

The influence of the French Penal Code of 1810 on the Belgian Penal Code of 1867: between continuity and innovation

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Abstract

As soon as Belgium became independent, a will to reform the Napoleon Penal Code of 1810 emerged. In 1848, a reform commission initiated the reform process that will lead to the new Penal Code of 1867. Under the impetus of J.J. Haus, a penalist from the Ghent University, the revision process took a rather abstract and technical direction. Influenced by the dominating neoclassical penal thought, the new Penal Code of 1867 does not mark a clear rupture with the imperial Code of 1810. The text oscillates between reform and continuity, with a specific wish to correct the punitive excesses of the earlier text.

Introduction

Still a young European State today, Belgium was founded in 1830. Before the revolution, the Belgian provinces, previously under French dominion, were incorporated into the Dutch provinces between 1814 and 1830. Over the course of that period, the Dutch authorities attempted to reform the French Imperial Code of 1810. The *“Project of criminal code for the united Netherlands”* was met with resistance by the Belgian provinces, where it was viewed as a manifestation of the authoritarian power of the House of Orange (I). As soon as Belgium became independent, however, a will to reform the 1810 Penal Code resurfaced. Following the failure of the *Lebeau project* in 1834, a reform commission was constituted in 1848, under the direction of Jacques Joseph Haus, a penalist from Ghent University. Strongly influenced by the evolution of the French doctrine, the commission produced a text that would match the liberal spirit of the times and that was eventually promulgated in 1867 (II). Deeply marked by the neoclassical penal thought, this Penal Code of 1867 is first and foremost a technical work, centered around general principles of penal Law and concerned with promoting a penology that would be more humane than that of 1810. Thus oscillating between continuity and change, the new penal code clearly retains traces of the Napoleonic Code, striving mostly to soften its punitive excesses, and to weather its overarching utilitarianism (III).

1. The premises of the 1810 Penal Code’s reform during the Dutch period

Following the battle of Fleurus of 1794, France had annexed the Belgian provinces and imposed there its police and penal system¹. The Penal Code of 1810 came into effect in the Belgian provinces from that point on, and would remain in effect there for the next twenty years or so. Upon the fall of the French Empire in 1814, the Belgian departments were incorporated into the Dutch departments to form the “United Provinces”, placed

¹ L. Van Outrive, Y. Cartuyvels, P. Ponsaers, *Les polices en Belgique. Histoire socio-politique du système policier de 1794 à nos jours* (Bruxelles : Vie Ouvrière, 1992, p. 7-16).

under the Sovereignty of the Prince of Orange. The 1815 Vienna Treaty implicitly acknowledged the application, in Belgium, of laws in effect in the Netherlands². Among these laws, we find the Penal Code of 1810, whose application had been maintained in the Netherlands by a provisional decree of 11 December, 1813.

Very shortly thereafter, the fundamental law of the new Kingdom of the Netherlands of 24 August 1815 provided, however, the drafting of new codes, including a penal code³. The function assigned to the proposed new General Code was, in accordance with the codifying tradition⁴, directly political: its purpose is, thanks to "the introduction of a uniform national legislation ... to establish the new kingdom on solid grounds," with the belief that a new Dutch-inspired code would be "a powerful link between the various provinces" of the North and South of the country⁵

As part of this unifying project, a *criminal code project for the United Netherlands* was filed in 1815 (Stevens 1997, 295). This text, which included criminal law as well as criminal proceedings, ended up being a failure, mainly because of differences of opinion between Belgian and Dutch specialists. In the North, people were anxious to get rid of the French Penal Code of 1810, which was by and large rejected. In these provinces, the Imperial Code "reminded foreign domination that at home, more than elsewhere, was burdensome and unfriendly to the nation"⁶. In addition, the French codes had recently been introduced there and had not truly left their mark on the legal level. In the Belgian provinces, the French legislation was better assimilated. The 1810 Penal Code thus aroused less resistance there, and its useful elements were acknowledged. Moreover, the focus of the study of the new texts was their Dutch language version, "whereas a French translation ... would be too time consuming"⁷. The language barrier was not likely met with benevolence in the Southern Provinces, where the dominant language was French. Belgian lawyers were also critical of a text that included the reintroduction of incriminations and penalties of the Old Regime, whose "inhuman and arbitrary" character they denounced⁸, or which still caused some confusion between a substantive criminal law and criminal procedure.

The text did not only produce controversy among the specialists in charge of examining over a hundred of its articles⁹. It was also rejected by the general public opinion as well as by certain Belgian reformers, who would later play an important role in the country's legislation. These include, for instance, the future promoter of solitary confinement in

² *Pasinomie* (Bruxelles : Moniteur, 1814-1815), p.199.

³ *Pasinomie*, (1815), p. 333

⁴ Y. Cartuyvels, *D'où vient le code pénal ? Une approche généalogique des premiers codes pénaux absolutistes* (Bruxelles, Montréal, Ottawa : PUM, PUO, De Boeck Université, 1996).

⁵ J.S.C. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I., Bruxelles, Bruylant-Christophe, 1867, Introduction, II- III.

⁶ J.S.G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I., III.

⁷ J. Beltjens, *Encyclopédie du droit criminel belge, 1ere partie. Le Code pénal et les lois spéciales* (Bruxelles-Paris : Bruylant-Christophe et Marescq,1901), col. 1491].

⁸ J. Gilissen, "Codifications et projets de codification en Belgique au XIXe siècle (1804-1914)", *Revue belge d'histoire contemporaine*, (1983) p. 225.

⁹ F. Stevens, La codification pénale en Belgique. Héritage français et débats néerlandais (1781-1867), in X. ROUSSEAU, R. LEVY (dir.), *Le pénal dans tous ses états. Justice, Etats et sociétés en Europe (XIIe-XXe siècles)*, (Bruxelles : FUSL, 1997), p. 296.

