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THE INFLUENCE OF THE FRENCH CODE DE PROCÉDURE CIVILE (1806) IN 19TH CENTURY EUROPE

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Abbreviations:

CdPC = French Code of Civil Procedure (1806)

LPCG = Geneva Code of Civil Procedure (1819)

DCCP = Dutch Code of Civil Procedure (1838)

1. Introduction

The number of European jurisdictions where Napoleon's *Code de procédure civile* (1806) left its mark, either directly or indirectly, is vast. According to R.C. van Caenegem, this is partly due to the fact that this code suited the needs of the 19th century and also embodied much of the common European procedural heritage.² Even so, the influence of the French code remains remarkable since no one will deny that this code was defective in many ways. In addition, it was far from innovative. After all, the code was largely based on the 1667 *Code Louis*.³ That the 1806 code was very similar to the pre-existing procedural law is clear; the main drafter of the code, E.-N. Pigeau (1750-1818), was said to have not been obliged to introduce many changes in post-1806 editions of his introductory work on French civil procedure.⁴

One may ask why, in the light of the above, such a mediocre piece of legislation proved to be able to dominate the procedural debate for a large part of the 19th century and even beyond. It seems that this is largely due to the fact that the code was used as a (positive or negative) point of departure when in the 19th century legislation was drafted in various European countries.

In the present text I will especially focus on Geneva, The Netherlands and Belgium. However, before doing so I will give an overview of the various European jurisdictions (1) where the 1806 code for a shorter or longer period became the law of the land or (2) where it was not introduced but where its model nevertheless influenced subsequent national legislation. Within the first group, I will distinguish the countries where the 1806 code was repealed shortly after the defeat of the French emperor and the countries where the code remained in force for a longer period of time. Within the second group, the jurisdictions where French influence was direct may be distinguished from jurisdictions where this influence can only be noticed through an intermediate source which in its turn had been influenced by the French code (either directly or indirectly).

2.1 Jurisdictions where the French code became the law of the land

The prime example of jurisdictions where the French code was introduced in the wake of the French armies but where it was repealed shortly after the defeat of Napoleon Bonaparte are the various Italian states. There, beginning in 1806, the introduction of the French code had followed the conquests of the French armies. Although according to Van Caenegem the code seems to have enjoyed a certain popularity in Italy,⁵ political reasons resulted in it being repealed after 1815 (even before the defeat of the French emperor, it was claimed that the French code was 'una legislazione quasi totalmente diversa

¹ The author would like to thank Prof. E. Eisinger (Wayne State University, Detroit) for reviewing the English of an earlier version of this paper, and Prof. Dr. D. Heirbaut (Ghent) for his help in obtaining the documents concerning the Belgian draft legislation discussed in Section 5 of this paper.

² R.C. van Caenegem, 'History of European Civil Procedure', in M. Cappelletti, *International Encyclopedia of Comparative Law* (Volume XVI: Civil Procedure, Chapter 2), Tübingen etc.: J.C.B. Mohr etc., 1973, 91.

³ For a recent edition of the *Code Louis*, see volume 1 of the series *Testi e documenti per la storia del processo*, Milan: Giuffrè, 1996.

⁴ According to A. Wijffels, however, the post-1806 editions should, nevertheless, be regarded as a substantially new work due to the extensive references to the new French codes. See A. Wijffels, 'French Civil Procedure (1806-1975)', in C.H. van Rhee (ed.), *European Traditions in Civil Procedure*, Antwerp/Oxford: Intersentia, 2005, 39.

⁵ R.C. van Caenegem, o.c., 94.

dall'antica', 'straniera affatto ai nostri studi ed ai nostri costumi').⁶ Although for a short while the old Italian laws were restored, the influence of the French code, often in combination with improvements contained in the procedural code of Geneva (see below), is nevertheless very much present in the various new laws on civil procedure that were introduced afterwards. Examples of French elements that can be found in one or more of the Italian codes are the compulsory preliminary conciliation of the parties, the rule that the opponent party should be summoned directly by the claimant through the services of a bailiff (*huissier de justice*), the role of the *Ministère Public* in civil litigation, public and oral hearings, the distinction between an ordinary procedure and a summary procedure, and the fact that judgments should contain the grounds on which they are based. Italian codes that were influenced by the French model are, for example, the Parmesan code of 1820, the Piedmontese Edict of 1822, the 1834 *Regolamento giudiziario per gli affari civili* introduced in the papal states by pope Gregory XVI,⁷ and the Sardinian codes of 1854 and 1859. French influence remained with the introduction of the all-Italian Code of Civil Procedure of 1865 (especially in the area of evidence), although since the start of the 20th century this influence seems to have decreased considerably because of the growing influence of German and Austrian procedural scholarship. Apart from this, it should be remembered that in many areas French influence in the 1865 code is indirect, because it incorporated rules from several earlier Italian codes which themselves had been influenced by the French example. The Parmesan code of 1820 was, for example, a source of inspiration. This code can be viewed as an improved version of the French code.⁸

As stated, the various Italian states quickly repealed the French code after the defeat of Napoleon Bonaparte. They were, however, not the only European territories to do so. Another jurisdiction that can be mentioned in this respect is Geneva. A new Geneva code was drafted by P.-F. Bellot (1776-1836) and others. This code was adopted on 29 September 1819 and came into effect in 1821. It shows clear ties with its French predecessor but at the same time contains a large number of improvements. I will discuss this code more extensively in Section 3.

The Netherlands were slower in replacing the French code with a native product, even though work on a Dutch Code of Civil Procedure started early, i.e., in 1814. However, mainly due to problems which arose as a result of the union of the Northern Netherlands (the present-day Kingdom) with the Southern Netherlands (Belgium) from 1815 until 1830, it would last nearly 25 years before the 1838 Dutch Code of Civil Procedure was introduced. I will discuss the Dutch code in some detail in Section 4.

Apart from the European jurisdictions where the 1806 code was relatively quickly replaced by native legislation, various other European states kept this code for a much longer period of time. In Poland, the code would be in force for more than 65 years. There, it had been introduced in 1808 in the Duchy of Warsaw and would only be abolished in 1875, when it was replaced by Russian laws on civil procedure dating from 1864 (which, however, themselves had been influenced by the French code; see below).⁹ The French code remained in force for roughly the same period of time in the German territories on the left bank of the river Rhine. In 1807 it became the law in Rheinpreussen, Rheinhessen and Rheinbayern, the Kingdom of Westphalia followed in 1809, whereas the Grand Duchy of Berg adopted the code in 1811. In several of these territories this code would only cease to be in force due to the introduction of the 1877 all-German *Reichszivilprozessordnung*.¹⁰ The French procedural model became very influential in Germany. I will discuss this subject in Section 2.2. First, however, some further attention should be given to Belgium, where the 1806 code remained in force for more than a century and a half.

In Belgium, which had been annexed to France in 1795, the 1806 code was introduced in 1807 just as in the other parts of the territories which at that time belonged to the realm of the French emperor. It was only replaced by a native product in the second half of the 20th century, when the 1967 *Code Judiciaire (Gerechtelijk Wetboek)* was introduced. In the present paper, this new code will not be discussed. However, I will discuss an unsuccessful 19th-century project in Section 5 aimed at introducing a new Belgian Code of Civil Procedure. This project from the late 1860s is interesting, because it was meant - just as the Geneva code - to improve the 1806 French procedural model.

⁶ See H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (Band III: Das 19. Jahrhundert, Zweiter Teilband), Munich: Verlag C.H. Beck, 1982, 2348.

⁷ For a new edition, see *Testi e documenti per la storia del processo* (Volume 2, IIe Sezione: Codici degli stati Italiani preunitari), Milan: Giuffrè, 2004.

⁸ R.C. van Caenegem, o.c., 94. However, the prime source was the Piedmontese code of 1859. According to some, the 1865 Italian code should be viewed as an revised version of the former code. See H. Coing, o.c., 2384.

⁹ H. Coing, o.c., 2805.

¹⁰ P. Oberhammer, T. Domej, 'Germany, Switzerland, Austria (1800-2005)', in C.H. van Rhee (ed.), *European Traditions*, o.c., 108.

2.2 Jurisdictions where the French code itself was never introduced but where nevertheless French influence may be noticed

French influence in the area of civil procedure went far beyond those territories where the 1806 code became the law of the land for a shorter or a longer period. This influence was either direct when the French rules were taken as a model, or indirect, which is the case in those jurisdictions where intermediate sources of law which themselves had been influenced by the French code were taken as a model.

Direct influence may be noted in various countries. In some of these countries, however, the influence is minimal. In Spain, for example, it was mainly cassation proceedings that were shaped according to the French example (a topic, it should be noted, that was regulated separately in France, i.e., not in the Code of Civil Procedure). In addition, it seems that the partial introduction of the free consideration of proof (this system is the opposite of the system of 'legal proof' in which every piece of evidence has a fixed value) may have been the result of French influence. It is also likely that the oral and public evidentiary proceedings were due to the French model.¹¹ For the rest, however, Spain kept its written procedure that closely followed the Romano-canonical model.

In Portugal, it seems that French influence – although present – was even less pronounced. There, it was mainly the judicial organization and conciliation proceedings that were – at least to a certain extent – influenced by France.¹²

Direct influence may also be noted in Bavaria, but in this country, unlike Spain and Portugal, the influence was pervasive. According to R.C. van Caenegem,¹³ the Bavarian Code of Civil Procedure of 1869 was so deeply influenced by the French code that some considered it a complete adoption of French procedure. As part of the explanation of the popularity of the French model in Bavaria it should be noted that the French code had for a long time been the law of the land in the Rhine territories of Bavaria, where it was introduced by Napoleon (see above).¹⁴

In the German States, the French code remained a popular model at the time of the introduction of the all-German *Reichszivilprozessordnung* (1877). The attraction of the French code was, according to Van Caenegem, strong, not only because it was applied in the Rhineland after the end of French rule, but also because of its intrinsic qualities. The learned author, however, notes that the oral and public character of the French code may have been exaggerated by German public opinion. In addition, Van Caenegem states that the written preliminary stage of French civil proceedings seems to have been underrated in Germany. However, in the end it was decided that the French model also exhibited some serious defects, for example, regarding the preponderant role played by counsel and the many interlocutory proceedings, which made this model very prone to undue delay. As a result of the perceived defects and because of 'the strength of the German tradition',¹⁵ the French code only influenced the new German Code of Civil Procedure in part. French influence was to some extent indirect, since in many cases the 1850 Code of Procedure of the Kingdom of Hanover acted as an intermediary.¹⁶ This code combined elements from the German 'common law' (*gemeines Recht*) tradition with those of the French and Geneva codes.¹⁷

French influence, either direct or indirect, may also be found in other European countries that did not adopt the French code at any moment in time. In the Greek Code of Civil Procedure of 1834 (replaced by a new code in 1968), for example, a mix of French and German elements may be found. The reforms introduced in Russia by Tsar Alexander II in 1864, on the other hand, mainly took the French system as an example (replaced in 1923). The adoption of the French model led to the creation of new technical terms in Russia through literal translation from the French. The Rumanian Code of Civil Procedure of 1865 (replaced in 1900) and the Bulgarian code of 1892 (replaced in 1952) also derived elements from the French code. In addition, the Rumanian code made use of the improvements of the French procedural model that could be found in the Geneva code. The 1869 Serbian Code of Civil Procedure contained French elements as well, but this changed with the introduction of an all-Yugoslavian code in 1929 which closely followed the Austrian code. In Turkey, the 1881 Law of Civil Procedure can be categorised as French. However, this code was replaced in 1927 with the introduction

¹¹ R.C. van Caenegem, o.c., 102.

¹² R.C. van Caenegem, o.c., 102.

¹³ R.C. van Caenegem, o.c., 93.

¹⁴ P. Oberhammer, T. Domej, 'Germany, Switzerland, Austria', o.c., 108.

¹⁵ R.C. van Caenegem, o.c., 93.

¹⁶ The Hanover code was not only influential at the time of the drafting of the *Reichszivilprozessordnung*, but it also influenced earlier legislation for the then still separate German states. It was taken as a model in 1864 by Baden and in 1865 by Württemberg.

¹⁷ P. Oberhammer, T. Domej, 'Germany, Switzerland and Austria', o.c., 111.

of civil procedure rules that were to a large extent based on those of the Swiss canton Neuchâtel of 1925. In addition some German and French elements can be pointed out.¹⁸

3. The Geneva *Loi sur la procédure civile* (1819)

Geneva was one of the territories that was quick to replace the French code by a native product. This did, in my opinion, not mean that Geneva left the group of jurisdictions whose procedure was influenced by the French procedural model. Even today, Geneva can still be classified as a part of Switzerland that belongs to a grouping of cantons (including Ticino, Berne and Vaud & Valais) that show a French approach to civil procedural law (it should be noted that each canton still has its own Code of Civil Procedure, although currently work is in progress to draft a single procedural code for the whole country).¹⁹ The other important group of cantons clearly belong to a different tradition in that they have adopted a German/Austrian approach.

