by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal*.» (European Convention on Human Rights.)

Statistics show that over a two-year period, some 1,262 appeals were heard. Of those, 5% who appealed were successful and were acquitted, but when the prosecution appealed the acquittals, 57% were overturned. Thus, prosecutors appear to benefit more from the "second chance" offered by the *Cour d'assises d'appel* (Hans & Germain, 2011,760).

Again, under the influence of the European Court of Human Rights for a fair trial, the issue of reasoned verdicts was raised in several cases. This means the written explanation of the reasons for the verdict. The Law of August 10, 2011 on the participation of lay citizens in criminal justice modified the composition of the *Cour d'assises* and instituted the obligation to provide reasoned verdicts (Redon, 2013, sec. 7; Pradel, La Cour, 2011a, 48). Furthermore, a decision of March 2, 2018 of the Constitutional Council requires a reasoned decision for the sentence itself. (Conseil constitutionnel, 2018)

The Law of 2011 inserted another change of note, in effect since 2012. The presiding judge now summarizes the facts, the indictment and the elements for the prosecution and for the defense for the jury, which makes it easier to understand the case, rather than having to listen to the text of the decision to send the case to the *Cour* (*Décision de renvoi)* which can be a very long document to read with technical terms.

It is thus notable that, under the influence of European human rights law, the popular jury has professionalized its procedure to be responsive to the notion of fair trial and intelligible procedure. (Conseil Constitutionnel, 2018).

The ebb and flow of the participation of lay jurors has manifested itself in the varying number of lay citizens on *Cour d'assises*. The number of lay citizens on the *Cour d'assises* has gone up and down over the years. The Law of 1941 had lowered the number of lay citizens from twelve to six, but other laws had raised it up to nine. Thus, up until 2011, three professional judges along with nine lay jurors decided together both on facts and on law, including the convicted defendant's punishment. The Law of 2011 changes the previous *minorité de faveur* (minority favor) for lay jurors. It reduces the number of lay citizens (jurors) in the first instance from nine to six, and on appeals from twelve to nine. The jury and a three-judge panel deliberate together. Defendants must be found guilty by at least a majority of six votes in the first instance and eight in appeals. The aim of this measure was to expedite the judgment of these cases, and taken in the context of the enlargement of using lay citizens in criminal courts beyond the *Cour d'Assises*. (Law No. 2011-939, Art. 13).

The reason behind this reduction came out of the the high-profile 2009 *Rapport Léger*, commissioned by French President Nicolas Sarkozy, which undertook a major re-examination of the French legal system (Léger, 2009). Among the most significant problems it identified were

lengthy delays for hearings at the *Cour d'assises*, which resulted in long periods of detention for defendants awaiting trial. As a remedy, the *Rapport Léger* proposed that the *Cour d'assises* be replaced with a new criminal court composed of professional judges and fewer lay jurors, and a more flexible and less formalist procedure than the current one. There was a proposal in 1996 by then Minister of Justice Jacques Toubon, to have a departmental *Tribunal d'assises* with three professional judges and five jurors. The appeals would have gone to the *Cour d'assises*, three professional judges and nine jurors, and decisions of guilt would have been taken with qualified majority, eight out of twelve votes. The proposal did not succeed. (Erhel, 1996). An alternative proposal called for the creation of a new "simplified" *Cour d'assises*, with two jurors instead of nine, to judge crimes up to twenty years of prison, with the hope to reduce the practice of correctionalization which requalifies certain crimes into delicts. It was defeated by a parliamentary commission of laws during the deliberations (Martinel, 2011) Several recent reports, the Léger and Huyghe reports can be consulted to shed some light and have some perspective on all these changes, as well as the current legislative proposal (Projet de loi de programmation, 2018).