Belgium, Edouard Ducpétiaux¹⁰. Moreover, the bottom line of the criticism—a denunciation of a set of "atrocious, vague, absurd, unintelligible laws, written in an arch, scholastic style"¹¹—was backed by the increasing hostility of the Belgian provinces to the authoritarian political evolution of the Dutch regime¹². Described as "hideous"¹³, the definitive draft of the criminal code for the United Netherlands¹⁴ filed in 1827 by the Dutch government, would be abandoned a year later, in 1828.

The Belgian revolution of 1830 finally put an end to the reform process of the 1810 Penal Code under the Dutch governance. Three additional factors may explain the failure of the reform attempt. First, the Dutch criminal code project does not reflect the reformist ideology looming at the time in Europe. The text appears at odds with the new trends of the time¹⁵. It remains, paradoxically, overly faithful to the legacy of the Napoleonic codes of 1809 and 1810. Leaving an important place to corporeal punishment (whipping, branding, public execution), it is still largely based on theories of intimidation and retribution that were increasingly questioned at the time¹⁶. Secondly, from a political perspective, the text is too closely tied to an authoritarian state power, which the Belgian southern provinces were seeking to overcome. A consensus between North and South over the promulgation of a new penal code was a perilous political undertaking at a time when independence fever was taking hold in the South. Finally, in the southern provinces, the proximity of language and acculturation to technical legislative drafting of the Penal Code of 1810 made this text a difficult monument to overcome: if plans to reform the text to fit the ideas of the time were envisioned, it was out of the question to outright eliminate it, at least not immediately.

2. The reform of the Criminal Code between 1830 and 1867 in Belgium between French influence and new ideas being circulated in Europe

2. 1. The lasting influence of France at the heart of a European movement

In France, the severity of the 1810 Penal Code was regularly questioned over the course of the following years¹⁷. The highlight of this development, *the 28 April 1832 Act amending the Penal Code*, carried two types of reforms that focused on punishment and reflected a new mindset: on the one hand, this law "humanized" sentences, removing punishment (stocks, branding, etc.) and decreasing the severity of punishment for

¹⁰ E. Rubbens, *Edouard Ducpétiaux*, 1804-1868 (Bruxelles : Louvain, Société d'études morales, sociales et juridiques, vol. I. et II, 1922), p. 35-49; J. Gilissen, "Codifications et projets de codification en Belgique au XIXe siècle (1804-1914)", (1983), p. 226-227.

¹¹ J. Savart, 1826, quoted in F. Stevens, *La codification pénale en Belgique. Héritage français et débats néerlandais (1781-1867)*, p. 298.

¹² E. Berger, D. Heirbaut, H. Leuwers, X. Rousseaux, "La justice avant la Belgique : tentatives autrichiennes, influences françaises et expériences néerlandaises (1780- 1830)", in M. De Koster, D. Heirbaut, X. Rousseaux (dir.), *Twee honderd jaar Justitie. Historische encyclopedie van de Belgische justitie. Deux siècles de Justice. Encyclopédie historique de la justice belge* (Brugge : Die Keure-La Charte, 2015), p. 44.

¹³ J.S.G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I.1867, introduction, p. III.

¹⁴ *Ontwerp-Wetboek van strafrecht. Verslag der handelingen van de tweede kamer der Staten-Generaal gedurende de zitting van 1826-1827, gehouden te Brussel, van 16 oktober 1826 tot 8 mei 1827, 1ste deel, n° XXIII.*

¹⁵ N. Hennequin, *Observations sur le projet du Code pénal du Royaume des Pays-Bas* (Liège : ed. Lebeau-Ouwerx, 1827).

¹⁶ J. Constant, "A propos d'un centenaire", *Revue de droit pénal et de criminologie*, 2 (1967), p. 92.

¹⁷ A. Chauveau, F. Helie, *Théorie du Code pénal*, T.I (Paris: Legrand, 1845), p. 25.

certain offenses. On the other hand, it 'correctionalized' certain indictable offences (in matters of theft and larceny) and extended the system of mitigating circumstances to all offences¹⁸. This law was actually a partial reform of the Penal Code of 1810, pending a more general reform of the latter¹⁹. It developed a movement of individualization of punishment that broke with the objectivism of the Penal Code of 1810. As Michel Foucault points out, "under the label of crime, what is judged are not only the legal objects defined by the code, but also, at one and the same time, passions, instincts, anomalies"²⁰. From behind the crime, the criminal individual emerges to seek a more just sentence, taking into account the guilt and moral responsibility of the author. The utilitarianism of the 1810 Penal Code is enhanced here by a moral principle, which takes into account the subjectivity of the author. As we will see below, the French reforms would often serve as a guideline for the early penal reforms and penal reform projects of the new Belgian state.

This evolution in France was the result of a neoclassical doctrinal current, borne in that country by authors like Guizot²¹, Rossi²² or Ortolan²³. Critical of the excessive severity of the Penal Code of 1810, the neoclassical doctrine sought a compromise between Benthamian utilitarianism, which dominates the imperial text, and Kantian moral retributivism. The logic of intimidation of the 1810 Penal Code was denounced on the grounds that it sometimes led to the setting of excessive sentences and, accordingly, to occasional excessive indulgence on the part of juries²⁴. The neoclassical school advocated therefore a first form of individualization of punishment which resulted in a reduction of sentences within existing criminal categories, both for reasons of justice and to favor effectiveness of sentences²⁵. This neoclassical thought found a wide resonance in Belgium, with Jacques Joseph Haus, the father of the Belgian Penal Code of 1867 and J.S.G. Nypels, one of the code's most enlightened commentators.²⁶ Rossi's *Traité de droit penal* (Treaty of criminal law), published in 1829, would become an important reference for the Belgian criminal neoclassical school. Moreover, in the 1830s, if the prison had definitely established itself as the ultimate form of punishment, it was the subject in France of heated debates that would also have an impact in Belgium. In France, Alexis de Tocqueville and Charles Lucas clashed on the pros and cons of the cellular model²⁷. Echoing the debate in Belgium, Edouard Ducpétiaux introduced the

¹⁸ A. Chauveau, *Code pénal progressif. Commentaires sur la loi modificative du Code penal* (Paris : rue Coquelière, 1832).