It is open to debate to what extent the 'French' cantons adopted the substance of French procedural law in the 19th century. According to Van Caenegem,²⁰ French influence on Swiss civil procedure is often overestimated. The learned author points out various differences between the French and the Swiss approach. Compared with his position under the French code, the Swiss judge was for example more active in directing the proceedings and, consequently, the parties were less dominant regarding various aspects of procedure. At the same time it seems that Swiss procedural legislation from the 19th century is less formal. Several differences between the French 1806 code and the 1819 Geneva code are the focus of attention of the present chapter.

An important source of knowledge of the Geneva code is a commentary written by its main drafter, P.-F. Bellot. In his introduction to this commentary, Bellot claims that it does not have an official character since it was written after the adoption of the code and should only be considered as Bellot's personal work.²¹ Nevertheless, this commentary is an important source for understanding the Geneva code, which is also witnessed by the fact that the commentary was reprinted several times (the last reprint dates from 1877).²² Consequently, I will discuss this commentary here in order to highlight important innovations of the Geneva code when compared with its French counterpart.

Bellot starts with claiming that of all the French codes that remained in effect after the liberation of Geneva, the Code of Civil Procedure was the most imperfect and also the least adapted to Geneva's needs and customs. According to him, this was due to the fact that the 1806 code was not innovative, but copied the 1667 *Code Louis* to a large extent, and also because the French legislator had not proven to be able to radically depart from procedural habits that had grown over the centuries. Consequently, the code contained many formalities that had lost their meaning or that had only been introduced for fiscal reasons (many procedural documents were, for example, subject to a stamp duty). Accordingly, after the liberation of Geneva, the replacement of the 1806 code was considered to be the most urgent codification project.²³ It was the task of the *Commission préparatoire des lois civiles*, established in 1816, to compile a draft code. The draft that was finally presented to the Geneva Council of State differed in various respects from its French counterpart. Some changes resulted in the re-introduction of (modified) pre-1806 Geneva rules (references to other jurisdictions than France and the pre-1806 Geneva rules are scarce in Bellot's commentary).²⁴ Whether the drafters also succeeded in presenting a code that even persons who were not educated in law were able to understand – as was their intention²⁵ – is difficult to determine after the passing of nearly 200 years.

I will now discuss various features of the Geneva code – mainly those of first-instance litigation – and indicate to what extent this code chose an approach that differed from or was similar to the French example.²⁶

¹⁸ R.C. van Caenegem, o.c., 99-101.

¹⁹ http://www.ofj.admin.ch/bj/fr/home/themen/staat_und_buerger/gesetzgebung/zivilprozessrecht.html (last consulted 31 May 2006).

²⁰ R.C. van Caenegem, o.c., 95.

²¹ C. Schaub, P. Odier, E. Mallet (eds.), *Loi sur la procédure civile du Canton de Genève suivie de l'exposé des motifs par feu P.-F. Bellot, professeur de droit*, Paris: Librairie d'Abraham Cherbuliez et Cie; Geneva: *idem*, 1837, III. This is the edition used by me.

²² C. Schaub, C. Brocher (eds.), *Loi sur la procédure civile du Canton de Genève avec l'exposé des motifs par feu P.-F. Bellot, professeur de droit*, Geneva: A. Cherbuliez et Cie, éditeurs; Paris: Sandoz et Fischbacher, 1877.

²³ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 3-4.

²⁴ One of the scarce references to foreign jurisdictions is to England (C. Schaub, P. Odier, E. Mallet (eds.), o.c., 79-80). Another reference is to Austria (C. Schaub, P. Odier, E. Mallet (eds.), o.c., 308).

²⁵ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 16.

²⁶ See also E. Schurter, H. Fritzsche, *Die geschichtlichen Grundlagen der kantonalen Rechte* (= *Das Zivilprozessrecht der Schweiz*, Band II, 1. Hälfte), Zurich: Verlag Rascher & Cie. A.-G., 1931, 17 et seq.

3.1 Structure of the code

A striking difference between the Geneva and the 1806 code is the structure of these codes. This is not surprising, because one of the criticisms of the French code was that its structure was somehow confused. Especially in the second book of the first part devoted to the proceedings before ordinary first instance courts (*Des tribunaux inférieurs*) one may have difficulties in recognizing some kind of order. Generally speaking, this book does not follow – or only slightly so – the order in which the various topics would appear in an ordinary first-instance case. Therefore, the Geneva code was organised according to a different scheme.²⁷ Additionally, the number of Articles was, where possible, reduced.²⁸

The code consists of two parts. Each part is divided in Chapters (*titres*) which consist of one or more Sections. The first part is devoted to civil procedure in general, whereas the second part deals with enforcement. At the end of this second part, a series of general Articles may be found devoted to time-limits, nullities, fines and forms for various procedural documents. In the present paper, I will focus on the first part of the code and the general Articles.

The first 10 Chapters follow first instance proceedings in a chronological manner, starting with the introduction of the claim and ending with the judgment and costs. Subsequently, specific topics are addressed: default and opposition (Chapter 11); proof and related issues, including the hearing of the parties themselves and the judicial oath (Chapters 12-18); actions regarding ownership and possession of immovables (petitory and possessory actions) (Chapter 19); intervention (Chapter 20); continuance, recommencement and discontinuance of the action (Chapter 21); relief from judgments (Chapter 22-23; a court of cassation was not instituted in Geneva and, consequently, cassation proceedings were not regulated by the code);²⁹ arbitration (Chapter 24); and official documents (e.g., notarial deeds) having the same force as a judgment (Chapter 25).

Comparing this structure with that of the 1806 code shows indeed that improvements were made. Generally speaking, the Geneva code follows the ordinary course of the procedure more closely than the French Code. In addition, a number of related rules that could be found scattered over the French code were brought together.³⁰

3.2 Powers of the judge

According to the Geneva code, the court was in charge of the manner in which the case would be prepared for judgment.³¹ It could order that oral pleading would be conducted during the first hearing in court without further formalities, or it could order preliminary proceedings comprising either the preliminary exchange of statements of case or a fully-fledged preliminary ‘instruction.’³² In the latter case, the powers of the court were considerable. It could order the submission of a document in which the claim was further expounded; it could determine the time-limits for the submission of the statements of case; and it could fix the date for oral pleading³³ (in the French code, on the contrary, much of the initiative was left to the most diligent party (‘la partie la plus diligente’); the court did not play an important role in this respect).³⁴

Generally speaking, it was the court that fixed the time-limits according to the Geneva code.³⁵ The court was, however, not allowed to abbreviate or extend time-limits fixed by the code itself unless the code in a particular instance expressly accorded this power to the court.³⁶ In cases where the setting of time-limits was left to the court, this power was limited by the fact that a time-limit should never be longer than strictly necessary; it should not be prolonged without a good reason.³⁷

²⁷ On the organisation of materials in the Geneva code, see, e.g., C. Schaub, P. Odier, E. Mallet (eds.), o.c., 141, 216.

²⁸ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 211.

²⁹ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 288-289.

³⁰ Bellot emphasizes, for example, that provisional measures, rules on which could be found at various places in the French code, were brought together in *Titre 2*. This *titre* was placed more or less at the beginning of the Geneva code because these measures usually precede the introduction of the claim, or at least the evidentiary stage and the judgment (C. Schaub, P. Odier, E. Mallet (eds.), o.c., 36).

³¹ On this topic, see also P. Oberhammer, T. Domej, ‘Powers of the Judge: Germany, Switzerland and Austria’, in C.H. van Rhee (ed.), *European Traditions*, o.c., 295 et seq.

³² Arts. 62-63 LPCG.

³³ Arts. 74-77, 83 LPCG.

³⁴ E.g., Art. 80 CdPC.

³⁵ See also, e.g., Arts. 92, 137, 232 LPCG.

³⁶ Art. 741 LPCG.

³⁷ Art. 744 LPCG.

Already under the French code, the powers of the judge in the evidentiary stage were quite extended³⁸ (although it should be noted that in practice these powers were used most sparingly;³⁹ whereas with regard to time-limits much depended on 'la partie la plus diligente').⁴⁰ This approach was also adopted by the Geneva code. Under this code it was the court that decided whether evidence would be ordered, what type of evidence was needed and when evidence had to be submitted.⁴¹ In case of witness testimony, it was determined that when the witness made an appearance, the court could pose the questions it deemed fit.⁴² It was also the court who *ex officio* determined the experts that should be appointed (unless the parties agreed on the experts) and the subject for which their expertise was required⁴³ (the approach of the French code differed in some respects; see Section 3.11). In addition, the court determined whether the report should be oral or in writing⁴⁴ (the French code only allowed written reports).⁴⁵ In case of a written report, the court could order the experts to make an appearance in order to give additional oral information.⁴⁶ The court would also decide whether further reports were needed.⁴⁷

3.3 Conciliation

From the first Chapter of the Geneva code on the introduction of the claim (*De la demande en justice*) it becomes clear that mandatory preliminary conciliation, which is a very distinctive feature of the French code, is severely curtailed.⁴⁸ In 1816 the Geneva legislature decided to abolish mandatory preliminary conciliation since it had degenerated in a pure formality without any beneficial results. Only the State might have had an interest in it, since an omission of conciliation would result in a money penalty.⁴⁹ Although mandatory preliminary conciliation had been abolished in 1816, it appears from Article 5 of the 1819 code that preliminary conciliation remained mandatory in cases between spouses and other close family members. According to Bellot, this was necessary in the interest of public decency and the protection of the family. In other cases, however, conciliation was purely optional (Article 6). It was decided that for these cases one would reintroduce the pre-1806 Geneva system, in which it was the court's task to try to reconcile the parties during the lawsuit. To this end, courts could appoint a judge-commissioner to reach an amicable settlement of the case whenever this was deemed fit. The advantage of this approach was that the court was able to determine the optimal moment to attempt conciliation. However, the approach also had some drawbacks. Bellot states that the judge would have to take care not to compromise his position as a judge when attempting conciliation. He should not use his authority to induce parties to settle in such a manner that a party would acquire something he would not have obtained when he would have litigated the whole case through. Such a situation would of course induce parties to abuse conciliation attempts.⁵⁰

3.4 Cautio judicatum solvi

The *cautio judicatum solvi* can be found in the Articles 67 and 68 of the Geneva code. This *cautio* is – of course – the security a foreign claimant has to provide on request of the defendant in order to make sure that the costs of the litigation and other expenses will be paid by the claimant if he loses his case. Claimants who owned a sufficient amount of property in Geneva or who came from a State that did not prescribe such a *cautio* for Genevans were exempt from providing the *cautio*.⁵¹ We do not find the latter exception expressed in the French code.⁵²

3.5 Summary and ordinary procedure

³⁸ See, e.g., Arts. 254 and 295 CdPC.

³⁹ A. Wijffels, 'Powers of the Judge: France', in C.H. van Rhee (ed.), *European Traditions*, o.c., 269 et seq.

⁴⁰ See, e.g., Art. 286 CdPC.

⁴¹ Arts. 150, 153 LCPG.

⁴² Arts. 196 jo 164 LPCG. Cf. Art. 273 CdPC.

⁴³ Arts. 214-215 LPCG.

⁴⁴ Art. 222 LPCG.

⁴⁵ Arts. 318 et seq. CdPC.

⁴⁶ Art. 227 LPCG.

⁴⁷ Art. 228 LPCG. Cf. Art. 322 CdPC.

⁴⁸ On this topic, see also P. Oberhammer, T. Domej, 'Conciliation: Germany, Switzerland and Austria', in C.H. van Rhee (ed.), *European Traditions*, o.c., 215 et seq., and A. Wijffels, 'Conciliation: France', in C.H. van Rhee (ed.), *European Traditions*, o.c., 197 et seq.

⁴⁹ Art. 56 CdPC.

⁵⁰ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 27-28.

⁵¹ Arts. 67-68 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 72, footnote 1.

⁵² Arts. 166-167 CdPC.