IV. Extension of Lay Participation to criminal courts beyond the Cour d'assises

In 2011, the extension of lay participation to French criminal courts was presented in the context of security concerns, as the expression of a strong political will (Pradel, 2011b). Then President Nicolas Sarkozy saw it as a way to bring citizens closer to justice and to remedy a perceived leniency of judges in the face of recent scandals, including several murders by criminals who were recidivists and had been let go by judges (Brafman, 2012). In August 2011, Parliament voted the new law which was validated for the most part by the Constitutional Council. It provided for a pilot program which extended the participation of lay citizens to criminal courts beyond the *Cour d'assises*. (Pradel, 2011b; Huygue, 2011). This extension of lay citizens was limited to specific cases of serious thefts and violent assaults on persons punishable by five to ten years of imprisonment (De Charette, 2010). They could not judge drug crimes, pimping or less serious thefts. It provided that two lay jurors (*citoyens assesseurs*) would sit together with three professional judges in the criminal court (*Tribunal correctionnel*), and the Appeals Criminal Court. They were to participate in the determination of the qualification of the facts, the culpability of the defendant, and the sentence (Law No. 2011-939, Arts. 1, 5). The year was divided into three periods of four months. The lay jurors could sit ten times during four months. This extension of lay citizens was a major event, since it was estimated that it would potentially involve 6,000 to 9,000 lay jurors, and apply to some 40,000 cases out of some 600,000 cases in criminal courts in any given year (Huygue, 2011, 136-137).

French criminal law distinguishes three categories of offenses. In broad terms, crimes are a few very serious offenses such as murder and rape; *délits* are less serious offenses such as theft, fraud, assault, and involuntary homicide; while the last category, *contraventions*, include a large range of regulatory offenses often of strict liability. The *tribunal de police* has jurisdiction over the *contraventions*, while the *tribunal correctionnel* deals with the *délits*. Appeals from judgments of both these tribunals are heard by the *chambre des appels correctionnels*. The *cours d'assises* have jurisdiction over crimes. The *cour d'assises* comprises three judges and several lay jurors. (Pradel, 2010, 51-56).

In addition to introducing lay jurors in criminal courts, the Law of 2011 also introduced lay jurors in the following courts: Criminal Tribunal for minors (*Tribunal correctionnel des mineurs),* and Criminal Tribunal for Implementation of Sentences (*Tribunal d'application des peines*). In each, two citizens would deliberate with three judges to examine parole requests or their revocation for all sentences above five years of imprisonment (2011 law art 15). In the Court of Appeals for Implementation of Sentences (*Chambre d'application des peines de la cour d'appel*), lay jurors from the public were to replace specialized jurors.

The main objective of the Law was to associate French citizens with the judging of particular offenses. President Sarkozy stated: "In a Cour d'assises, a lay jury pronounces sentences with judges. And when deciding on early releases, it must also be a professional judge surrounded by lay jurors to make that decision…. And so there will no longer be any scandals." (Loi no. 2011-939, arts. 1, 5, Huyghe, 2011, 136-137). Sarkozy hoped that juries would be stricter than judges. The costs of this reform was estimated to be substantial, at some 40 million Euros. For that reason, it was decided to implement a pilot program in some jurisdictions before extending it throughout the entire French territory (Etude d'Impact, 2011). Thus, some of the provisions of the Law were only applicable in certain parts of France from January 1, 2012, to January 1, 2014, as an experiment. The citizens were chosen from a list of citizens registered for voting in the jurisdiction of the competent court, prepared by the mayor of that jurisdiction after a drawing (art. 1). The Law included a provision prohibiting discrimination against the citizens who participate in judging the offenses set forth by the Law or who are jurors (art. 9). The experiment started in the region of Dijon and Toulouse. It was extended to Angers and Béthune in January 2013.

The constitutionality of certain provisions of the Law had been challenged before the Constitutional Council; in particular, some of the provisions relating to minors. There were concerns that they violated the fundamental principles of juvenile justice. Those are the use of specialized courts, mitigated criminal responsibility due to age, and priority placed on educational rather than law enforcement measures. The Council found four articles of the Law unconstitutional, and those articles were deleted from the Law (Conseil Constitutionnel, 2011).