¹⁹ J.S.G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I., 1867, T. I, p. 19.

²⁰ M. Foucault, *Surveiller et punir. Naissance de la prison* (Paris : Gallimard, 1975), p. 22-23.

²¹ Fr. Guizot, *Des conspirations et de la justice politique. De la peine de mort en matière politique*, (Paris : Sautet-Alexandre Mesnier-J. Barbezat, 1822), (ed. Paris : Fayard, 1984).

²² P. Rossi, *Traité de droit penal*, (Bruxelles : Louis Hauman et Cie, 1829).

²³ J. Ortolan, *Cours de législation pénale comparée*, T. II, (Paris : Joubert, 1841).

²⁴ H. Donnedieu de Vabres, *Traité de droit criminel et de législation compare* (Paris : Sirey, 1947), 32.

²⁵ Y. Cartuyvels, "Légalité pénale, délégation au juge et habilitation de l'exécutif : le jeu pluriel des sources en droit penal", in I. Hachez, Y. Cartuyvels, H. Dumont, Ph. Gerard, F. Ost, M. van de Kerchove (dir.), *Les sources du droit revisitées. Vol. II, Normes internes infraconstitutionnelles* (Bruxelles : Anthemis-USL, 2012), p.66-67.

²⁶ J.J. Haus, *Les principes généraux du droit pénal belge*, 2 T. (Gand-Paris : Hoste-Thorain 1869); J.S.G Nijpels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I. (Bruxelles ; Bruylant-Christophe), 1867.

²⁷ See F. Digneffe, "Problèmes sociaux et représentations du crime et du criminel. De Howard (1777- à Engels (1845)", in Ch. Debuyst, Fr. Digneffe, J.M. Labadie, A.P. Pires, *Histoire des savoirs sur le crime & la peine*, vol. I (Montréal, Ottawa : De Boeck Université, 1995), p.185-190.

generalization of solitary confinement, arguing for its advantages in terms of atonement and moral reformation for the inmate²⁸. This new approach would also bear on the reform of the system of penalties in the Penal Code of 1867.

Lastly, the neoclassical period was also characterized by the development, in France and elsewhere in Europe, of the *legal technique* which influenced the numerous codifications carried out on the old continent.²⁹ In Belgium, this will to "improve the criminal legislative technique"³⁰ would clearly be present behind the Penal Code of 1867. This explains the decision to entrust the management of the reform to a top-flight technician, Jacques Joseph Haus. Haus chose to remain faithful to the main categories of the Penal Code of 1810, considered clearer and more concise than its legislative rival, the Bavarian Penal Code of 1813, inspired by Feuerbach. But the wish to produce a technical masterpiece in light of the Penal Code of 1810 would favor a refinement of various penal concepts, such as the principle of legality, offence attempt, concurrence of offenses or recidivism³¹.

The penal reform process in Belgium thus took place in a vibrant intellectual environment. On the one hand, it remained heavily influenced by developments of penalty in France, a country with which Belgium shares both a language and a penal tradition. On the other hand, it was clearly inspired by another "discourse of truth" on penalty³², carried by the neoclassical school that was also implanting itself across Europe at the time. The neoclassical discourse pushed indeed to reform the penal code in various European countries and to adapt penalty to the level of civilizational advancement of their respective countries. At that time, as Rossi points out, "everywhere work is conducted on penal laws; the luxury of codification is all over [us]"³³. And as Haus explained, the country should not stay behind in terms of the institutional and intellectual changes of the time : "It matters a great deal to Belgium, which has the most liberal political institutions of Europe, to follow the general movement (to) put into practice the theories that have been confirmed by the experience of other people."³⁴

In Belgium, the penal reform was thus marked by multiple influences. The French heritage was analyzed and discussed against the background of legislative changes at work there, but also with the desire to give place to home-grown liberal political thought and to new ideas regarding criminal law, which were blowing across Europe at the time. The influence of France remained important but was also diluted in a movement of broader ideas at the European level, something which was underlined by the call made by Haus regarding comparative law as inspiration for reform.³⁵ This eclecticism of

²⁸ L. Ducpétiaux, *Réforme des prisons. Système cellulaire* (Bruxelles : Victor Devaux et C°, 1865).

²⁹ Including in Russia (1845); Portugal (1852); Austria (1852); 'Germany' (1870); Spain (1870); the Netherlands (1881) or in Italy (1899).

³⁰ M. Ancel, *Réflexions d'un pénaliste étranger sur le Code pénal de 1867*, *Revue de Droit Pénal et de Criminologie*, 1967, n°2, p.121.

³¹ M. Ancel, *Réflexions d'un pénaliste étranger sur le Code pénal de 1867*, *Revue de Droit Pénal et de Criminologie*, 1967, p. 123- 124.

³² M. Foucault, *L'ordre du discours*, Paris, Gallimard, 1971, p. 20.

³³ P. Rossi, *Traité de droit pénal*, 3e ed., Paris, Librairie de Guillaumin, 1863, p. 23.

³⁴ "Rapport de la Commission chargée de la révision du Code pénal", *Annales parlementaires*, Chambre, session 1849-1850, p.325.