What is striking when comparing the Geneva code with its French counterpart is that the former code changed the usual approach - which originated from Romano-canonical procedure - of dividing cases in two groups: ordinary cases and summary cases (to what group a case belonged was decided on the basis of its nature, its money value, or on the basis of the fact that it was judged at first or last resort).⁵³ Instead of this approach, the Geneva code introduced an ordinary procedure that was organised in such a manner that it would be fit for the most simple cases. An important feature of this procedure was that oral pleading would be scheduled at the first day in court or on a subsequent day without any prior formalities.⁵⁴ In cases where this procedure was not suitable, two possible approaches were made available: either an exchange of statements of case and other documents before oral pleading, or a fully fledged preliminary 'instruction' set out in *Titre VI* of the code.⁵⁵ The final decision on how to proceed was - within certain limits⁵⁶ - left to the judges, because they were in the best position to determine what proceedings were needed in the individual case. These measures aimed at making litigation more expedient, something that was also encouraged by other rules, e.g., the fact that parties and proctors⁵⁷ asking for an adjournment without good reasons, and proctors who negligently or on purpose delayed the 'instruction' of the case, had to pay the superfluous costs and interests encountered by the opponent and a fine.⁵⁸

3.6 Summons

According to the Geneva code, the summons was served on request of the claimant by a bailiff (*huissier de justice*).⁵⁹ The rules on the tasks of the bailiff in serving the summons and other procedural documents in the Geneva code differed at certain points from those of the French code. Part of these differences were the result of the fact that the Geneva legislature aimed at improving the structure of the code. Unlike the French code, the Geneva code made a clear distinction between the general formalities common to all notifications by the bailiff, and the formalities that should be observed when serving the summons.⁶⁰ Regarding the summons, the former Geneva rule was reintroduced to indicate the day and hour of the appearance in court, thus changing the French approach which only fixed a certain interval within which the appearance had to be made and for the rest left it to the proctors to decide on the specific moment the case would first be heard. In addition, the summons needed to contain 'les conclusions' and a summary of 'les moyens de la demande',⁶¹ i.e., what was claimed as well as the grounds on which the claim was based. This description is clearer than the one that can be found in the 1806 code which required in its Article 61 mention of *l'objet de la demande* and *l'exposé sommaire des moyens*. The Geneva code avoided the phrase 'l'objet de la demande.' The interpretation of this phrase was problematic, since authors differed in their opinion as to what was meant by 'l'objet de la demande.'

3.7 Statements of Case

According to the French code, the parties did not have to make an appearance in court after the term communicated in the summons had expired, but the defendant was accorded another two weeks for his defence, and the claimant a third week for his reply. After the expiration of the various time periods, 'la partie la plus diligente' would have to take the case to a court hearing.⁶² Bellot remarks that although this approach seems simple, it contains serious defects. It remained in his opinion, for example, to be seen whether the complete absence of involvement of the court during the exchange of statements of case was indeed beneficial. It often happened that time-limits were not respected, also because the proctors of the respective parties allowed each other much freedom regarding time-limits. Each proctor had an incentive to be lenient towards his colleague, since in his turn he might be in need of leniency in other cases. Bellot states: 'Un même besoin d'indulgence avait introduit un mutuel support.'⁶³ It often happened that cases were not even prepared sufficiently at the moment of the first hearing in court. As a result, further extensions had to be accorded causing extra delay. The Geneva code therefore returned to the pre-1806 Geneva practice in which the court played an important role regarding the exchange of

⁵³ Art. 404 CdPC.

⁵⁴ Art. 62 LPCG. See also C. Schaub, P. Odier, E. Mallet (eds.), o.c., 55-56.

⁵⁵ Art. 63 LPCG.

⁵⁶ Art. 72 LPCG.

⁵⁷ In the present text, the word 'proctor' will be used as a translation of both 'procureur' and 'avoué'.

⁵⁸ Arts. 751(2), 759 and 761(2) LPCG. See also C. Schaub, P. Odier, E. Mallet (eds.), o.c., 83.

⁵⁹ Arts. 32 et seq. LPCG.

⁶⁰ Arts. 32 et seq. and 50 et seq. LPCG.

⁶¹ Arts. 50-51 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., p. 49.

⁶² Arts. 75 et seq. CdPC.

⁶³ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 77.

statements of case, at least, where the fully-fledged preliminary ‘instruction’ of *Titre VI* of this code was concerned. The court fixed the various time-limits for submitting the statements of case, something that could be done either consecutively for each statement separately or for all statements at once.⁶⁴

3.8 Counterclaims

Just as its French 1806 counterpart, the Geneva code does not contain specific rules for the counterclaims.⁶⁵ Nevertheless, it appears that such a claim was allowed as the counterclaim is mentioned in Article 131 of this code, which states: ‘Si le défaut est prononcé contre le demandeur, le défendeur sera libéré des conclusions prises contre lui, et il obtiendra *ses conclusions reconventionnelles*, si elles ont été produites au demandeur.’

3.9 The hearing of the parties

Bellot is very clear in his judgment on the *interrogatoire sur faits et articles* of the French code.⁶⁶ He states: ‘Si jamais un législateur se propose le problème du mode le plus sûr de ne point atteindre la vérité, le Code de Procédure français lui en fournira la solution au titre de l’*Interrogatoire sur faits et articles*.’⁶⁷ According to this procedure the party to be interrogated was informed of the facts on which he would be questioned at least 24 hours before the hearing. As a result, parties would be able to prepare their answers in advance. They would of course be tempted to consult counsel and provide answers that would support their case. Such behaviour was also encouraged by the fact that neither the opposing party nor the public was allowed to be present at the hearing. In order to avoid these problems, the drafters readopted the pre-1806 Geneva rules.⁶⁸ These did not allow a preliminary communication of the facts on which the party would be heard. The hearing was in public. Both judges and parties were allowed to ask questions.⁶⁹

The Geneva code did not completely abolish the hearing of the parties in each others’ absence. If the latter approach was chosen, however, the parties needed to be confronted with each others’ answers at a later stage.⁷⁰

According to Bellot the Geneva approach was beneficial. As a result, he claimed, ‘vous verrez bientôt les nuages se dissiper, les faits s’éclairer, la vérité se montrer en tout son jour [...]’.⁷¹

3.10 The hearing of witnesses

Bellot states that in his time the admissibility of proof through witnesses was still restricted in many countries. In his opinion, this was the case, for example, in France, the Southern Netherlands (present-day Belgium), Prussia, and, since the introduction of its new code, also in the Swiss Canton of Vaud. This was not the approach of the Geneva code. In the Geneva code many of the restrictions regarding witness testimony had disappeared. The procedure for hearing witnesses was also remodelled. The hearing was not conducted in private before a judge-commissioner (as was the rule under the French code in the ordinary procedure;⁷² the parties were, however, allowed to be present) but in public before the court itself. The presiding judge questioned the witness, but the other judges, the parties and the *Ministère Public* could ask additional questions. Witnesses had to answer immediately. They would not be given time to prepare their answers. Witnesses could be questioned as long as this appeared necessary. They could also be asked to testify for a second time. Witnesses who gave opposing answers were confronted with one another. If the case was subject to appeal, a full report of the hearing had to be drafted. If no appeal could be lodged, a summary report sufficed.⁷³

⁶⁴ Arts. 75-77 LPCG.

⁶⁵ The fact that specific rules on counterclaims were omitted does, however, not prevent that some rules touch upon this type of claim. In the French code, for example, the section that deals with ‘demandes incidentes’ (Arts. 337-338) is also relevant for the counterclaim.

⁶⁶ Arts. 324 et seq. CdPC.

⁶⁷ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 147.

⁶⁸ See, however, also Art. 119 CdPC.

⁶⁹ Arts. 160-165 LPCG.

⁷⁰ Art. 163 LPCG.

⁷¹ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 150.

⁷² Art. 255 CdPC. The hearing of witnesses in open court was not thought to be appropriate, according to J.A. Rogron, *Code de procédure civile expliqué par ses motifs, par des exemples et par la jurisprudence*, Brussels: Société belge de librairie, 1845, 127, because ‘on a craint que l’appareil d’une audience n’intimidât les témoins, et ne les empêchât de rectifier les erreurs qui leur seraient échappées [...]’. For the summary procedure, see however Art. 407 CdPC.

⁷³ Arts. 179 et seq. LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 173 et seq.

3.11 Expert evidence

According to the 1806 code, experts were appointed by the parties. Three experts were nominated, unless the parties agreed that a single expert should be appointed.⁷⁴ According to Bellot, it was better to have all experts appointed by the court. In the Geneva code it was determined that the court could choose to either appoint a single expert if the parties agreed or if the value of the case was low, or three experts. The experts were either heard orally in open court or could be ordered to submit a written report⁷⁵ (the French code only allowed a written report).⁷⁶

3.12 Inspection of premises

The way the inspection of premises (*descente*) was organised in the Geneva code differed from the manner in which this part of the litigation was conducted according to the French code.⁷⁷ According to the Geneva code, the full panel of judges had to be present and not merely a single judge-commissioner as was the case in France. This guaranteed immediacy and also allowed oral pleading and the pronouncement of the judgment to take place at the locality visited by the judges.⁷⁸ Apparently, the fact that this manner of proceeding would cost a considerable amount of court time was not felt as a problem.

3.13 Oral pleading

According to Bellot, in principle, the public nature of civil litigation required that not only the judgment should be pronounced in public, but also that the lawsuit should contain an oral pleading stage. Only in cases where the parties themselves were of the opinion that oral pleading was not necessary or where the case was so complicated that it could not well be pleaded orally, purely written pleading was allowed. The Geneva code introduced a simplified procedure when the latter approach was chosen; the 1806 rules on this topic⁷⁹ were considered to be too complicated and prone to delay. This simplified procedure was modelled, at least to a considerable extent, on the pre-1806 Geneva rules. Oral pleading was replaced by written *mémoires* in which the parties expounded their case. These had to be submitted at the court's registry and exchanged between the parties. The *mémoires* and the rest of the case file had to be studied by the judges before they deliberated about the judgment.⁸⁰

Measures were taken to reduce the time needed for oral pleading. Under the French code the parties had, as a rule, been allowed to present an oral reply and rejoinder. Under the Geneva code the court could decide not to allow the parties to present their case orally beyond an oral claim and defence, because in practice the oral reply and rejoinder 'ne sont le plus souvent qu'une fastidieuse répétition de la demande et de la défense'.⁸¹

According to Bellot, the judges before whom oral pleading took place were the same judges as the ones who had been present at the hearing of witnesses.⁸²

3.14 Ministère Public

The *Ministère Public* had been introduced in Geneva in civil cases during the occupation by the French.⁸³ According to the French legislation, in civil cases the *Ministère Public* gave its opinion at the end of oral pleading. The parties were not allowed to give an oral reaction to this opinion. Their only possibility to react was to immediately submit written notes indicating to what extent the *Ministère Public* – in their opinion – had based its opinion on wrong or inexact facts. The Geneva code introduced a change in this respect. It allowed the parties an oral reaction in open court after the *Ministère Public* had given its opinion, but this only in order to rectify facts or to react to a new argument (*un moyen nouveau*).⁸⁴

3.15 Judgment

⁷⁴ Art. 303 CdPC.

⁷⁵ Arts. 214 et seq. LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 195 et seq.

⁷⁶ Arts. 302 et seq. CdPC.

⁷⁷ Arts. 295 et seq. CdPC.

⁷⁸ Arts. 229-230 LPCG; C. Schaub, P. Odier, E. Mallet (eds.), o.c., 201.

⁷⁹ Arts. 95 et seq. CdPC.

⁸⁰ Arts. 91 et seq. LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 86-88.

⁸¹ Art. 90 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 86.

⁸² C. Schaub, P. Odier, E. Mallet (eds.), o.c., 183.

⁸³ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 90.

⁸⁴ Art. 100 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., p. 91-92.

The Geneva code abolished the so-called *qualités* of the French code.⁸⁵ These were encompassed by a document drafted by the claimant's proctor *after* the oral pronouncement of the judgment. The document contained *inter alia* a designation of the parties to the action and a summary of the case as it had developed before the court. If he disagreed, the opponent could file opposition against this document. After the necessary procedural steps, a final text was established by the court.⁸⁶ The *qualités* would be inserted in the original written copy of the judgment (*expédition*) preceding the actual ruling as pronounced and drafted by the court.⁸⁷ Bellot considered this procedure both useless and dangerous. Useless because the *qualités* reproduced information that was already available in the case file, and dangerous because the summary was not necessarily in accordance with the truth. Furthermore, if the presentation of the facts in the *qualités* was not in accordance with the truth, chances were high that corrections would not be made since the opponent party was only given 24 hours to decide whether or not to file an opposition.⁸⁸ Additionally, Bellot thought it surprising that information that was not readily available in the case file, i.e., the contents of oral pleading, was not included in the *qualités*.