What were the reactions to the enlargement of role of lay jurors (*citoyens assesseurs*)? From a study I undertook of national and regional online newspapers and magazines which made regular references and comments (*Le Monde*, *Nouvel Observateur*, *le Figaro*, and *Libération*, among others) the public was generally favorable. Narratives from jurors showed that they were mostly happy, and were taking their responsibilities seriously. The legal profession, judges, and *avocats*, however, were mostly opposed to it (Rastello, 2012). The judges immediately reacted to it negatively through their unions, and saw it as evidence of a mistrust of their profession. (Neuer, 2012).

Some details of the plan for implementation in Béthune in the North of France illustrate some of the implementation difficulties. The presiding judge estimated the need for eighty lay jurors. Normally, they have about 1,000 cases per year in that area. Of those, about 300 qualified for lay jurors, "audiences citoyennes." The estimate was that three cases per hearing (*audience*) could be heard, that is, two or three times fewer than with professional judges. It would take longer time for a case, and fewer cases could be judged, because lay jurors need time to learn. One of three judges would need to summarize the case in neutral terms, sift through the expert reports and testimonies to help citizens understand the personality of the accused (Mastin, 2012). In between these trials, other cases needed to be adjudicated in other courts, and there was a fear to lengthen the delays (Mastin, 2012).

Judges and avocats were definitely against the new reform. An opinion poll in April 2012 showed that 82% of 5,000 avocats polled were against it because they felt that citizens did not have the technical skills needed (Lombard-Lathune, 2012) The unions of judges complained about it. Christophe Régnard, Head of the major Union (USM), said that it was a luxury and privileging a few cases to the disadvantage of other files, that it took a long time to choose the lay jurors. (Neuer, Bilan, 2012).

Early in 2013, the pilot program was extended to other courts, including the one in Béthune, in the North of France, and Angers, in the Loire Valley. However, things changed after the election of the Socialist government in May 2012. The new Minister of Justice Christine Taubira requested a report from two prosecutors. The two judges (prosecutors) wrote a report severely criticizing the pilot program of lay citizens in criminal courts in two courts of appeals jurisdictions in Dijon and Toulouse (Salvat, 2013). They said that it was extremely burdensome and costly and not adapted to bring the citizens closer to justice. Their arguments were that the decisions were not more severe, that the program had caused numerous difficulties, including the heavy load of annual selection, the management, the lengthening of the duration of hearings (3 cases in a citizen hearing against 12-20 in a normal hearing), their cost, (some 300 euros more.) They felt that the one-day training was not enough, and that the jurors depended too much on the professional judges for the technical part. The Report severely condemned the pilot program (L'Expérimentation, 2013). The pilot program was frozen, and not extended to other jurisdictions. Following the report, the Minister of Justice put an end to the experiment and the participation of lay citizens in criminal courts beyond the *Cour d'assises* (Arrêté, march 18, 2013).

The experimentation failed in large part because it was the result of bad relations between President Sarkozy and the judges who felt attacked and mistrusted. Christophe Régnard, the President of the Union USM, called the introduction of lay jurors in criminal courts « mistrust of judges » (Neuer, 2012).

After the end of that experimentation, the Minister of Justice commissioned four different reports on justice reform, and convened a major meeting in early 2014. The four reports issued did not provide for much in the way of lay citizen participation (Justice du 21ème Siècle). They did contain some proposals for specialized citizens, not those selected at random from the general population. These reports were followed by the Law on the Modernization of Justice, which does not mention the participation of lay citizens in criminal courts. (Justice du 21ème Siècle)