³⁵ One should "Take advantage of the experience of others and take from it all that is good and useful." (First report, corresponding to chapters I, II and III of the project comprised of the penal system, made in

influences explains in great part the future orientations of the 1867 Penal Code, which oscillated between continuity and change regarding the Napoleon Penal Code of 1810.

2.2. The political reform process: a doctrinal work in accordance with the spirit of the times

From the establishment of Belgium in 1830, the Belgian government considered, as did the Kingdom of the Netherlands in 1815, the revision of the existing codes. A few months after the revolution, the Constitution of 7 February 1831 foresaw, in its Article 139, 12°, the revision of the codes "as soon as possible". The process was conventional and emphasized once again the importance of the codifying instrument in asserting the political power of the State. Without waiting for the promulgation of a new code, a reform movement was quickly initiated in the field of criminal law, in order to respond to the proposed liberal society model of the new Belgian state. The Constitution thus reminded the cardinal principle of legality of crime and punishment (Art. 9), canceled general confiscation as penalty (Article 12), and abolished civil death (Article 13), seen as an "equally heinous and useless" punishment,³⁶ or even as an absurd leftover fantasy from another time³⁷. A few months earlier, a decree of the provisional government of 16 October 1830 had decriminalized violations of the right of association, invoking respect for "the sacred rights of the individual and political freedom"³⁸, while another decree of October 22, 1830 repealed the "surveillance de haute police" (high police surveillance) of the 1810 Penal Code, to control the convicts after their release. Revoked on the grounds that it favored an unduly security-oriented logic and undermined the reintegration of prisoners into society, high police surveillance would however be partially restored by a law of December 3, 1836, in view of the high numbers of recidivism.³⁹

From early on, thus, the liberal spirit inspired partial changes facing the authoritarian system of the Penal Code of 1810. In the spirit of previous change and inspired by the French legislation, a Belgian law of 29 February 1832 introduced the "correctionalization" of certain indictable offences for which the "Cour d'Assises" had the power to impose correctional penalties⁴⁰. The law was criticized by some commentators because it did not correctionalize enough crimes and was insufficiently liberal or progressive. In fact, its purpose was more pragmatic than philosophical, aiming mainly to unburden the Cour d'Assises from cases deemed unworthy of its time

the name of the government commission by Mr. J.J. Haus, and addressed to the Minister of Justice/Premier rapport correspondant aux chapitres I, II, et III du projet comprenant le système pénal, fait au nom de la commission du gouvernement par M. J. J. HAUS et adressé à M. le ministre de la Justice, in J. S. G.. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code penal belge*, T.I, (Bruxelles : Bruylant, 1867) p. 22.

³⁶ See E. Huytens, *Discussions du Congrès national de Belgique*, 5 vol. (Bruxelles : Société typographique belge, 1844), p. 668-669.

³⁷ J.J. Haus, *Observations sur le projet de révision du Code pénal présenté aux chambres belges, suivies d'un nouveau projet*, 3 vol. (Gand : De Buscher-Braeckman, 1835), p. 34.

³⁸ *Pasinomie* (1830), p. 35.

³⁹ J. Vanderlinden, "Le Code pénal belge entre 1830 et 1867", in *Mélanges offerts à Robert Legros*, (Bruxelles : U.L.B., 1985), p. 709-714.

⁴⁰ *Pasinomie* (1832), p. 272.

and intervention.⁴¹ Two years later, in 1834, a more ambitious reform bill was filed in the House, by the Minister of Justice Joseph Lebeau.⁴² Inspired by the French reform of 1832, the *Draft Penal Code of 1834* corrected the most glaring excesses of the 1810 Penal Code, such as banishment, deportation and stocks. But the text also intended to innovate by removing the death penalty for political crimes⁴³. Furthermore, it proposed the introduction of mitigating circumstances, with the twofold aim of finding a better balance between punishment and crime, and to optimize the effectiveness of the sentencing.⁴⁴ Behind a more humanitarian discourse, the project remained true to the spirit of the Penal Code of 1810, retaining the latter's general structure as well as its sequence of articles.⁴⁵ The text was abandoned a few years later, as a result of which a number of punishments (stocks, branding, mutilation) were officially still in effect, even if they were hardly ever enforced any more.⁴⁶

Faced with the reluctance of the judiciary, the draft Penal Code received scathing criticism, primarily from Haus. Published in 1835, his *Observations on the draft revision of the Penal Code presented to the Belgian Chambers, with a new project* was to play a key role in the reform process.⁴⁷ Behind his criticism of the Lebeau project, Haus indeed drew the pillars of the penal reform to come, as he conceived of and emphasized the new direction to be taken by a penal law in line with the progress of society in its fight against crime. Building on Rossi and his *Traité de droit pénal* published in 1829, Haus strongly criticized Bentham's utilitarianism and its dominance in the Penal Code of 1810, as well as its philosophy basing the legitimacy of the sentence only on the need to defend society against crime. Haus used harsh words in his critique of the Napoleon Code: "It is the basis on which the Penal Code rests which is vicious. This basis is utility, the only utility; as far as justice itself is concerned, it is trampled underfoot".⁴⁸ Anxious to limit the influence of the utilitarian function of punishment with a retributive function, and eager to reconnect "the just" and "the useful", Haus was also critical of the sentence's intimidation function, and sensitive to the principles of expiation and amendment at the heart of neoclassical criminal science.⁴⁹ The text is essential because, through these observations made in 1835, Haus actually devised "the matrix of the

⁴¹ J. Vanderlinden, "Le Code pénal belge entre 1830 et 1867", in *Mélanges offerts à Robert Legros*, (Bruxelles : U.L.B., 1985), p. 712.