In the Geneva code only one person was responsible for drafting the judgment. This was the clerk of the registry, who had to literally copy the documents that had been submitted during the proceedings and the judgment as it had been pronounced by the court.⁸⁹ Just as in France,⁹⁰ the judgment was required to contain the grounds on which it was based.⁹¹

3.16 Default

Regarding default, the Geneva code adopted the French rule that as a result of a single default the defendant would lose his case. However, the Geneva code differed by determining that, as a result of the defendant's default, the claimant would obtain what was claimed. The French rule was that before giving a favourable judgment for the claimant, the claimant's claims had to appear justified and based on good grounds (*justes et bien vérifiées*). This rule was not adopted by the Geneva legislator because it was found impossible to apply it correctly, and also because according to Bellot it was not necessary since a default gave rise to the presumption that the defendant's case was not defensible ('que le droit est contre lui'). In addition, as a general rule, the claimant was presumed to have the strongest case.⁹²

The defendant could file an opposition against the default judgment within a period of two weeks after the judgment had been served on him (the same rule applied to a defaulting claimant).⁹³ The French code established different time-limits for filing an opposition, depending on whether or not the defaulting party had been represented by a proctor.⁹⁴

3.17 Third Party Opposition

A separate chapter on third party opposition disappeared from the Geneva code⁹⁵ since the manner of proceeding in this case was the same as the manner of proceeding in other cases in which the contested judgment had to be re-evaluated by the very court that had given this judgment (this was baptised *révision* in the Geneva code). Devoting a separate chapter to third party opposition would, in Bellot's opinion, only result in a multiplication of chapters without reason.⁹⁶

3.18 Appeal against non-final judgments

The Geneva code maintained the rule of the French code⁹⁷ that an appeal against a so-called preparatory judgment was – in principal – only allowed together with an appeal against the final judgment.⁹⁸ However, the category of preparatory judgments under the Geneva code was larger than under the French code. According to the French code, a distinction should be made between preparatory and interlocutory judgments. The former judgments were defined as 'les jugements rendus pour l'instruction de la cause, et qui tendent à mettre le procès en état de recevoir le jugement définitif.'

⁸⁵ On (the abolition of) *qualités* in France, see A. Wijffels, 'Powers of the Judge: France', in C.H. van Rhee (ed.), *European Traditions*, o.c., 274.

⁸⁶ Art. 145 CdPC.

⁸⁷ Arts. 142-145 CdPC.

⁸⁸ Art. 143 CdPC.

⁸⁹ Arts. 107-108 LPCG; C. Schaub, P. Odier, E. Mallet (eds.), o.c., 104-106.

⁹⁰ Art. 141 CdPC.

⁹¹ Art. 107 LPCG.

⁹² C. Schaub, P. Odier, E. Mallet (eds.), o.c., 127.

⁹³ Art. 136 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 129.

⁹⁴ Arts. 157-158 CdPC.

⁹⁵ Cf. Arts. 474-479 CdPC.

⁹⁶ Art. 286 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 245.

⁹⁷ Art. 451 CdPC.

⁹⁸ Art. 307 LPCG. C. Schaub, P. Odier, E. Mallet (eds.), o.c., 298-299.

Interlocutory judgments were defined as ‘les jugements rendus lorsque le tribunal ordonne, avant dire droit, une preuve, une vérification, ou une instruction qui préjuge le fond.’⁹⁹ Interlocutory judgments could be appealed before the final judgment.¹⁰⁰ The drafters of the Geneva code thought the distinction between these two types of judgment to be too subtle¹⁰¹ and therefore did not recognize interlocutory judgments as a separate category but brought them under the heading of preparatory judgments *tout court*.¹⁰² Consequently, the rules on appeal against preparatory judgments applied also to the former ‘interlocutory’ judgments and, as a result, no appeal could be lodged against the latter judgments before the final judgment (unless these judgments allowed a certain means of proof or a manner of instruction in a case where this had been forbidden by the code; in this particular case appeal was immediately possible).

4. The Dutch Code of Civil Procedure (1838)

The Dutch Code of Civil Procedure was drafted by the so-called ‘National Legislation Drafting Committee’ (*Commissie van Redactie der Nationale Wetgeving*). Work on the various codifications started in 1814, but as a result of the union of the Northern Netherlands with present-day Belgium, the original plans of the Dutch legislature to introduce a code that would reflect the Dutch procedural tradition were thwarted.¹⁰³ In the South the French code had made a considerable impression and lawyers in that part of the country favoured a codification along French lines.

What was meant to be the final draft of the code was submitted to the Lower House of Parliament on 18 October 1827. There, it was the object of lively discussion in the then two languages of the Kingdom, Dutch and French.¹⁰⁴ An important issue was whether the French code should indeed be taken as the example. MP Daam Fockema (1771-1855), who had been involved in drafting the unsuccessful Dutch procedural codes of 1799 and 1809,¹⁰⁵ was very forceful in his opposition against the adoption of the French example. He was of the opinion that it would have been preferable to introduce a code which reflected a Dutch approach to matters and which was phrased in proper Dutch instead of being a bad translation from the French. The draft would in his opinion give rise to a continuing influence of the French procedural code. Not only would this code itself serve as a source for interpreting the Dutch code, but he feared that even the 1667 Ordinance and other French laws would be brought forward ‘from the corners where they were now hiding.’ In this manner the Dutch would continue to be reminded of the conquerors of their fatherland.¹⁰⁶

A.J. Barthélemy (1764-1832), however, who was a prominent member of the drafting committee, did not agree with Daam Fockema. He was of the opinion that it would have been difficult to choose any other model than the French code. The diversity of procedural laws of the 18th century Low Countries made it, according to him, impossible to adopt a national model even though the former procedural laws may have contained good elements. Barthélemy states:

‘Partout, il est vrai, on retrouve les principes d’éternelle justice sur la latitude de la défense, et sur les moyens d’éclairer les juges: le Code qui nous régit aujourd’hui [i.e., the 1806 Code] ne s’en est écarté, et malgré les défauts qu’on lui reproche, avec raison, il est infiniment au-dessus de ce qui avait précédé. On en a dans plusieurs circonstances adopté les dispositions, lorsqu’on ne pouvait espérer d’être plus clair ou plus précis. D’ailleurs on ne pouvait pas trop s’en écarter, lorsqu’il s’agissait de suivre une ligne qui partait d’un droit civil semblable [the Dutch Civil Code was also heavily influenced by the French model]; la tâche de la Commission consistait principalement à classer avec ordre, clarté et simplicité, à rechercher l’économie des frais et des formalités, pour arriver au but avec célérité sans gêner les parties dans le développement de leurs moyens.’¹⁰⁷

⁹⁹ Art. 452 CdPC.

¹⁰⁰ Art. 451 CdPC.

¹⁰¹ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 299, footnote 1.

¹⁰² This is not as surprising as it seems, since according to legal literature, e.g., J.A. Rogron, o.c., 188, interlocutory judgments should be regarded as a sub-category of the larger group of preparatory judgments.

¹⁰³ See also C.H. van Rhee, ‘Pogingen tot codificatie van het burgerlijk procesrecht in de Lage Landen bij de zee (1798-ca. 1819). Naar een ‘oudvaderlandse’ procedure in de traditie van het ius commune?’, *Pro Memoria. Bijdragen tot de Rechtsgeschiedenis der Nederlanden*, 1/2003, 66-95 and 2/2003, 264-287.

¹⁰⁴ For an account of the proceedings in both the Lower and the Upper Houses of Parliament, see J.J.F. Noordziek, *Geschiedenis der beraadslagingen gevoerd in de Kamers der Staten-Generaal over het Ontwerp van Wetboek van burgerlijke regtspleging*, The Hague: Martinus Nijhof, 1885 (1 volume in two parts; references in this paper are to the first part).

¹⁰⁵ C.H. van Rhee, ‘Pogingen’, o.c.

¹⁰⁶ J.J.F. Noordziek, o.c., 27 et seq.

¹⁰⁷ J.J.F. Noordziek, o.c., 5.

England and Germany were not fit to serve as a model either. As for England, Barthélemy makes the following remark:

‘Ne se souvient-on pas de ce que disait le célèbre Peel,¹⁰⁸ à l’une des dernières sessions du Parlement, des efforts qu’il se proposait de faire pour donner à son pays un Recueil de ses lois; n’est-ils pas notoire que cet empire est pour ainsi dire régi par une jurisprudence, dont l’existence est subordonnée à la mémoire des jurisconsultes, et ne présente encore qu’un chaos à débrouiller?’¹⁰⁹

In Germany the situation was even worse according to Barthélemy. He states:

‘Quelques progrès que cette nation ait faits dans les sciences, il est douteux qu’on puisse déjà y trouver des modèles en législation; en grande partie ce pays est encore réglé par des chancelleries plus militaires que civiles.’¹¹⁰

In the end, the legislation of only one foreign State was used as a source of inspiration by the drafters of the Dutch code, i.e., that of Geneva. However, the number of rules that were adopted from the Geneva code was limited.¹¹¹ Surprisingly enough, this was according to Barthélemy due to the fact that Geneva was a small state. Only if the Geneva code would have been ‘destiné au service d’un grand Etat’ would it have been possible to make use of this code more extensively.¹¹²

MP Th. Dotrengé (1761-1836) agreed with Barthélemy that taking the French code as the model for Dutch legislation instead of drafting a purely Dutch code was not problematic. He was of the opinion that a situation where there would have been more conformity with the French code would not have been problematic and phrased this in terms that are very recognizable to a modern reader living in the epoch of the European Union. He states:

‘Dans la Constitution actuelle de la grande République Européenne, au milieu des rapports inévitables, qui en lient tous les peuples et tous les Gouvernements, un Code de lois et de règlements qui, isolant une nation de toutes les autres, ne conviendrait et ne pourrait convenir exclusivement qu’à elle seule, loin d’être national, serait pour elle-même le plus désastreux, et par conséquent le plus anti-national que ses législateurs pourraient imaginer de lui donner.’¹¹³

MP P.J. Trentesaux (1773-1849) agreed with Dotrengé that it was not a bad thing to adopt rules from foreign legislation. He states:

‘Cet emprunt nous fait honneur. Il prouve, que nous sommes au-dessus des petites passions, des misérables rivalités, et que nous rendons justice à tout le monde, en nous servant de ce que chacun a de bon.’¹¹⁴

At the time of the Belgian Revolt of 1830 (which resulted in the separation of the Northern and the Southern Netherlands and in the creation of the Kingdom of Belgium), the draft Code of Civil Procedure had been approved by both the Lower and the Upper Houses. Consequently, when Belgium and The Netherlands split in 1830, a code with strong French characteristics was ready to be introduced. However, the introduction of all the codes, including the procedural code, was postponed as a result of the political upheavals. Although in 1837 – the year before the code’s introduction in the North; Belgium kept the French code – some changes were introduced in the draft,¹¹⁵ it could still be described as a (bad) translation of the French original.¹¹⁶ In this respect, it differed very much from the

¹⁰⁸ Robert Peel (1788-1850), British Statesman.

¹⁰⁹ J.J.F. Noordziek, o.c., 4-5.

¹¹⁰ J.J.F. Noordziek, o.c., 4.

¹¹¹ A list of rules that were copied from the Geneva Code may be found in R. van Boneval Faure, *Het Nederlandsche burgerlijk procesrecht*, Volume 1, Leiden: E.J. Brill, 1893, 28-29.

¹¹² G. Beelaerts van Blokland (1772-1842) thought this to be an inadequate reason. He stated *inter alia* that the territories of the ordinary Dutch first-instance courts were comparable in size to Geneva (J.J.F. Noordziek, o.c., 46-47).

¹¹³ J.J.F. Noordziek, o.c., 59.

¹¹⁴ J.J.F. Noordziek, o.c., 69.

¹¹⁵ R. van Boneval Faure, o.c., 16-17.

¹¹⁶ A.W. Jongbloed, ‘The Netherlands (1838-2005)’, in C.H. van Rhee (ed.), *European Traditions*, o.c., 69.

Code of Civil Procedure of Geneva, since elements improving the French example were not very pronounced and often only textual without changing the substance of the rules. Major improvements had to wait until 1896, when various amendments were introduced by the so-called Lex Hartogh (I will not discuss these amendments here).¹¹⁷

An important source for understanding the code is J. van den Honert, *Handboek voor de Burgerlijke Regtsvordering in het Koninkrijk der Nederlanden*, published in Amsterdam in 1839.¹¹⁸ It contains the text of both the Code of Civil Procedure and the Law on Judicial Organisation with the parliamentary history. When discussing various features of the Dutch code and comparing them with their French example below, I will refer to this book. Again, I will mainly concentrate on first instance proceedings.

4.1 Structure of the code

A striking difference between the French and the Dutch codes is their structure. The Dutch drafting committee deliberately attempted to introduce a more logical structure.¹¹⁹ In addition, the number of Articles in the Dutch code was reduced.