This raises the question of the attitude of the Socialist party vis-a-vis the citizens. In spite of the rhetoric, it seems that they mistrust the citizens. The Socialists and the leftist parties in general have an ambiguous attitude toward the participation of lay citizens in the justice process. During the 19th century, the left fought in favor of the *jurés populaires*, to extend their participation in civil and criminal matters, and to enlarge their representativity (Faure, 2011). But nowadays, the left has lost so much contact with the *classes populaires,* the people, that they tend to mistrust them (Faure 2011). Only a few socialists have expressed their favor for the *jury populaire*, that is, lay citizen participation. Andre Vallini is the most expressive. He was close to former President Francois Hollande, and named Secretary of the Territorial Reform during his presidency. On the topic of the jury, he is quoted as saying: "I have written in a 2008 book that I am favorable to the participation of citizens to the justice process. Not out of mistrust for judges, but to bring justice and the citizens closer to associate citizens to the act of judging is a work of pedagogy." (Reju ,2012) And then "the citizen does not know the procedure or fine points of the law. But the heart of the criminal trial rests

on essential questions, such as "does the accused lie? Is the accused credible? What are the reasons of the crime? Are there extenuating circumstances?" It is not with a diploma that one can answer these questions, but with one's conscience. Of course, judging is a profession. But I only see advantages in having a citizen sit together with professional judges in the *Tribunal correctionnel*." He nevertheless also said that the reform was done in haste and too costly.

Another consideration is the role, attitudes, and culture of judges in France, particularly since the inception of the National School for Judges. Created in 1959, the National Centre for Judicial Studies became the French National School for the Judiciary in 1972 (Ecole Nationale). It is located in Bordeaux and has premises in Paris. It forms the corps of judges and public prosecutors who serve on all posts on the bench as well as in the public prosecution in first instance courts. Judges are civil servants, paid during their studies, and forming an esprit de corps during their careers. They were allowed to form unions in 1968 to defend their working conditions and interests. The judges themselves express a strong mistrust toward citizens interfering with what they perceive to be their functions.

A recent book by a well-known *avocat* is a reflection on lay jurors and professional judges. The avocat is not generally favorable to lay citizens for a variety of reasons, but he accepts their participation as a way to legitimize the exercise of justice when it confronts crimes which emotionally shake a large number of citizens (St Pierre, 2013). His suggestions for improvement include a separation between the judges and prosecutors (*magistrats du siège* et *magistrats du parquet*). The public does not necessarily understand that their functions are different, because right now, they are trained in the same school and belong to the same profession (with the same unions for both professions). Another suggestion is to make the presidents of the *Cour d'assises* more legitimate, to have their nomination approved by the bar, and to make the hearings more objective by suppressing the president's role of grand inquisitor who pushes the accused to his/her very limits and then presides over the deliberations of the jurors. He regrets that the debates are not transcribed or taped (*but see* an evolution mentioned in the conclusion of this chapter), and that there is no camera in the court, as contrasted with the International Criminal Court. The author makes ten concrete proposals to preserve the popular jury inherited from the Revolution and modernize the procedure rules and give the jurors additional responsibilities vis a vis the professional judges, without removing the possibility for them to refuse a verdict of condemnation which would seem unjust to them.

V. Current Situation

In the spring of 2018, Justice Minister Nicole Belloubet introduced a legislative proposal, which would consist of taking a substantial number of cases away from the *Cour d'assises* (Jacquin, 2018). Currenly, the *Cour* judges severe felonies, murders, and rapes which incur a minimum of ten years to perpetuity. The criminal court (T*ribunal correctionnel*) adjudicates *délits*, such as theft, moral harassment, involuntary homicide. The *Cour d'assises* is composed of three professional judges, and a jury of six citizens (nine on appeal). The *Tribunal correctionnel* is composed of three professional judges.

The current proposal is for a *Tribunal criminel départemental*, an intermediary departemental criminal tribunal, distinct from the long established *tribunal correctionnel* (regular criminal court). This new *Tribunal criminel départemental* would be composed of five judges.