⁴² J. De Brouwer, Jacques-Joseph Hauss et l'esprit de la réforme du Code pénal de 1810, *Journal des Tribunaux*, 2010, n°6413, p. 646.

⁴³ "If France preceded Belgium, in removing the death penalty for all crimes against property, Belgium shall outperform all of Europe, in proposing the deletion of the death penalty in all political crimes" (*Moniteur Belge* (9 octobre 1834).

⁴⁴ J. De Brouwer, Jacques-Joseph Hauss et l'esprit de la réforme du Code pénal de 1810, *Journal des Tribunaux*, 2010, n°6413, p. 646.

⁴⁵ J. Constant, "A propos d'un centenaire", *Revue de droit pénal et de criminologie*, (1967), p.95.

⁴⁶ F. Muller, X. Rousseaux, 2016, "Politiques et pratiques pénales à l'aune des transformations de l'Etat belge (1830-2012)", in M. De Koster, D. Herbaut, X. Rousseaux (dir.), *Twee honderd jaar Justitie. Historische encyclopedie van de Belgische justitie. Deux siècles de Justice. Encyclopédie historique de la justice belge* (Brugge : Die Keure-La Charte), 2015, p. 194.

⁴⁷ J.J. Haus, *Observations sur le projet de révision du Code pénal présenté aux chambres belges, suivies d'un nouveau projet*, 3 volumes (Gand : De Buscher-Braeckman, 1835).

⁴⁸ J.J. Haus, *Observations sur le projet de révision du Code pénal présenté aux chambres belges, suivies d'un nouveau projet*, p. 25.

⁴⁹ J.J. Haus, *Discours prononcé par M. J.J. Haus, recteur de l'Université de Gand, à la réouverture des cours, le 10 octobre 1865. Du principe de l'expiation considéré comme base de la loi pénale*, (Gand : C. Annoot-Braeckman, 1865).

Explanatory Memorandum of the 1867 Penal Code".⁵⁰

While referring to the progress of the "science of criminal law," a Royal Decree of May 1st, 1848, commissioned the examination of the 1834 draft. The aim was to "identify gaps revealed through the experience of recent years" (Article 1) in the *Projet Lebeau* and to propose a new project on this basis. In the minds of the authorities, the reform of the Penal Code of 1810 was still a priority, but one which took into account both the new neoclassical spirit that dominated criminal science in Europe and the lessons of case law that had developed in Belgium since 1830. Theory and empirical practice had to nurture the spirit of the reform in equal part. In fact, the central role given, within the Committee, to J.J. Haus⁵¹ would guide the work of the commission towards an essentially scientific approach. In 1867, the new text that some also called the "*Haus Code*" at the time⁵² would leave very little room to the teachings of Belgian case law. To such an extent that some evoked the hypothesis of a "divorce" between the essentially doctrinal work of Haus (supported by Nypels, another brilliant academic partner in the reform process) and the Belgian case law, especially that of the "Cour de Cassation", de highest jurisdiction in Belgium, often more repressive or even at odds with the "spirit of time" that inspired the drafters of the new code.⁵³ What is significant in any case is "the almost total absence of reference to case law and, more broadly, to judicial practice" in the project.⁵⁴

Under the impetus of Haus, the revision process of the 1810 Penal Code took a rather abstract direction. The work is mostly devoted to technical issues on various general principles of criminal law, leaving little room for discussion of political and social issues, conflicts of interests and values that are usually to be seen behind a Penal Code's set of offences and penalties. Prepared by a committee of experts, the Book I project, dealing with general principles of criminal law, was presented in two parts to the House of Representatives, on 14 December 1848 and 20 March 1850. Subject to discussion, the draft was forwarded to the Senate and then returned to the House, before being definitively adopted by the Senate on March 11, 1853. Overall, the political discussion did not significantly change the draft of the commission, largely designed by Haus. At most, one can discern a marginally more progressive tendency in the House of deputies, where some members tried to increase the liberal nature of the project on technical points, while the Senate adopted a somewhat more conservative approach.⁵⁵ Book II, entitled *Des infractions et de leur répression en particulier* (*On offences and their punishment in particular*) was presented to the House on January 20, 1858. Dedicated to special criminal law, or the incriminations and their penalties, Book II was also the subject of a long process of discussion in the House and Senate before being definitively adopted in the Senate on May 17, 1867. Initiated with the critical reaction of Haus to the

⁵⁰ J. De Brouwer, Jacques-Joseph Hauss et l'esprit de la réforme du Code pénal de 1810, *Journal des Tribunaux*, 2010, n°6413, p. 646., p.647.

⁵¹ J.Y. Dautricourt, "Les auteurs du Code Pénal belge de 1867? Jacques Joseph Haus (1796-1881), Jean-Servais-Guillaume Nypels (1804-1886), *Revue de droit pénal et de criminologie*, 1967, n°2, pp. 79-85.

⁵² *La Belgique judiciaire*, 1881.

⁵³ J. Vanderlinden, Le Code pénal belge entre 1830 et 1867, in *Mélanges offerts à Robert Legros*, Bruxelles, U.L.B., 1985, 1985 p. 724.

⁵⁴ Fr. Tulkens, M. van de Kerchove, Y. Cartuyvels, Ch. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, (Diegem : Kluwer, 2014), p. 108.

⁵⁵ J. De Brouwer, Jacques-Joseph Hauss et l'esprit de la réforme du Code pénal de 1810, *Journal des Tribunaux*, 2010, n° 6413, p. 650.

draft proposed by Lebeau in 1835, the reform process had been in the making for 32 years.