The code consisted of three books. The first book was devoted to rules of procedure *strictu sensu*. It contained 11 chapters (*titels*) devoted to: (1) general rules of procedure; (2) litigation at the lowest first-instance courts (*kantonrechter*); (3) first-instance cases before the ordinary courts of first instance (*arrondissementsrechtbanken*), the courts of appeal and the Supreme Court (in a limited number of cases, the courts of appeal and the Supreme Court took cognizance of actions at first instance); (4) commercial cases; (5) the *Ministère Public*; (6) litigation before the Court of Appeal at first and final instance (i.e., cases which should have been started at an ordinary first-instance court but which, by consent of both parties, were immediately brought before a Court of Appeal); and (7-11) relief from judgments, including third party opposition and cassation.

The second book dealt with enforcement, and the third book encompassed a large collection of rather disparate rules that did not fit in the structure of Books 1 and 2 (e.g., arbitration, divorce and – as an original addition of the Dutch code – the preliminary hearing of witnesses). The *Dispositions générales*, that could be found at the end of the French and Geneva codes, had disappeared from the Dutch code; most of these *dispositions* had been inserted at appropriate places in this code.

4.2 Powers of the Judge¹²⁰

A serious backlog of cases at various courts was a problem in The Netherlands at the end of the 1820s. According to MP Daam Fockema this was due to the fact that (in the ordinary procedure) the French code left the initiative regarding the progress of civil cases to ‘la partie la plus diligente.’¹²¹ Daam Fockema referred here to the fact that according to the French code various procedural steps were only taken if requested by one of the parties. Until this ‘partie la plus diligente’ appeared, the case would be halted.¹²²

According to Fockema, the judge should be given *ex officio* powers regarding time-limits. Only if both parties requested an adjournment, he should not exercise these powers but decide according to the request of the parties. According to the MP these additional tasks of the judge did not contradict the rule that a court should only administer justice on request of the parties. The MP held that this rule applied regarding the question whether or not an action should be brought before the court (i.e., the current *Dispositionsmaxime*), but when an action was brought it was the judge’s task to maintain the time-limits expressed by the code. He should make sure that justice would be administered quickly and at low cost.¹²³

¹¹⁷ Cf. A.F.K. Hartogh, C.A. Cosman, *De wet van 7 juli 1896 (Stbl. No. 103) tot wijziging van het Wetboek van burgerlijke regtsvordering*, The Hague: Gebr. Belinfante, 1897.

¹¹⁸ The publisher was L. van der Vinne.

¹¹⁹ As regards this structure, member of the drafting committee Barthélemy remarked: ‘Il a paru que l’ordre des idées demandait une autre division’ (J.J.F. Noordziek, o.c., 6). As regards the structure of the Dutch code, he states: ‘Cette distribution du Code en trois Livres, qui embrassent toutes les matières dans leur ordre, nous a paru présenter plus de simplicité et de clarté, une meilleure division enfin que celle du Code actuel’ (J.J.F. Noordziek, o.c., 7).

¹²⁰ On this topic, see also R. Verkerk, ‘Powers of the Judge: The Netherlands’, in C.H. van Rhee (ed.), *European Traditions*, o.c., 281 et seq.

¹²¹ J.J.F. Noordziek, o.c., 32.

¹²² See, e.g., Arts. 80, 286, 299, 307 CdPC.

¹²³ J.J.F. Noordziek, o.c., 27 et seq.

Daam Fockema was not successful; various Articles of the 1838 code determined that it was indeed 'la partie la plus diligente' (*de meest gereede partij*) who had to take the initiative.¹²⁴ More generally, the Dutch code did not bring significant changes when compared to the French code regarding the powers of the judge in the conduct of a civil action.

4.3 Conciliation

Compulsory preliminary conciliation was abolished by the Dutch code.¹²⁵ MP O. Leclercq (1760-1842) was very clear in his opinion on this requirement of the French legislation. He stated: 'Il est en jurisprudence, comme en beaucoup d'autres choses, de belles théories qui paraissent présenter de grands avantages, que la pratique fait évanouir: telle est la conciliation préliminaire [...].'¹²⁶ Leclercq was of the opinion that the parties had a fixed opinion about their respective positions when they appeared before the *juge de paix* for the compulsory conciliation attempt. They would not be likely to co-operate, also because they would be unwilling to give the necessary information out of fear of hurting their case. Consequently, the only result of compulsory preliminary conciliation was extra costs.¹²⁷

MP Leclercq and other MPs were, however, positive regarding Article 19 of the Dutch code, an Article that was inspired by a similar provision in the Geneva *Loi Judiciaire* (1816).¹²⁸ Article 19 provided that irrespective of the stage of the action, the judge could – either *ex officio* or on the request of one or both of the parties to the action - order that the parties make a court appearance or appear before one or more judge-commissioners, in order to attempt to settle the case, at least when a settlement seemed feasible.

4.4 Cautio judicatum solvi

Article 152 of the Dutch code contained provisions on the *cautio judicatum solvi*, just as the French and Geneva codes. The Dutch Article is comparable to its French counterpart.¹²⁹

4.5 Summary and ordinary procedure

Unlike the Geneva code, the Dutch code maintained the traditional division between the ordinary and the summary procedure.¹³⁰ In practice, however, the ordinary procedure became very unpopular as a result of which in practice the summary procedure was used in most cases. This was made possible by the fact that the description of cases which could be dealt with in summary proceedings left considerable room for assessment of the judge and the parties as to whether or not this procedure should be used.¹³¹ It would nevertheless be until the end of the 19th century before the summary procedure was officially introduced as the ordinary type of procedure. This occurred as a result of the so-called Lex Hartogh of 7 July 1896.¹³²

4.6 Summons

¹²⁴ E.g., Art. 146 DCCP.

¹²⁵ On this topic, see also R. Verkijk, 'Conciliation: The Netherlands', in C.H. van Rhee (ed.), *European Traditions*, o.c., 207 et seq.

¹²⁶ J.J.F. Noordziek, o.c., 15.

¹²⁷ J.J.F. Noordziek, o.c., 16. See also the speech of MP Dotrengé (J.J.F. Noordziek, o.c., 64). This MP was of the opinion too that compulsory conciliation at the start of the action is useless due to the state of mind of the parties at this moment: 'La passion agit plus fortement alors sur l'esprit des parties. Celle, qui est persuadée de la bonté de son droit, se révolte de l'injustice qu'elle croit qu'on veut lui faire, et n'est guère disposée à des sacrifices. Elle devient plus traitable, quand plus tard elle s'aperçoit que la question, qui lui paraissait d'abord si claire, pourrait bien être douteuse, et que c'est peut-être la difficulté de la résoudre qui porte le juge à essayer les moyens de la conciliation. Elle peut alors ne plus trouver convenable à ses intérêts d'exposer tout, ou partie, de sa fortune à la chance d'une voix de plus ou de moins.'

¹²⁸ Art. 78 of this *Loi* (that was modified in 1832), stated: 'Dans toutes les causes qui leur paraîtront de nature à être conciliées, les tribunaux civils du canton, tant inférieurs que d'appel, devront, avant ou après les plaidoiries, commettre un de leurs membres pour ouïr plus particulièrement les parties, et les concilier si faire se peut.' See C. Schaub, P. Odier, E. Mallet (eds.), o.c., 24.

¹²⁹ Art. 166 CdPC.

¹³⁰ Arts. 135 et seq. DCCP. Cases that could be dealt with in summary proceedings were listed in Art. 140 DCCP.

¹³¹ See especially Art. 140 sub 2 and 5 DCCP.

¹³² Dutch Official Journal 103. On the Lex Hartogh, see C.H. van Rhee, 'Het Interim-rapport in historisch perspectief', in: P. Ingelse (ed.), *Commentaren op fundamentele herbezinning* (Prinsengrachtreeks 2004/1, Gerechtshof Amsterdam), Nijmegen: Ars Aequi, 2004, 99-135.

Just as the French and the Geneva codes, the Dutch code determined that the summons was served on request of the claimant by a bailiff (*deurwaarder*).¹³³ Unlike the Geneva code, however, the Dutch code did not separate the rules common to all process notices by the bailiff from the rules that were only applicable to the writ of summons. It followed another approach in that it contained a general section of all process notices by the bailiff including the writ of summons,¹³⁴ and sections on the summons for specific courts.¹³⁵ Just as in Geneva, the rule was introduced that the summons needed to indicate the day and the hour of the appearance in court.¹³⁶ In addition, the summons needed to contain the ‘moyens’ and the ‘objet’ of the claim (‘de middelen en het onderwerp van den eisch’), as well as a clear and specific ‘conclusion’, i.e. a clear and specific description of what was claimed (‘eene duidelijke en bepaalde conclusie’). In its Article 61 the French code did not mention that a clear and specific ‘conclusion’ should be included in the summons, although it seems unlikely that in practice this could be omitted. The Dutch legislature may have been inspired by the Geneva code when explicitly mentioning the ‘conclusion’ as part of the summons.

4.7 Statements of Case

Concerning the exchange of the statements of case, the Dutch code followed its French counterpart: in the ordinary procedure there was no involvement of the court. After the exchange, ‘la partie la plus diligente’ had to bring the case on the cause list for a hearing.¹³⁷

4.8 Counterclaims

Articles 250-253 of the Dutch code dealt with counterclaims,¹³⁸ a subject that was not dealt with specifically in the French and Geneva codes. Such claims were, according to Article 250 of the Dutch code, allowed in all cases except:

1. where the claimant acted in a certain capacity (for example as tutor) when the counterclaim concerned him personally, or where the opposite situation existed;
2. where the court had no subject-matter jurisdiction over the counterclaim or in certain specific cases where the court had no jurisdiction over the person against whom the counterclaim was brought (e.g., the King and members of the royal family);
3. where the counterclaim concerned ownership, whereas the original action was of a possessory nature;
4. where the action was brought in a dispute on the enforcement of judgments.

The Dutch code did (and does) not contain the rule that the claim and the counterclaim need to be related in one way or another. This is most likely due to the fact that this requirement was also absent in The Netherlands in the pre-codification period; it was not part of the Dutch legal tradition and, in this respect, Dutch law was in accordance with the rules on this issue of the Romano-canonical procedure.¹³⁹

4.9 The hearing of the parties

As stated above, the *interrogatoire sur faits et articles* of the French code was not considered to be a useful instrument to obtain a clear picture of the case, since the facts on which a party would be heard were communicated to him in advance. This allowed this party to prepare his answers and even to consult counsel in order to only give those answers that were favourable to his case. Consequently, the Geneva code abolished the preliminary communication of the facts. In addition, it laid down that the hearing would take place in open court. Originally, the Dutch code followed the Geneva example. However, finally this procedure was considered ‘too inquisitorial’ and therefore the Dutch returned to the French example: the facts were communicated in advance - according to the Dutch Code, they would be accompanied by the questions that would be asked - but neither the opponent party nor the public were allowed to be present at the hearing. As a result various MPs were of the opinion that the *interrogatoire* should better be abolished completely, since in practice it would not be used or only

¹³³ Art. 1 DCCP.

¹³⁴ Arts. 1-17 DCCP.

¹³⁵ E.g., Arts. 97-98 DCCP (lowest first-instance courts), 126-134 DCCP (ordinary first-instance courts and other courts administering justice at first instance).

¹³⁶ Art. 5 DCCP.

¹³⁷ Arts. 146 DCCP.

¹³⁸ On this topic, see also C.H. van Rhee, ‘De vordering in reconventie in Nederland en Europa’, in E.H. Hondius et al. (eds.), *Liber Amicorum Paul Meijknecht. Van Nederlands naar Europees procesrecht?!*, Deventer, 2000, 227-242.

¹³⁹ C.H. van Rhee, ‘De vordering’, 232-234.

very seldomly. In the end, the legislature decided to maintain this procedure even though it was also of the opinion that the number of cases in which the *interrogatoire* would be used was very limited.¹⁴⁰

4.10 The hearing of witnesses

The Dutch code determined in its Article 204 that the hearing of witnesses could take place during a court hearing, i.e., in public, or before a judge-commissioner. It was the court that decided which of the two options would be chosen. When witnesses were heard before a judge-commissioner, the parties had the right to be present (the public was excluded in this case).¹⁴¹ The possibility to have witnesses heard in open court was an improvement when compared to the situation under the French code, that in the ordinary procedure only allowed a hearing by a judge-commissioner¹⁴² (in the summary procedure, witnesses were heard in open court).¹⁴³ J.A. Rogron remarks in his *Code de procédure civile expliqué par ses motifs, par des exemples et par la jurisprudence*:¹⁴⁴ ‘Elle [i.e., the hearing of witnesses] n’est pas faite devant le tribunal et en public, parce qu’on a craint que l’appareil d’une audience n’intimidât les témoins, et ne les empêchât de rectifier les erreurs qui leur seraient échappées [...]’.¹⁴⁵ Because in Dutch practice it seldom happened that witnesses were heard in open court - having them heard by a single judge-commissioner in the presence of only the parties was more expedient - the Dutch situation did not differ much from the French.