The proposal starts from the observation that certain crimes, such as rapes, are reclassified into sexual assaults, that is, a lesser offense, and go to the criminal court, the main reason being to allow for a faster judgement. The delays for a *Cour d'assises* trial can go over eighteen months, from the time the inquiry starts to the beginning of the trials. If there is an appeal, and the accused was put in preventive detention since the beginning, the wait can extend beyond the maximum duration of preventive detention which is four years, and they need to be let go with a possibility to flee (Egre, 2016). The delays are so long that France has been condemned several times by the European Court of Human Rights for violation of the rights of the accused. This new departmental criminal tribunal would judge crimes punishable from fifteen to twenty years of prison, such as rapes or thefts with weapons. These cases would be adjudicated by professional judges only, without any lay citizens. The appeals would go to the *Cour d'assises* Appeals Court. The most severe crimes would continue to be judged by the *Cour d'assises.* It is estimated that some 60% of the cases would be taken away from the *Cour d'assises* docket (Pradel, 2018). This new court will be experimented starting January 1, 2019, for three years, in test departments, before being generalized. The Ministry of Justice estimates that close to six out of ten cases would be affected. The legislative proposal has been the subject of an *étude d'impact*, and was reviewed by the *Conseil d'Etat* (Conseil d'Etat, 2018).

The reaction to this proposal is mixed. The judges are happy, one judges' union is favorable, the other one is not. The lawyers are not. Parliamentary debates were held in October, and the new court, renamed the "*Cour criminelle départementale*" voted by the Senate and National Assembly in November 2018, as part of a much larger law on justice reform (Projet de loi Programmation, 2018).

BELGIUM

I. History of Belgian Criminal Jury

The situation in Belgium is different from France. Belgium inherited the jury because Napoleon exported it to countries under his domination. It was suppressed in 1814 by King William I of the Netherlands, but then, after independence, the Belgian Congress inscribed it into the Belgian constitution in 1831, to make it harder to undo (Goffinon, 2011). Judges and the legislators never liked the jury much, but the institution of the criminal jury is still currently enshrined in the Belgian Constitution. Art. 150 of the Constitution states: "[T]he jury is established in all criminal matters and for political and press offenses, with the exception of those inspired by racism and xenophobia." (the Belgian Constitution).

Starting in the 19th century, however, similarly to France, the notion of extenuating circumstances allowed the courts to reclassify the crime into a *délit* to prevent the use of the *Cour d'assises* and send these cases to the criminal courts instead, without a jury. It happened as early as a law in 1838, and this was extended over the years sometimes even to crimes punishable by life imprisonment and forced labor or even death penalty. (Projet de loi, 2015, 267). At the same time, other laws lengthened the sentences allowed in criminal courts to ten, twenty, and even more years of imprisonment. (Projet de loi, 2015, 267-68). The justification by the Council of State legislative section was that the application of extenuating circumstances

was part of the criminal public policy of the legislature to individualize sentencing and to let the judge have discretion and decide sentencing within the limits of the law (Projet de loi, 2015, 268).

With regard to the provision in Art. 150 on "political and press offenses," the notion of political offenses and press offenses are so narrowly defined by case law that in practice hardly any political or press offense has been brought to the *Cour d'assises*. (Cour d'assises Belgium, 3). Press offenses inspired by racism or xenophobia were removed from the competence of the *Cour d'assises* by a law in 1999, and go to the criminal courts (Law of May 7, 1999; CPCP, 2016, 6).

Up until the 2016 reform, the criminal jury functioned as a "true" jury, in the sense that only twelve lay citizens took part in the jury for the culpability verdict, without the participation of professional judges. The latter only joined the jury for the deliberation on the punishment. There are eleven *Cour d'assises* in Belgium. The number of criminal cases brought to the *Cour d'Assises* is very low, some 83 cases per year between 2000 and 2013, as contrasted with some 50.000 to 55.000 criminal trials per year. (CPCP,2016, 7). However, these are usually sensational and emotional cases that are widely reported in the newspapers.

The *Cour d'Assises* like in France is not a permanent court. It sits any time an accused is sent there by the Chamber of Indictment. It normally sits in the provincial seat of the different provinces and in Brussels. The jury is composed of twelve jurors randomly drawn. A maximum of two thirds can be from the same sex. To become a juror, you need to be at least 28 up to 65 years old, write and read, and have no criminal conviction longer than four months, and enjoy civil and political rights. (Cour d'Assises Belgium, 6).