3. The Belgian penal code of 1867 and the imperial code 1810: between continuity and change

3. 1. A technical work, centered on the general principles of criminal law

From the outset, the Penal Code draft proposed by Haus wavered between revision and reform. Anxious to mark the importance of the break with the past, Haus first stated that the 1810 Criminal Code needed to be "completely overhauled" and that the adaptation of Belgian criminal law in the new liberal political project implied "a complete reform of our criminal law" whose mindset must clearly distance itself from the "excessive severity" of the Napoleonic Code.⁵⁶ But this clear position was immediately tempered by the assertion whereby the Commission draft was not intended as a "review of our criminal laws" and that Haus did not claim to create "an entirely new code." It would indeed be "foolish to topple the substantive criminal code from top to bottom and replace it with an entirely different system, for the sake of creating national legislation only." It was therefore no longer a question of replacing the 1810 Penal Code system by an entirely new one, but merely "to correct its defective parts and to fill in its gaps."⁵⁷

Haus took over the reformist philosophy from its inception in Belgium - the Lebeau project - while developing the project further. If we look at the structure of the Code and its general principles, elements of continuity with the Imperial Code are clearly preserved. Thus, the 1867 Penal Code maintains the tripartite structure of incriminations from the Penal Code of 1810, although it inverts the order of presentation. Admittedly, this tripartite division (crime, delict, contravention) was rejected by some foreign codes⁵⁸ and questioned at the time in Belgium on behalf of its "strictly formal" relevance.⁵⁹ But Haus stressed the fact that this structure, which governed the hierarchy of incriminations based on the applicable penalty, was found in various European codes of the time (in France, Italy, Germany or even the Netherlands). He also emphasized that, on a scientific level, one could not formulate "any serious objection" to this "practical division, so intimately related to our judicial institutions that it can't be erased from our criminal laws."⁶⁰ Similarly, various general principles of repression were derived in straight line from the Napoleonic system, such as the system of aggravating circumstances in case of criminal participation, or Article 71 of the Penal Code with respect to criminal responsibility, the latter article being directly modeled on the famous Article 64 of the Code of 1810. Finally, with regard to incriminations,

⁵⁶ "First report, corresponding to chapters I, II and III of the project comprised of the penal system, made in the name of the government commission by Mr. J.J. Haus, and addressed to the Minister of Justice", in J. S. G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code penal belge*, T.I, (Bruxelles : Bruylant, 1867) p. 18-21.

⁵⁷ Ibidem, 23.

⁵⁸ M. Ancel, *Réflexions d'un pénaliste étranger sur le Code pénal de 1867*, *Revue de Droit Pénal et de Criminologie*, 1967, n°2, 1967, p. 117.

⁵⁹ A. Prins, 1889, *Science pénale et droit positif*, (Bruxelles-Paris : Bruylant-Marescq, 1889), no. 145.

⁶⁰ "Explanatory Memorandum made in the name of the government commission by M. J.J. Haus and to the attention of M. the minister of Justice", in J.S.G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code penal belge*, 1867, II, 26. On this issue, see F. Bartholeyns, Ch. Guillaïn, "La division tripartite des infractions", *Journal des Tribunaux*, 6413, (2010), p. 654-658.

qualifications were regularly maintained.⁶¹

However, a number of inflections are noticeable, which clearly mark a formal evolution compared to the 1810 Penal Code. Thus, the 1867 Code was structured in two parts and not four, as had been the case for the 1810 Code, or the Lebeau project from 1834, which had remained faithful to the imperial code in this respect. In so doing, the Penal Code of 1867 revived the tradition of some traditional criminal codes of the absolutist period⁶² and the mathematical spirit of a qualitative ideal of codification carried by the Natural Law School from the late seventeenth century.⁶³ Reviving the thread of a project inaugurated by Leibniz in the German Empire⁶⁴, Haus considered the Code as a logico-deductive whole, with a strong articulation between the general principles of Book I and the incriminations and penalties of Book II. In this perspective, the importance of Book I, dedicated to general principles, becomes essential, since its construction would determine the application of incriminations and penalties *in concreto*. Also, where the 1810 Penal Code was mainly devoted to the question of specific incriminations and penalties, the Code of 1867 "would reverse the order of priorities"⁶⁵, demonstrating a central interest to the technical discussion of the general principles of criminal law contained in Book I. The rules relative to criminal participation, to the causes of justification, to excuses, to concurrence of offences or even still to recidivism, are also the subject of much further development than in the Code of 1810, without falling into the traps of an overly complex criminal casuistry. In this regard, the Code of 1867 is a true manifestation of neoclassical thought, featuring both its advantages and disadvantages: while the text is distinguished by a concern for technical perfection, the focus on the question of "how to punish" is sometimes overly deployed to the detriment of the political question of "why" and "wherefore" punish.

3. 2. A humanist penology, faithful to the neoclassical spirit

Some twenty years after the enactment of the Criminal Code of 1867, A. Prins, one of the founders, alongside Dutchman Von Hammel and German von Litz, of the *International Union of Penal Law*, emphasized its anthropological matrix. This Code, Prins said, is "a work of optimism and humanity, hope and faith in the perfectibility of man"⁶⁶. In so doing, the 1867 Code contrasted with the spirit of the Penal Code of 1810. But – as Prins implicitly highlights – the text is also out of step with the new security-oriented scientism embodied by the Italian positivistic school and the movement for social defense emerging in the late nineteenth century in Belgium and Europe.⁶⁷

This humanistic optimism, which aroused both the respect and distrust of Adolphe

⁶¹ M. van de Kerchove, "La peine, de 1810 à 1867, entre continuité et changement", *Journal des Tribunaux*, 6413, (2010), p. 678.

⁶² Y. Cartuyvels, *D'où vient le code pénal ? Une approche généalogique des premiers codes pénaux absolutistes*, (Bruxelles, Montréal, Ottawa: PUM, PUO, De Boeck Université, 1996), p. 135-296.