4.11 Expert evidence

Regarding expert evidence, the Dutch code¹⁴⁶ did not contain significant changes when compared to its French counterpart.¹⁴⁷

4.12 Inspection of premises

According to the French code, only a single judge could be appointed to perform the inspection of a locality.¹⁴⁸ This limitation was not adopted by the Dutch code, stating that one or more judges could be appointed.¹⁴⁹ The court could order an inspection *ex officio* when this was deemed necessary without the limitations of Article 295 of the French code.¹⁵⁰

4.13 Oral pleading

According to the Dutch code oral pleading would take place unless the court *ex officio* or on request decided that purely written pleading should be ordered.¹⁵¹ Unlike the French code, which in the case of purely written pleading did not allow the parties to react orally to the report that had been made by a *juge-rapporteur* on the basis of the written pleading,¹⁵² the Dutch draft originally gave the parties the possibility to react by way of ‘oral pleading’.¹⁵³ In Parliament, this innovation was applauded. MP Leclercq stated:

‘Les plaidoyers publics sont un frein que la loi impose aux juges; ils les obligent à prêter la plus grande attention, ils les avertissent que le public est là pour comparer les motifs du jugement avec les raisons alléguées par les parties, et décider si le jugement est d’accord avec la justice; ce contrôle est utile pour empêcher les juges de porter leurs jugements avec légèreté. Les plaidoyers publics obligent encore le juge, chargé d’un rapport, de le faire avec la plus grande exactitude [...]’.¹⁵⁴

¹⁴⁰ Arts. 237-246 DCCP. See J. van den Honert, o.c., 323-331.

¹⁴¹ Arts. 215 jo. 109 DCCP.

¹⁴² Art. 255 CdPC.

¹⁴³ Art. 407 CdPC.

¹⁴⁴ O.c.

¹⁴⁵ Note under Art. 262 CdPC (p. 127).

¹⁴⁶ Arts. 222-236 DCCP.

¹⁴⁷ Arts. 302 et seq. CdPC.

¹⁴⁸ Art. 295 CdPC.

¹⁴⁹ Art. 219 DCCP.

¹⁵⁰ Art. 295 CdPC reads as follows: ‘Le tribunal pourra, dans le cas où il le croira nécessaire, ordonner que l’un des juges se transportera sur les lieux; mais il ne pourra l’ordonner dans les matières où il n’échoit qu’un simple rapport d’experts, s’il n’en est requis par l’une ou par l’autre des parties.’

¹⁵¹ Arts. 162-175 DCCP.

¹⁵² Art. 111 CdPC.

¹⁵³ J. van den Honert, o.c., 288.

¹⁵⁴ J.J.F. Noordziek, o.c., 90.

The final draft, however, followed the French system, which only allowed the parties to submit written notes explaining why the *juge-rapporteur* had been incomplete in his report or had made a mistake.¹⁵⁵

Unlike the Geneva Code, the Dutch Code did not contain measures to reduce the amount of time needed for oral pleading. We do not find a specific rule providing that the court could decide not to allow an oral reply and rejoinder.

4.14 Ministère public

The Dutch code did not introduce important changes in the rules on the role of the *Ministère Public* in civil cases when compared to the French code. It did not allow the parties to furnish an oral reaction to the opinion of the *Ministère Public*, but maintained the rule of the French code that they were only allowed, immediately after to submit written notes in which they could explain why in their opinion the *Ministère Public* had erred regarding the facts of the case.¹⁵⁶

4.15 Judgment

Just as the Geneva code, the Dutch code abolished the so-called *qualités*. Article 62 of the Dutch code determined explicitly that the official copy of the judgment that was delivered to the parties (*expéditie*) would be drafted *without* the cooperation of these parties. The judgment should contain the grounds on which it was based.¹⁵⁷

4.16 Default

The Dutch code followed the French code in many respects regarding default. A difference was that the defendant who was declared a defaulter would lose his case *unless* it appeared to the judge that the statements of the claimant were not justified or without grounds.¹⁵⁸ Article 150 of the French code formulated this rule positively and less severely in the following manner: ‘et les conclusions de la partie qui le requiert [= le défaut] seront adjugées, si elles se trouvent justes et bien vérifiées.’ The defendant could file an opposition to the default judgment before the default judgment was enforced. This was laid down as a general rule and, as a result, the Dutch code differed from the French code, which had different time-limits for opposition depending on whether or not the defaulter was assisted by a proctor.¹⁵⁹

4.17 Third party opposition

Third party opposition was abolished. Although MP W.B. Donker Curtius van Tienhoven (1778-1858) requested that third party opposition would be included in the code,¹⁶⁰ the Minister of Justice, C.F. van Maanen (1769-1846), was of the opinion that the rules in the French code on third party opposition were incomprehensible. He referred to the many difficulties which third party opposition had caused in French legal practice and added that even F.J.J. Bigot de Préameneu (1747-1825), member of the French codification commission, had doubted whether this type of opposition was needed.

4.18 Appeal against non-final judgments

Articles 336-337 of the Dutch code are roughly similar to Article 451 of the French code: appeal of preparatory and interlocutory judgments¹⁶¹ was regulated in the same manner.

5. Procedural Reform in Belgium (1869)

As stated in the introduction, Belgium is the country where the *Code de procédure civile* remained in effect for more than 150 years, i.e., until it was replaced by the *Code judiciaire (Gerechtigd Wetboek)* of 1967. However, also in Belgium the French procedural legislation was subject to criticism but during the 19th century this only resulted in minor changes. On 23 July 1866 a Commission was appointed for the revision of the code.¹⁶² However, in the end this Commission proved to be unsuccessful. This is partly due to the fact that one of the Commission’s proposals was to abolish the ancient division of tasks between proctors (*avoués*) charged with duties in the conduct of litigation of a

¹⁵⁵ Art. 174 DCCP.

¹⁵⁶ Art. 328 DCCP.

¹⁵⁷ Art. 59 DCCP.

¹⁵⁸ Art. 76 DCCP.

¹⁵⁹ Arts. 157-158 CdPC.

¹⁶⁰ J.J.F. Noordziek, o.c., 161-162.

¹⁶¹ For a definition of these types of judgment, see Art. 46 DCCP, which is roughly similar to Art. 452 CdPC.

¹⁶² *Révision du Code de procédure civile. Projet de Loi. Rapport fait, au nom de la Commission par M. Albérie Allard et exposant les motifs du projet* (Extrait des Documents parlementaires, Chambre des représentants, session de 1869-1870), Brussels: Imprimerie du Moniteur belge, 1870, 21.

more or less administrative nature, and advocates. The latter acted as learned legal counsel. In the draft, the proctors were completely abolished and their duties were transferred to the advocate. In this the Commission followed Geneva, where proctors were abolished in 1834. More in general, they may have been inspired by the bad opinion on proctors that was current in the 19th century. The Dutch Minister of Justice N. Olivier (1808-1869), for example, stated that the proctor was only 'un dangereux intermédiaire et un objet de luxe.'¹⁶³ In Belgium, however, the Commission's proposals gave rise to a powerful and finally successful lobby not to adopt the Commission's draft.¹⁶⁴ Nevertheless, the draft is worthy of some attention, since it was the first Belgian attempt to replace the French code by a native product.

The Commission severely criticized the 1806 code. Although it considered the first book of this code concerning *justice de paix* perfect, it found titles 1-23 of the second book 'détestable.'¹⁶⁵ Therefore, the Commission chose a different approach and, consequently, the Belgian draft contained a large number of improvements when compared with the French code. A selection of these, mainly regarding first instance proceedings, will be discussed below.

One may ask whether the introduction of the Belgian draft would have meant a break with the French procedural tradition. This may not have been the case, something which already appears when consulting the selection of innovations from the draft as presented below.¹⁶⁶ In addition, the Belgian Commission emphasized that apart from criminal procedure, one of its main sources were various prominent French procedural treatises which themselves were very critical about the 1806 code. Examples are the treatises of E.L.J. Bonnier, J.E. Boitard, A. Rodière, P. Boncenne, C.L.J. Carré and A. Chaveau.¹⁶⁷ Also, the foreign legislation that was consulted by the Commission can be classified as belonging to the French tradition, at least in the late 1860s. Especially the legislation of Geneva, The Netherlands and the Kingdom of Italy were taken into consideration.¹⁶⁸ Legislation that did not belong to the French tradition was discarded. For example, the legislation of the greatest part of Germany was not consulted even though interesting procedural codes had been promulgated in different parts of Germany during the 1850s and 1860s. The English rules were not consulted either.¹⁶⁹ As regards these rules, it may indeed be admitted that they may not have been a good example at this moment in time, i.e., before the introduction of the Judicature Acts 1873-1875. The Commission is clear in its opinion about the English rules. It remarks: 'Ce n'est point d'ailleurs à cette nation qu'il faut demander des modèles de procédure.'¹⁷⁰ Nevertheless, one finds a few references to English procedure where the hearing of witnesses is discussed.¹⁷¹

5.1 Structure of the code

A point of criticism concerned the structure of the French code¹⁷² and its verbosity. The draft implemented a structure that was considered to be more logical and reduced the number of Articles where possible. It consists of a preliminary book devoted to jurisdiction and the way in which litigation could be prevented or stopped at an early stage (*de la compétence en matière contentieuse, compromis and conciliation*). Next came five books, of which only the first three were actually completed by the Commission. Concerning these three books it was stated that the number of Articles was reduced with one third when compared to the French code.¹⁷³ The first book was devoted to the ordinary rules of civil procedure at first instance (*procédure ordinaire en première instance*). The second book dealt with exceptions to the first instance rules for specific courts (*juge de paix*, commercial court) or cases (*référé* proceedings). Next came a third book devoted to the means of recourse against judgments (including cassation, an issue that was not regulated by the French code) or judges. The books which were not completed would have dealt with the enforcement of judgments and official documents (Book 4) and 'procédures diverses' (Book 5).

¹⁶³ *Révision*, o.c., 31.

¹⁶⁴ D. Heirbaut, 'Het 'civiel' beleid van onze ministers van Justitie van 1830 tot heden: een grote onbekende', in D. Heirbaut et al., *Histoire politique et sociale de la justice en Belgique de 1830 à nos jours*, Bruges: La Chartre, 2004, 49.

¹⁶⁵ *Révision*, o.c., 23.

¹⁶⁶ The same is true for the 1967 *Code judiciaire*. After the introduction of this *Code* Belgium continued to be part of the French procedural tradition. The *Code* has been described as a 'rationalisation' of procedural law on the basis of the existing foundations.

¹⁶⁷ *Révision*, o.c., 24.

¹⁶⁸ *Révision*, o.c., 25.

¹⁶⁹ *Révision*, o.c., 24, footnote 3 (right hand side).

¹⁷⁰ *Révision*, o.c., 30.

¹⁷¹ *Révision*, o.c., 78.

¹⁷² See, e.g., *Révision*, o.c., 85.

¹⁷³ *Révision*, o.c., 21.