As contrasted with the French system where a two-third majority of the votes is necessary, a simple majority is enough for a verdict, but the judge can send the case to another court if he/she feels that the jury erred. (*Code d'Instruction Criminelle*, Art. 331) With regard to the wording of the instructions to the jury, one notes a major difference with the French jury, as the 2009 reform replaced the notion of "intime conviction" with the standard of "beyond a reasonable doubt." (Goffinon, 2011). Article 327 of the *Code d'Instruction Criminelle* replaces the old article 342, and is thus closer to the U.S standard of proof for guilt (Law Dictionary).

Up until 2016, the jury ruled alone only on the culpability of the accused. After the jury had delivered a guilty or not guilty verdict, they would get together with the professional judges (three of them, a president and two judges) to establish the sentence (Cour d'assises Belgium, 5) and to provide a reasoned verdict (Cour d'assises, Belgium 19). The reasoned verdict is a recent reform, pursuant to a 2009 law, passed as in France to conform with the European Convention on Human Rights norms for a fair trial. There is no appeals court yet, which is different from France.

II. Recent Reform

In 2016, Justice Minister Koens Geens orchestrated a transformative reform, fundamentally changing the *Cour d'assises* and leading to its suppression in practical terms (CPCP, 2016). It allowed for the correctionalization of all crimes, with very few exceptions, meaning that all of

them could go to the criminal courts, unless the prosecutor or the Chamber of Indictment decided that, because of the extreme gravity of the facts, the accused must absolutely go before a *Cour d'assises.* No criteria were specified for this choice of court.

Additionally, from February 2016 on, the three judges deliberate with the twelve lay citizens on culpability (Loi Pot-Pourri II), thus making the jury into a mixed system like in France. The judges' participation is deemed to be passive, as they do not vote on the guilt, only the jurors. The judges, however, deliberate and vote with the lay citizens on the punishment. Since Art. 150 of the Constitution has a specific wording on the nature of the jury, the Council of State was called upon to advise on the matter. Its interpretation is that it is up to the legislature to define criminal matters (Projet de loi, 2015). The reform also lengthened the maximum sentences to be given by criminal courts to forty years or life imprisonment. The rationale behind this reform was budgetary reasons. The first legislative proposal reserved some cases for the *Cour d'assises*, such as crimes against the police or minors. However, the Council of State decided that it would be discriminatory. Then, Justice Minister Geens decided that all crimes should be within the jurisdiction of criminal courts, the *Tribunal correctionnel*.

This reform was, of course, controversial and, as recent developments show, the situation is still fluid. There were some strong negative reactions to the announced suppression of the *Cour d'assises*, particularly from lawyers, and others concerned by the constitutionality of this reform. Critics argued that Art. 150 of the Constitution needed to be revised before these changes could occur; that the jury is a democratic institution, a protection against the abuse of the powerful; that it guarantees citizens' rights; and that the public is in favor of the jury for most severe crimes. However, the Justice Minister, the Judges' Union, and the High Council of Justice are all for the quasi suppression of *Cour d'assises*. Their rationale is the high cost, five times more than the criminal court, the complexity of cases, and the difficulty in providing a reasoned verdict.

In the summer of 2016, the Belgian Bar Francophone and Germanophone sections introduced an action before the Constitutional Court against some articles of the Law Pot Pourri II, arguing that the quasi-suppression of the *Cour d'assises* violated Art. 150 of the Belgian Constitution. (rdre des barreaux, 2016).

Faced with the strong negative reactions, in September 2016, Justice Minister Geens announced plans to end the *Cour d'assises* after December 2016 and replace it with a new Cour d'assises model, called "assises 2.0," which would consist of a criminal court with six jurors (rather than twelve), along with experts (psychologists, criminologists) who would sit next to the professional judges and assist them. The trial would be shorter, but would include open debates and testimony by witnesses and experts, in a way similar to the current *Cour d'assises*. The decisions could be appealed, which is still not the case in Belgium for *Cour d'assises* verdicts. This project was debated in commission, but then other events intervened (Wauters 2016).