⁶³ C. Varga, "Utopias of rationality in the development of the idea of codification", *Rivista internazionale di filosofia del diritto*, 1, (1978), 21-38.

⁶⁴ Y. Cartuyvels, "Entre la règle et le cas : réflexions sur les raisons et les impasses d'un modèle géométrique du droit", *Revue Interdisciplinaire d'Etudes Juridiques*, 76, (2016), p. 191-194.

⁶⁵ Fr. Tulkens, M. van de Kerchove, Y. Cartuyvels, Ch. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, (Diegem : Kluwer, 2014), p. 98.

⁶⁶ A. Prins, *Science pénale et droit positif*, (Bruxelles-Paris : Bruylant-Marescq), 1889, p. 98.

⁶⁷ F. Tulkens, (dir.), *Généalogie de la défense sociale en Belgique (1880-1914)*, (Bruxelles : Ed. Story-Scientia, 1988).

Prins, is reflected in the fate of certain general principles on temporal/motivational concurrence, causes of justification, attempted offence, or criminal participation, for which the new Code introduced rules that refined and generally softened repression. Furthermore, in terms of incrimination, a large number of indictable offences saw themselves downgraded to summary offences, resulting in mitigation of punishment by the judges *in concreto*.⁶⁸ So that, while retaining the architecture of the Criminal Code of 1810, the 1867 text modified the items that "bore the stamp of excessive severity."⁶⁹ But it is particularly with respect to the level of punishment that the evolution is the sharpest. Succeeding the 1810 Penal Code, the 1867 Code deleted the term "afflictive and defamatory punishment", replacing it by "criminal penalty". Following once more the French penal reform of 1832, the 1867 Code officially abolished several "afflictive" corporal penalties.⁷⁰ This is the case of amputation of the hand in case of parricide, deportation, or general confiscation, deemed "unfortunate legacies of barbarous times, many of these sentences imbued with cruelty, which our milder manners have forever postponed."⁷¹ As for the death penalty, even if it was not formally abolished in political matters, the will for its more general abolition made progress. First, the 1867 Code restricted its application "within limits that had not been admitted by the Code's revision in France in 1832".⁷² And secondly, the reform commission, true to the vision of Haus on this point⁷³, expressed the hope that it "will be applied increasingly scarcely, so that the future generations may complete the abolition of this repressive means."⁷⁴ As for "defamatory" penalties, many of them were deleted, because of their stigmatizing character, and their counter-productive nature in terms of reintegration of the convict after he/she had finished to serve the sentence. Again, the weight of the French doctrine played a significant role⁷⁵ and compelled the authors of the Criminal Code of 1867 to eliminate altogether branding, civic degradation, public exhibition or stocks.⁷⁶

In general, the softer penology of the 1867 Penal Code is marked by a double influence. On the one hand, thinking about the foundations and purposes of punishment had changed dramatically. Punishment was no longer conceived for its sole function of intimidation, as in the Penal Code of 1810. It now included a concern for the criminal's atonement, but also "a new principle, namely the amendment of the condemned," which "now dominates the making of the criminal laws of all civilized nations. " This new corrective perspective "required a radical change in the penal system of the 1810

⁶⁸ J. Constant, A propos d'un centenaire, *Revue de droit pénal et de criminologie*, 2, (1967), p. 112.

⁶⁹ Explanatory Memorandum made in the name of the government commission by M. J.J. Haus and to the attention of M. the minister of Justice, in J.S.G. Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code penal belge*, T.I, (Bruxelles : Bruylant, 1867)T. II, p. 18.

⁷⁰ M. van de Kerchove, "La peine, de 1810 à 1867, entre continuité et changement", *Journal des Tribunaux*, 6413, (2010), p. 679.

⁷¹ Report made in the name of the commission by M. Adolphe Roussel, *Parliamentary Documents Chamber* 2 of July, 1851, n°245, p. 12. One will note that, while most of these penalties were abolished in France in 1832, the expression "afflictive penalty" was maintained up until 1992 (M. van de Kerchove, 2010, 679).

⁷² L. Thésard, *De la revision du Code pénal en Belgique* (Paris: 1867), p. 15.

⁷³ see J.J. Haus, *La peine de mort - Son passé, son présent, son avenir*, (Gand : Hoste, 1867), p. 139.

⁷⁴ Report made in the name of the commission by M. Adolphe Roussel, *Documents Parlementaires, Chambre*, n°245, 13.

⁷⁵ M. van de Kerchove, "La peine, de 1810 à 1867, entre continuité et changement, *Journal des Tribunaux*, 6413, (2010), p. 679.

⁷⁶ Idem, 12. Note that the proposed Dutch Penal Code, presented to the House of Representatives in 1827, provided, in Article 66, a specific sentence of "declaration of infamy" (eerloosverklaring) for certain crimes "worthy of this moral blight" (Wetboek van Ontwerp van Strafrecht 1827 in Noordziek, 1883 39).