Apart from the first three books the Commission did complete a set of general provisions, which were meant to be inserted at the end of the draft, i.e., after Book 5. These general provisions were changed when compared to a similar list in the French code, partly because various rules from the French general section were inserted at other places in the draft.¹⁷⁴

The general provisions in the draft concerned first of all procedural nullities. The approach to this topic differed from that of the French and Dutch codes. The latter codes laid down that a nullity could only exist if the law so determined.¹⁷⁵ In the Belgian draft the Geneva system was adopted, which determined that a nullity could also exist if the act had been performed by an incompetent judge or officer of the court such as a proctor, bailiff or a clerk (*magistrat ou officier ministériel*), or if it was found that this act had caused a prejudice to a party that could not be repaired in another manner.¹⁷⁶ In case an incompetent judge or judicial officer had performed the act, the nullity could be pronounced *ex officio*. In other cases - as a general rule, with some exceptions - the act in question needed to be complained of ('pas de nullité sans grief').¹⁷⁷

Other subjects addressed by the general provisions are the calculation of time-limits, the manner in which procedural papers and copies thereof should be drafted, forgeries and witnesses.¹⁷⁸

5.2 Powers of the judge

In line with 19th-century developments in other European countries, the Belgian draft aimed at increasing the powers of the judge. The approach to the legal action was 'que le juge peut, d'office, ordonner toutes les mesures qu'il croit indispensable à son instruction.'¹⁷⁹ I will limit myself to giving some examples of this approach. First of all, the use of so-called *avenirs* or *sommations d'audience* (documents by which a party gave notice to his opponent that on his request a court hearing had been scheduled) which left it, for example, to the parties to influence the time-limits for the exchange of statements of case and all other court documents, were abolished.¹⁸⁰ The draft established that the court itself would be in charge completely of the time-limits¹⁸¹ and, in this, the Belgian draft followed the rules on the preliminary 'instruction' of the Geneva code (see Section 3.2). The court was also given the discretionary power to strike the case from the cause-list if statements of case had not been exchanged within the set time-limits.¹⁸² In addition, the powers of the court during oral pleading were enlarged: each party was only given a single opportunity to present the case orally, unless the court decided that more information was needed¹⁸³ (the approach of the Geneva code was different: the parties could plead twice unless the court found that sufficient information had been given after the oral defense).¹⁸⁴

Also during the proof stage, the court's powers were extended, but it should be remembered that this was also the case according to the 1806 code (even though these powers, as stated above, seem not to have been used extensively in practice). The court could on its own motion order proof of facts that were contested.¹⁸⁵ It fixed the place, day and time for an evidentiary hearing.¹⁸⁶ The court determined whether the parties should make an appearance in order to be questioned about the case.¹⁸⁷ As to the hearing of witnesses, the court could change the order in which witnesses were heard,¹⁸⁸ it could ask witnesses the questions it deemed fit,¹⁸⁹ and it could decide to hear a witness for a second time.¹⁹⁰ It could appoint experts of its choice,¹⁹¹ and, on its own motion, it could order an inspection of a locality (*descente sur les lieux*).¹⁹²

¹⁷⁴ *Révision*, o.c., 111.

¹⁷⁵ Article 1030 CdPC: 'Aucun exploit ou acte de procédure ne pourra être déclaré nul, si la nullité n'en est pas formellement prononcée par la loi.' Art. 90 DCCP: 'Geenerlei exploit of akte van regspleging kan nietig verklaard worden, indien de wet de nietigheid van dezelve niet uitdrukkelijk bevolen heeft.'

¹⁷⁶ Art. 745 LPCG.

¹⁷⁷ *Révision*, o.c., 21, Dispositions générales, Art. 1; *ibidem*, 111-112.

¹⁷⁸ *Révision*, o.c., 21, Dispositions générales, Arts. 3-9; *ibidem*, 111-113.

¹⁷⁹ *Révision*, o.c., 82. See also p. 73: 'Nous avons tenu à donner plus d'autorité, plus de surveillance aux magistrats. En général, tout se fera sous leur yeux et à l'audience publique [...].'

¹⁸⁰ *Révision*, o.c., 65.

¹⁸¹ *Révision*, o.c., 7-8, Book 1, Titre II, Chapitre II, Arts. 7 et seq.

¹⁸² *Révision*, o.c., 8, Book 1, Titre II, Chapitre II, Art. 11.

¹⁸³ *Révision*, o.c., 8, Book 1, Titre II, Chapitre II, Art. 20.

¹⁸⁴ Art. 90 LPCG.

¹⁸⁵ *Révision*, o.c., 10, Book 1, Titre VI, Chapitre I, Art. 1.

¹⁸⁶ *Révision*, o.c., 10, Book 1, Titre II, Chapitre VI, Art. 2.

¹⁸⁷ *Révision*, o.c., 10, Book 1, Titre VI, Chapitre II, Art. 7.

¹⁸⁸ *Révision*, o.c., 11, Book 1, Titre VI, Chapitre IV, Art. 32.

¹⁸⁹ *Révision*, o.c., 11, Book 1, Titre VI, Chapitre IV, Art. 39.

¹⁹⁰ *Révision*, o.c., 12, Book 1, Titre VI, Chapitre IV, Art. 43.

5.3 Conciliation

Compulsory preliminary conciliation was abolished by the draft in the majority of cases, a development that had already taken place in many of the other jurisdictions which followed the French model, for example in Geneva and The Netherlands. It was, however, not abolished in cases before the justice of the peace (with two exceptions)¹⁹³ and where spouses or close members of a family were concerned.¹⁹⁴ In addition, all judges were, just like in Geneva and The Netherlands, given the task to attempt conciliation during the action whenever this was deemed fit.¹⁹⁵

5.4 Cautio judicatum solvi

The *cautio judicatum solvi* was abolished since it was considered not to be in accordance with the laws of modern nations.¹⁹⁶

5.5 Summary and ordinary procedure

The ordinary procedure of the French code was considered an example of how things should not be organised. The ordinary procedure was considered too complicated. In this respect, the Commission shared the views of the Geneva legislature of circa half a century earlier. The Commission asked why the uncomplicated summary procedure of the French code (first part, Book 2, *Titre* 24) had not been adopted as the ordinary procedure. In the end, the draft introduced an ordinary procedure partly based on the summary procedure with additions from the rules of procedure for the commercial courts (Articles 404-442 of the 1806 code) and the *justice de paix* (Articles 1-47 of the 1806 code).¹⁹⁷ The number of formalities by which the action was encumbered was consequently considerably reduced. In the opinion of the Commission the sole reason for the existence of many formalities was to increase the profits of practitioners. They held that formalities had often been introduced because the 1806 legislator had yielded to the pressure of these practitioners.¹⁹⁸

5.6 Summons

According to the Belgian draft, the summons was served on request of the claimant by a bailiff (*huissier de justice*). Just like the Geneva code, the draft divided the rules on notifications by the bailiff into general rules and specific rules for the writ of summons.¹⁹⁹ The draft aimed at the reduction of the number of formalities that had to be observed when serving the summons and other procedural documents.²⁰⁰ For example, the way in which the documents on which the claim was based were brought to the attention of the defendant was simplified in order to reduce costs: it sufficed to allow the defendant to consult the originals instead of having the bailiff serve copies on him, as was the case under the French and the Dutch codes and, in some instances, also under the Geneva code.²⁰¹ The originals could be exchanged between the parties or consulted at the registry of the court (this rule also applied regarding documents the defendant wished to introduce).²⁰² As to the manner in which the claim should be indicated in the summons, the draft contained a clearer description than could be found in the 1806 code (the description also differed from that of the Geneva and Dutch codes). As stated, the 1806 code required mention of *l'objet de la demande et l'exposé sommaire des moyens*. Although the meaning of *moyens* was clear (i.e., the grounds on which the claim was based), a difference of opinion existed regarding the meaning of *l'objet de la demande*. The draft did not adopt this terminology but used the more straight-forward description *des conclusions sommairement motivées*.²⁰³

5.7 Statements of case

¹⁹¹ *Révision*, o.c., 12, Book 1, Titre VI, Chapitre V, Art. 54.

¹⁹² *Révision*, o.c., 8, Book 1, Titre VI, Chapitre VI, Arts. 69-70.

¹⁹³ *Révision*, o.c., 5-6, Livre préliminaire, Titre II, Chapitre II, Art. 18.

¹⁹⁴ *Révision*, o.c., 5-6, Livre préliminaire, Titre II, Chapitre II, Arts. 19; *ibidem*, 58-60.

¹⁹⁵ *Révision*, o.c., 6, Preliminary Book, Titre II, Chapitre II, Art. 20 et seq.

¹⁹⁶ *Révision*, o.c., 67.

¹⁹⁷ *Révision*, o.c., 23.

¹⁹⁸ *Révision*, o.c., 73: 'Ce qui dominait l'instruction des procès devant les tribunaux de première instance, c'était une masse énorme de requêtes, d'ordonnances, de procès-verbaux, d'expéditions, de significations, qui mettait la justice hors de la portée du plus grand nombre. C'est à l'influence funeste des praticiens que le législateur de 1806 avait cédé, en adoptant cette organisation longue et coûteuse.'

¹⁹⁹ *Révision*, o.c., 6-7, Livre I, Titre I, Chapters 1-2.

²⁰⁰ *Révision*, o.c., 25.

²⁰¹ Art. 65 CdPC; Art. 133 DCCP; Art. 51 LPCG.

²⁰² *Révision*, o.c., 7, Book 1, Titre II, Chapitre II, Art. 9.

²⁰³ *Révision*, o.c., 7, Book 1, Titre I, Chapitre 2, Art. 22. See also *ibidem*, 63.

The Belgian draft provided that the judges were in charge of the time-limits for the exchange of statements of case. A system was introduced that resembled the rules concerning the preliminary ‘instruction’ of the Geneva code (see Section 3.2 above). In urgent cases, different rules applied. These provided that oral pleading would take place immediately at the first hearing in court without the need of a fully-fledged preliminary ‘instruction’.²⁰⁴ These rules also resembled those of the Geneva code.²⁰⁵

5.8 Counterclaims

Counterclaims, which were not regulated by the French and Geneva codes, were present in the draft.²⁰⁶ They could be introduced in three situations: if they arose *ex eadem causa* and in two cases where they arose *ex causa dispari*: either (1) if the counterclaims could serve as a direct defense against the claim, or (2) if what was claimed could serve as a set-off against the original claim.²⁰⁷ This approach differed from that of the Dutch code, which only negatively described when counterclaims were not allowed (see Section 4.8).

5.9 The hearing of the parties

The Belgian Commission abolished the hearing of parties by way of *interrogation sur faits et articles* for the reasons indicated in Section 3.9 of the present paper.²⁰⁸ The Commission decided to develop a new procedure on the basis of Article 119 of the 1806 code, which dealt with the personal appearance of the parties in court. This Article was, however, rather problematic, since the procedure to be followed was not regulated by the code. In practice this caused various problems. Therefore, the Commission developed a procedure in which the parties would be heard in public during a personal appearance in court. At the time of this hearing, the opponent party was also allowed to ask questions by submitting these to the presiding judge. In order to guarantee that the answers were spontaneous, the party who was being questioned was not allowed to bring any notes to the hearing.²⁰⁹ The procedure was roughly similar to that of the Geneva code (even though Bellot does not refer to Article 119 of the French Code when discussing this procedure, but to pre-1806 Geneva rules).²¹⁰

5.10 The hearing of witnesses

In respect to the hearing of witnesses, the Belgian Commission stated that it had to make a choice between the two types of *enquête* of the 1806 code. The first was the ordinary type, i.e., written, in the presence of the parties but not in public and very mediate since it was conducted before a judge-commissioner.²¹¹ The second was the summary *enquête*: oral, public, and immediate because it was conducted before the court itself.²¹² In accordance with the ideas of the influential French textbook writer P. Boncenne (1775-1840), who advocated immediacy, the Commission chose the summary *enquête*.²¹³ In addition, it decided to partly model the new rules on the hearing of witnesses in criminal cases. The danger that as a result courts would be too encumbered since they could – in principle – not delegate the hearing of witnesses to a judge-commissioner anymore was not seen as a problem.²¹⁴

5.11 Expert evidence

According to the draft, experts, who usually presented their report in writing, could be ordered to give an additional oral explanation.²¹⁵ In order to reduce costs, it was even possible to order a completely oral report in cases not subject to appeal.²¹⁶ Additionally, the draft provided that the appointment of experts was the sole task of the court and the court could decide either to appoint three experts or a single expert only²¹⁷ (a similar approach was chosen in Geneva).²¹⁸

²⁰⁴ *Révision*, o.c., 7, Book 1, Titre II, Chapitre II, Arts. 7-8.

²⁰⁵ Arts. 62-63 LPCG.

²⁰⁶ *Révision*, o.c., 9, Book 1, Titre V, Chapitre III; *ibidem* 69-70.

²⁰⁷ *Révision*, o.c., 9, Book 1, Titre V, Chapitre III, Art. 13.

²⁰⁸ *Révision*, o.c., 74.

²⁰⁹ *Révision*, o.c., 10-11, Book 1, Titre VI, Chapitre II.

²¹⁰ Geneva code, *Titre XIII*.

²¹¹ Arts. 253 et seq. CdPC.

²¹² Art. 407 CdPC.

²¹³ *Révision*, o.c., 11, Book 1, Titre VI, Chapitre IV. See also p. 77: ‘[...] nous établissons, comme règle générale, l’enquête à l’audience, en présence des juges qui sont appelés à vider le litige [...]’.

²¹⁴ *Révision*, o.c., 11, Book 1, Titre VI, Chapitre IV; *ibidem* 77 et seq.

²¹⁵ *Révision*, o.c., 12-13, Book 1, Titre VI, Chapitre V, Art. 67.

²¹⁶ *Révision*, o.c., 12, Book 1, Titre VI, Chapitre V, Art. 66.

²¹⁷ *Révision*, o.c., 12, Book 1, Titre VI, Chapitre V, Art. 54.

²¹⁸ Art. 216 LPCG.