III. Current Situation

The Constitutional Court ruled in December 2017 on the request from the Bar, and annulled several provisions of the new law Pot-Pourri II as unconstitutional, notably those which tend to say that the quasi-totality of crimes can now be adjudicated by criminal courts, and no longer the *Cour d'assises*. (Cour Constitutionnelle, 2017). It states that the government could not use ways to get around the Constitution in that way. The court also annulled the creation of sentences of up to forty years in prison and the possibility for criminal courts to sentence to prison for longer than twenty years. (lexing.be)

In the Fall of 2017, Justice Minister Koen Geens came up yet with another proposal, this time a new form of jury, consisting of three professional judges and four citizens, drawn at random (Geens, 2017) A major change would be that the members of the jury would be named for a set time, for instance for one year. Thus, a panel of lay citizens would be drawn at random and these would be one of the seven members of the jury, one or several times during the set time. This proposal is, of course, controversial again. Professor Benoit Frydman, President of the Perelman Center of Law Philosophy at the Université Libre de Bruxelles states that it is no longer a jury, but a new form of jurisdiction, and a way to get around the Constitution, that would probably be annulled by the Constitutional Council in the next year. (Frydman, 2018).

Stay tuned for further developments!

Conclusion: Analysis and Future Prospects

As we wrote in *The Jury at a Crossroads*, historically, the French and Belgian juries emerged as a product of the French Revolution. As such, they were seen as a way to fight arbitrary justice. In today's world, even though France and Belgium follow the rule of law, with independent professional judges, the participation of lay citizens retains an important symbolic and practical value that allows citizens to have a direct voice in the resolution of criminal trials. Public opinion is largely in favor of it and the public is attached to the institution of the jury. It is a good way for citizens to be involved in the justice system, so that they understand the issues better.

The various reform proposals and options presented in France and Belgium could lead either toward the practical suppression of the *Cour d'assises* and its replacement with professional judges, or toward a modernization and simplification of the procedure, or even a reappearance in a different form or formulation.

The biggest obstacle in Belgium is that the jury is inscribed in the Constitution. The efforts of Minister of Justice Geens to abolish it in almost all crimes led to a sanction by the Constitutional Court in December 2017. It is, however, very difficult to modify the Constitution. This is not the situation in France, where the jury is not mentioned in the Constitution or even considered a fundamental principle of the Republic, but the obstacle there is that public opinion is largely in favor of the institution. In both countries, everyone agrees that the cost of a jury trial is very high, and the hearings can be interminable because of the orality of the debates and the number of witnesses. In Belgium, several commentators and the Minister of Justice have called for an appeals court.

Some observations about France lead us to think that, considering the recent events, one cannot but note how the participation of lay citizens has been manipulated by political parties both on the right and on the left. Our analysis has also shown that there was a collateral damage as a result of the Law of 2011, in that jurors are now less well represented at the *Cour d'assises*, since their number was reduced and they no longer have a qualified minority to render verdicts.

The *Cour d'assises* in France has been tweaked over the years. Several measures have already been taken in France to improve the procedure and conform to the European requirements for a fair trial. They resulted in the obligation of providing a reasoned verdict both for the judgement and the sentence, and an appeals process to another *Cour d'assises*. In addition, the Law of May, 2014 implemented a Directive of the European Union concerning the right to information in criminal proceedings. With that law, the accused is allowed to stay silent during the trial (as well as speak and answer questions), and has a right to an interpreter; the parties now have the right to obtain documents from the file; and the proceedings have to be taped. This obligation to tape became optional with the law of 2016 (Law of June 3, 2016), at the discretion of the presiding judge, but compulsory at the appellate level. All these reforms negate the original principle of orality of debates, but make sense in today's age, and are consistent with contemporary European standards of fair trial procedure and the rights of the defense.