Code"⁷⁷ and explains the elimination of various "cruel" and "defamatory" forms of punishment, which were incompatible with the latter objective. On the other hand, the debate over the prison issue, which dealt with the execution of the sentence, changed the way to conceive sentencing. By the mid-nineteenth century, the American debate on imprisonment, pitting supporters of the "Pensylvanian model" and those of the "Auburnian model", burst onto the European scene.⁷⁸ Introduced in France by Beaumont and Tocqueville,⁷⁹ this debate discussed the pros and cons of collective imprisonment versus solitary confinement (the cellular model). In Belgium, collective confinement, still favored by the *projet Lebeau* of 1834, was gradually dismissed, notably under the impetus of Edouard Ducpétiaux, the Kingdom's inspector general of prisons, who was largely favorable to the cellular model. For Ducpétiaux, solitary confinement, which revived the tradition of a religious ideal of penitence and moral reformation, met the new ideals of atonement and moral reformation brought about by the prison sentence⁸⁰. Haus and the Penal Code reform committee thereafter clearly opted for Ducpétiaux's proposal,⁸¹ favoring a strict solitary confinement, day and night, so as to also prevent 'contagion' among inmates. This isolating perspective, which makes the sentence more painful, then explains a change in the scale and length of punishments, generally softened. Similarly, this would become the basis for a discussion on the possible abolition of life sentences. Haus and the Reform Commission were indeed favorable to the removal of these life sentences, which they considered incompatible with the strict regime of complete isolation.⁸² Their proposal was rejected, however, by political actors in the Senate. The latter deemed that while one must avoid punitive excesses, one should also "be wary of this cruel philanthropy that seems to protect the crime against innocence, and commiserate more with the fate of the guilty parties than with the victims."⁸³

Finally, the abolition of the death penalty for political crimes and the removal of other political penalties under the Criminal Code of 1810 (deportation, exile, loss of civil rights) led the legislator of 1867 to introduce a specific sentence of "detention" for political crimes. True to a romantic conception of the political crime, associated more with a noble ideal or passion than with the perversity or antisocial character of its author, the detention sentence implied preferential treatment on various levels. In this respect, the reversal witnessed in our early 21st century is obviously striking: in a context dominated by the issue of terrorism, the political dimension of crime is less and less recognized. And when it is invoked, this political dimension appears increasingly as

⁷⁷ J.S.G. Nypels, *Le Code pénal belge interprété*, (Bruxelles : Bruylant-Christophe), 1867: p. 31-32.

⁷⁸ F. Digneffe, "Problèmes sociaux et représentations du crime et du criminel. De Howard (1777)- à Engels (1845), in Ch. Debuyst, Fr. Digneffe, J.M. Labadie, A.P. Pires, *Histoire des savoirs sur le crime & la peine*, vol. I, (Bruxelles, : De Boeck Université, 1995), p. 180-183.

⁷⁹ G. de Beaumont, A. de Tocqueville (1833), *On the Penitentiary System in the United States and Its Application in France* (Carbondale & Edwards ville, Southern Illinois University Press, 1979).

⁸⁰ L. Ducpétiaux, *Réforme des prisons. Système cellulaire*, (Bruxelles : Victor Devaux et C°, 1865).

⁸¹ "Rapport de la Commission chargée de la révision du Code pénal", *Annales parlementaires*, Chambre, (session 1849-1850), p. 327.

⁸² Haus report in the name of the government commission, in J.S.C Nypels, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I. (Bruxelles : Bruylant-Christophe 1867), p. 31.

⁸³ Baron d'Anethan's report to the Senate session, 24 March 1852, in J.S.C. Nypels, 1867, *Législation criminelle de la Belgique ou Commentaire et complément du Code pénal belge*, T.I. (Bruxelles : Bruylant-Christophe 1867), p. 283.

an aggravating factor and no longer a mitigating one.

Conclusion

Although the Belgian Penal Code of 1867 was the result of a political initiative that dates back to the aftermath of the Belgian revolution, its political character was relatively weak. Significantly less than other codes, it was promoted as the nationalization law instrument meant to assert symbolically the power and authority of the new state. A technical work, the Criminal Code of 1867 primarily reflected the desire to not stay behind the various, liberally-inflected developments in criminal law that were spreading across Europe at the time. More than a political project, the text therefore bore the seal of neoclassical thought that dominated the legal debate in France and other European countries at the time. A work of revision, the text does not mark a clear break with the imperial Code of 1810. In this regard, the text fits between reform and continuity, with a particular care to correct the punitive excesses of the earlier text, following the movement initiated by the French neighbors through different partial reforms. It is therefore important for the legislator to re-inject, next to the principle of utility, an ideal of justice and equity, overly sacrificed by the Code of 1810 to the Reason of State and to the concern of public order alone.

Paradoxically, once promulgated the text appeared out of step with its time. Like the Zanardelli Code of 1889 in Italy,⁸⁴ the editors of the Belgian Penal Code of 1867 did not take the measure of the emergence of a new reading of crime, borne by criminal anthropology and the social defense movement in the last part of the century. If the principle of individualization of the penalty, so dear to the neoclassical school, was preserved, it now was resting on new assumptions in a world that had changed. As part of an emerging "insurance society"⁸⁵ driven by the concepts of risk, insurance and guarantee, in which the state is now summoned to protect individuals against risks of any kind, the notions of fault, moral responsibility and fair compensation were challenged by new concepts such as determinism, social responsibility and dangerousness. As a result of a proper compromise in the spirit of "penal welfarism"⁸⁶ that developed in Europe at the time, the 1867 Penal Code underwent however no fundamental changes: it remained in effect but would be completed very quickly on its margins by "social defense laws" for various categories of dangerous individuals. "Guilt" and "dangerousness" then complement each other to refine the mesh of a penal net whose basic architecture is still marked today by the 1867 text.

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⁸⁴ L. Lacche, Un code pénal pour l'Unité italienne, le Code Zanardelli (1889). La genèse, le débat, le projet juridique, in X. ROUSSEAU, R. LEVY (dir.), *Le pénal dans tous ses états. Justice, Etats et sociétés en Europe (XIIe-XXe siècles)* (Bruxelles : FUSL, 1997), p. 316-317.

⁸⁵ See F. Ewald, *L'Etat providence*, Paris, Grasset, 1986.

⁸⁶ D. Garland, *Punishment and Welfare. a History of Penal Strategies* (Brookfield : Gower Publishing, 1985).

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