5.12 Inspection of premises

The Belgian draft did not follow the Geneva code in requiring all members of the panel of judges to be present at the inspection of a locality. However, if this was considered to be indispensable, the court could decide to have the inspection of the locality conducted by the whole panel.²¹⁹

5.13 Oral pleading

The draft aimed at reducing the length of oral pleading. The Commission was of the opinion that oral pleading had the potential of delaying the hearing of cases of other litigants because it took a considerable amount of court time.²²⁰ A reduction of the time available for oral pleading was – in the eyes of the Commission – justified by the fact that as a result of the new rules of the draft cases would arrive at the oral hearing well prepared.²²¹ Therefore, it was decided that each party would only be allowed to present his case once (as stated above, the Geneva code also aimed at reducing the number of times the parties were allowed to present their case orally). This was only different if the court believed that it required further information.²²² The new rule differed from the existing practice, according to which each party was normally allowed two presentations. However, in practice it appeared that the oral statement of reply very often only duplicated the oral statement of claim and therefore merely served to prolong the case unnecessarily.

In addition, the draft provided that the judges before whom oral pleading took place would have to be the same judges as the ones who had been present at the hearing of witnesses (the same was true according to the Geneva code).²²³ At least, this is the manner in which Article 53 of Book 1, *Titre VI* was to be understood according to the Commission.²²⁴ As a result, immediacy was promoted.

Written pleading as it could be found in the French code was completely abolished.²²⁵

5.14 Ministère Public

The Belgian draft did not introduce important changes in the rules on the role of the *Ministère Public* in civil cases. It did not allow the parties to furnish an oral reaction to the opinion of the *Ministère Public*, but maintained the rule of the French code that they were only allowed to submit immediately after the opinion had been introduced ‘de simples notes énonciatives des faits sur lesquels elles prétendent que les conclusions ont été incomplètes ou inexactes.’²²⁶

5.15 Judgment

The Commission paid attention to the drafting of *qualités* by the claimant.²²⁷ A minority of the Commission wished to abolish these *qualités* as had happened in Geneva and The Netherlands. The majority, however, believed that the old system should not be abolished, but that it would have to be improved. This meant that the *qualités* should not be submitted after the judgment had been pronounced, at the moment a party wished to obtain an official written copy (*expédition*) of it, i.e., at a moment the litigants’ memory regarding the relevant facts had faded and their presentation of what had happened was influenced by what they had learned about the strength of their respective positions. Consequently, the draft determined that the *qualités* should be submitted at the same time as the statements of case. They had to be drafted by the claimant (better: his counsel), whereas the defendant was given the opportunity to indicate what points in the summary were missing and what points were incorrect.²²⁸ The text of this document would be used when drafting an official copy of the judgment. The Commission also suggested to strike the name *qualités* from the statute book since it was old-fashioned and did not convey what was meant by it.²²⁹

5.16 Default

²¹⁹ *Révision*, o.c., 13, Book 1, Titre VI, Chapitre VI, Arts. 69 et seq.

²²⁰ *Révision*, o.c., 66: ‘La plaidoirie n’ayant pas d’autre objet que d’éclairer les juges, c’est un devoir pour eux de la faire cesser quand la cause est pleinement éclaircie. Agir autrement, ce serait en quelque sorte commettre un déni de justice vis-à-vis des parties qui attendent leur tour de rôle.’

²²¹ *Révision*, o.c., 66: ‘Les affaires, d’après le vœu du projet, ne doivent venir à l’audience que bien préparées; tout doit être communiqué ou signifié au préalable [...]’

²²² *Révision*, o.c., 8, Book 1, Titre II, Chapitre II, Art. 20.

²²³ C. Schaub, P. Odier, E. Mallet (eds.), o.c., 183.

²²⁴ *Révision*, o.c., 80.

²²⁵ *Révision*, o.c., 66.

²²⁶ *Révision*, o.c., 14, Titre VII, Arts. 1 et seq.

²²⁷ Art. 142-145 CdPC.

²²⁸ *Révision*, o.c., 8, Book 1, Titre II, Chapitre II, Art. 14; see also *idem*, 14, Book 1, Titre VIII, Art. 6.

²²⁹ *Révision*, o.c., 65.

Under the French, Geneva and Dutch codes, a defendant against whom a default judgment had been given could attack this judgment by way of opposition. The Belgian draft chose a different approach. The drafting Commission stated that a default followed by opposition was often premeditated where debtors decided to stay away in order to prolong litigation and, consequently, defer payment.²³⁰ The Commission believed that in the case of a defaulting defendant, it would suffice to have him resummoned by a *huissier*. This would give him in the Commission's opinion the same guarantees as an opposition. If the defendant did not make an appearance after being resummoned, the claimant would be awarded his claims – at least if they appeared 'justes et bien vérifiées'²³¹ and if the summons had been served on him in the right manner – and the judgment would not be regarded as a default judgment. Consequently, opposition was not possible. As a result of this measure, opposition was effectively abolished by the draft.²³²

5.17 Third party opposition

Third party opposition was abolished. The Commission was of the opinion that a real third party did not have an interest in the case and that, consequently, third party opposition was not needed. If the enforcement of the judgement would affect the third party's rights, he would, according to the Commission, have the necessary means to prevent this during the enforcement proceedings.²³³

5.18 Appeal against non-final judgments

The Commission distinguished various types of judgments. Its distinction did not completely coincide with that of the French code. The preparatory and interlocutory judgments of the French Code were in the Belgian draft brought under the heading of *jugements d'instruction*. According to the Belgian draft these judgments were meant to put the court in a position to pronounce final judgment, e.g., by ordering the hearing of witnesses. According to the draft, filing an appeal against *jugements d'instruction* was only allowed together with an appeal against the final judgment. Because the definition of *jugement d'instruction* of the Belgian draft coincided with that of preparatory judgment of the Geneva Code (see Section 5.18 above), the Belgian draft did exclude intermediate appeals in the same kind of cases as the Geneva Code. It did, however, not include the exception to this rule in the Geneva Code, i.e., the possibility of an intermediate appeal if the judgment appealed of allowed a certain means of proof or a manner of instruction in a case where this had been forbidden by the code; in this particular case appeal was immediately possible according to the Geneva code. It was felt that the Geneva exception had given rise to abuse.²³⁴

6. Conclusion

The French *Code de procédure civile* (1806) shaped civil procedural law for a longer or shorter period of time in many European countries. Even in countries where this code was never officially introduced, it was taken as an example for national codification efforts. Whether the popularity of the French code was due to its intrinsic qualities may however be doubted. The example of Geneva, The Netherlands and Belgium shows that in the 19th century one was well aware of the various shortcomings of the French code and this resulted in several amendments to the French procedural model. The Geneva code and the Belgian draft show the largest number of amendments, whereas the Dutch code was more conservative in its outlook.

In Chapter 3 of the present article a selection of innovations from the Geneva code has been presented. To a large extent these innovations formed a reaction against the perceived deficiencies of the French code. Several innovations are presented in Bellot's commentary as a return to Geneva practice that predated the introduction of the 1806 Code. References to jurisdictions other than France and Geneva are scarce.

The innovations did, however, not mean that the Geneva Code left the French family of civil procedural law. The basic concepts of civil procedure remained the same, whereas many important features of the French code were maintained. Examples are the fact that the action had to be commenced by way of a summons served by a bailiff without the involvement of the court and the fact that the judgment needed to contain grounds.

The innovations of the Geneva Code may be brought together under at least four headings. First, attempts were made to regulate the same subject-matter more concisely and to structure this

²³⁰ *Révision*, o.c., 67.

²³¹ The French rules were maintained in this respect.

²³² *Révision*, o.c., 8, Book I, Titre III.

²³³ *Révision*, o.c., 92.

²³⁴ *Révision*, o.c., 17, Book III, Titre I, Art. 4; *ibidem*, 93.

subject-matter better. This resulted in a Code that contained a smaller number of Articles than the French Code. These Articles were also arranged according to a different scheme.

Secondly, several procedural techniques from the French code were abolished. Compulsory preliminary conciliation is a good example. As stated above, it was replaced by the power of the judge to attempt conciliation at a moment in the action he deemed most fit for this. Another example is the *interrogatoire sur faits et articles*. It was replaced by the possibility of hearing the parties in open court without having to inform them in advance of the facts on which they would be questioned. A final example is the abolition of the so-called *qualités*.

Thirdly, various innovations aimed at improving existing procedural rules and concepts. Often these involved increasing the judge's powers to influence the course of the lawsuit. It was the judge who had to strictly guard the time-limits; the 'partie la plus diligente' disappeared from the Geneva Code. The exchange of statements of case was also brought under the control of the court, as was the appointment of experts. At the same time considerable attention was paid to increasing immediacy in the hearing of cases. The code provided that witnesses should be heard before the panel of judges instead of being questioned in private by a judge-commissioner. Also, the judges who attended the hearing of witnesses had to be the same as the ones attending oral pleading. The inspection of a locality by the whole panel of judges instead of by a judge-commissioner aimed at increasing immediacy too.

Finally, various measures sought to reduce the amount of time needed for hearing actions. An example is the reduction of the length of oral pleading by limiting the possibility to present an oral reply and rejoinder. Another example is the abolition of intermediate appeals of the 'interlocutory judgments' of the French code, due to their classification as 'preparatory' in the Geneva code. More generally, the rather blunt division of cases in ordinary and summary cases of the French code was replaced by an approach which allowed the judge to differentiate more precisely on the basis of the character of the case.

As stated, the Belgian draft was also very innovative. Just as in the case of the Geneva code, this did, however, not mean that Belgium would have abandoned the French procedural tradition if the country would have adopted this draft. Not only was a deliberate decision made to only consult the legislation of countries belonging to the French tradition whenever a comparative approach was chosen, but also French procedural treatises were very much favoured by the commission as a source for the Belgian draft.

The innovations of the draft can be brought together under the same headings as those of the Geneva Code. First - and in this the Belgian draft chose an approach similar to that of the Geneva code - the subject-matter was presented more concisely and structured differently. In addition, subject-matter that had not been regulated by the French code but which nevertheless played a role in case law, such as counterclaims, was now specifically regulated.

Secondly, several procedural techniques from the French code were abolished. Compulsory preliminary conciliation and the *interrogatoire sur faits et articles* are good examples. More original are the abolition of opposition against a default judgment by the defaulter, third party opposition and the *cautio judicatum solvi*. Surprisingly, the *qualités* were not abolished by the draft, although some improvements were introduced regarding the moment these needed to be submitted.

Thirdly, various innovations aimed at improving existing procedural rules and concepts. Just as in Geneva, these often involved increasing the judge's powers to influence the course of the lawsuit. The approach to the legal action was 'que le juge peut, d'office, ordonner toutes les mesures qu'il croit indispensable à son instruction.' At the same time attention was paid to increasing immediacy in the hearing of cases. For example, the draft provided that witnesses should not be heard by a judge-commissioner but by the court. Also, the judges who attended the hearing of witnesses had to be the same as the ones attending oral pleading.

Finally, various measures sought to reduce the amount of time needed for hearing actions. Several measures were similar to those of the Geneva code, for example the reduction of the length of oral pleading by limiting the possibility to present an oral reply and rejoinder, and the abolition of intermediate appeals against the 'interlocutory judgments' of the French code, this time due to their classification as 'jugements d'instruction.' More generally, the ordinary procedure was simplified in order to reduce the time necessary for hearing the action.

When compared with the Geneva Code and Belgian draft, the Dutch Code of Civil Procedure was extremely French in its outlook, even though originally plans were made to introduce a purely Dutch code. However, the creation in 1815 of the Kingdom of The Netherlands which resulted in the union of the Southern Netherlands (Belgium) and the Northern Netherlands resulted in the abolition of these plans. Under Belgian pressure, the French code was taken as an example that was closely followed. In the Dutch Code the powers of the judge were comparable with those of the French code (the 'partie la plus diligente' continued its existence, whereas the exchange of statements of case was

not brought under the control of the court), the distinction between the summary and ordinary procedure was maintained and the manner in which these procedures was organised was in line with the French example, whereas the *interrogatoire sur faits et articles* was only slightly modified.

Important innovations were limited in number. Examples are the introduction of a new code structure which was thought to be more logical than that of the French code, the reduction of the number of Articles in the code, the abolition of compulsory preliminary conciliation (in fact, the approach of the Geneva code was adopted in The Netherlands), third party opposition, the requirement to submit so-called *qualités*, and the introduction of rules regulating the counterclaim as well as the option to hear witnesses in open court in all cases. Generally speaking the Dutch code continued to demonstrate many of the shortcomings of the French code and, consequently, 19th century legal literature on the Dutch code is full of complaints. Major reforms were only introduced at the end of the 19th century.