In both countries, some practical steps might help modernize and streamline the proceedings of the *Cour d'assises*. Steps could include more information shared with the lay jurors before the trial, more reliance on the written dossier (or file, written documents prepared ahead of the trial, including testimonies), and fewer oral testimonies, either the shortening of testimony by witnesses or not interviewing all the witnesses, there again relying on the written dossier where those appear. Access to the file by lay jurors has been proposed by several commentators, including judges involved with the *Cour d'assises*. This recommendation is, however, curiously set aside by the current French proposal, arguing that jurors do not have the time to read the entire file after they are selected because the trial starts right away and they may not have the competence to understand the legal side in any event (Projet de loi de Programmation, Etude d'Impact, 2018).

Some French judges experienced in *Assises* cases provided some advice in a 2015 report (Durançon, 2015, 697). They recommend less reliance on the orality of the debates, explaining that the orality principle corresponded to a time where the written word was considered to be one way to influence a lay juror often illiterate, but that it is no longer adapted to the requirements of speed and quality of contemporary criminal justice. They feel that access to the file would be useful in coming up with the reasoned verdict, which currently must be written without access to the file (*dossier d'instruction*). Jurors would like to verify information, the judges even are not allowed to see it, only the presiding judge. They also recommend a "lighter" procedure, which, with the agreement of all parties, could lead to expedited proceedings, limiting the testimonies of witnesses and experts, resulting in some cases being judged in one day hearings. This is to be contrasted with the current *Cour d'Assises* proceedings (hearings) which last a minimum of two days for simple cases, due to the orality of the debates and witness testimonies.

The number and respective roles of judges and lay citizens in a mixed jury matter. A higher number of lay citizens, for instance, is more costly, but a lower number means that they have less influence. Another recommendation is that jurors be appointed for a set time, e.g., one year, rather than just one session, and that some be drawn from the general population, but also include some specialists –experts, criminologists, etc. In Belgium, the proposal by the Minister of Justice Koen Geens of four jurors and three judges is an example of this. The *assises 2.0* model recently presented in Belgium offers a potentially useful alternative, with a mix of lay citizens, experts, and professional judges who can benefit from each other's perspectives and experience (Geens, 2017).

The proposal by French Minister of Justice Nicole Belloubet would do away with lay citizen participation in a substantial number of cases. It seems justified by the intention to provide better and faster justice, particularly in cases of rapes. Because of the reality of delays at the *Cour d'Assises*, many rape cases are currently downgraded to the regular criminal court. The *Cour criminelle départementale* would be different from a regular *Tribunal correctionnel* (criminal court) in its procedure, still to be determined, and with more judges, five, instead of three. It might be useful to give the victim the choice of choosing the *Cour d'assises* or that new *Cour criminelle*. The new court decisions could be appealed to a *Cour d'assises*, which involves lay citizens. The most severe crimes would still be within the competence of the *Cour d'assises*. It is a reasonable proposal, couched in terms of a pilot project. (Pradel, 2018)

One possible source of controversy in the future involves the notion of guilty plea (*Plaider coupable*) which was recently introduced in France and also in Belgium. In France, it can only be used for *délits*, and certain *délits* are excluded, specifically crimes of violences, threats, sexual aggressions, involuntary homicides, press and political offenses, etc. At least one commentator writes about the fear that one day it might be applied to rapes, etc. (Pradel, 2018). As we know, in the USA, many criminal trials end up in plea bargaining rather than jury trial. In France, however, guilty plea is not yet part of the French culture where there is a feeling that justice would not be rendered properly in the absence of a full trial.

In sum, in recent years, both in France and Belgium, the jury is a moving target, generating many current discussions, and much will happen in the next few years. Each country provides a good illustration of societal choices on who should judge, the extent of participation of citizens in the criminal justice process, democratic values, the tension between professional judges, the media and the public. The participation of lay citizens in the criminal justice process offers a fertile ground for discussion.

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