

Medico-Legal Death Investigation Systems – Belgium

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ABSTRACT

The Belgian criminal justice system, and hence its death investigation system, is based on the French Code Napoléon from 1808. It is characterized by an inquisitory (secret) nature being mostly led by an investigating judge. Most deaths are certified (so-called Model IIIC) by general physicians with very limited forensic knowledge or experience. There are no legal restrictions as to which physician can certify any death. Only when the nature of death is considered 'suspicious' or 'violent' by these physicians, the public prosecutor will ask for a more in-depth investigation by a doctor trained in forensic medicine. If necessary, a forensic autopsy will be commissioned by an investigating judge who investigates both *à charge et à décharge*. Overall, the autopsy rate (forensic and clinical) is low in Belgium (estimated up to 1-2% of +/- 110,000 annual deaths).

Residency training and specialization in forensic medicine takes 5 years and the candidates are trained both in clinical forensic medicine and forensic pathology (regulated by the Ministerial Decree of February 27th 2002).

Keywords: Code Napoléon; court of assizes; investigating judge; inquisitory; Model IIIC.

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After its independence in 1830, the new Belgian state adopted Napoléon's *Code d'instruction criminelle* from 1808 as its own Code of Criminal Procedure (*Wetboek van Strafvordering – Code d'instruction Criminelle*). To date, the criminal investigation and prosecution system has changed little from its origins more than two centuries ago. It still has a pronounced inquisitorial (secret) character in which a judge plays an active role in investigating the facts of the case and thus being distinct from the adversarial system in which the role of the judge/court is primarily that of an impartial referee between the prosecution and the defense.

In Belgium, when confronted with the death of any person, a medical doctor is required to formally establish that the person is deceased and has to complete the death certificate ('model IIIC' or 'model IIID' for children below the age of 1) before the Officer

of the Civil Registry can provide an authorization for burial or cremation (article 77 Civil Code). There are no legal restrictions as to the qualification(s) of the medical doctor who completes the death certificate. Even more, in Belgium any medical doctor can certify any death. Neither training in death certification of legal medicine nor an independent professional position with regard to the deceased person is a prerequisite. The medical disciplinary body (Order of Physicians) only gives some deontological advice with respect to death certification and stipulates that this should be done 'with the utmost care'.

The Model IIIC death certificate consists of a part that has legal implications, and a part that only serves statistical purposes. The legal part of the death certificate has one important 'tick-box' where the medical doctor's opinion is asked as to whether there is any 'medico-legal objection against burial or cremation'. The nature of these 'objections' is specified in a footnote: 'death is possibly or certainly caused by an external factor'. The medical disciplinary body states that 'if there is any doubt [as to a natural death] in the mind of the medical doctor' a medico-legal objection should be expressed. The physician who completes this death certificate will also make an administrative decision as to the manner of death: homicide, accident, suicide, natural, or undetermined. We often see major discrepancies between the administrative cause of death and the appreciation of 'medico-legal objection' on the one hand due to the lack of forensic knowledge by general physicians and on the other hand a tendency by some physicians 'not to cause additional burden or

grief to the family by ticking the medico-legal objection box’.

If no medico-legal objections are mentioned and there is a request for cremation, a second, independent, medical opinion is required (Decree of January 16th 2004). An independent, so-called ‘sworn’ medical doctor, appointed by the Civil Registry, has to certify the absence of signs of a violent or suspicious death. These sworn medical doctors are however again often family physicians without any forensic training. If the sworn doctor can’t certify the absence of signs of violent or suspicious death the Officer of the Civil Registry has to inform the Public Prosecutor’s Office (*Procureur des Konings – Procureur du Roi*) and he is not allowed to issue a permission for burial or cremation.

In Belgium, approximately 110,000 deaths occur per year. It is estimated that less than 1-2% of these deaths are investigated by full (clinical or forensic) autopsy¹.

A continued decline in the clinical autopsy rate is seen, whereas the forensic autopsy rate remains stable. Recently, medical specialists in forensic medicine have been authorized to also perform clinical autopsies².

When a medico-legal objection is made by the initial medical doctor, the Officer of the Civil Registry is again not allowed to issue permission for burial or cremation and again has to inform the Public Prosecutor’s Office of a suspicious death (article 81 of the Civil Code).

In a first step, the Public Prosecutor has the possibility to commission ‘one or two physicians’ to inform his office about ‘the cause of death and the state of the body’ (article 44 of the Criminal Code). In the past any physician could be commissioned by the Public Prosecutor; however recently the Criminal Code stipulates that this examination should be performed by a physician who is registered in the National Register for Court Experts (Law of April 10th 2014). Mostly, these physicians are forensic medicine specialists working in an academic forensic institute.

Experts included in the National Register are now permanently sworn as court experts. Beforehand, the forensic expert is expected to mention the legal oath explicitly in every report: “I swear that I will fulfill my mission in good conscience, conscientiously and honestly” (“Ik zweer dat ik mijn opdracht naar eer en geweten, nauwgezet en eerlijk zal vervullen” - “Je jure de remplir ma mission en honneur et conscience, avec exactitude et probité”). If not mentioned, the forensic report would be declared null and void.

The medical examination regarding ‘the state of the body’ is in this stage limited to an external examination, not a full autopsy and thus establishing ‘the cause of

death’ is often not more than an educated guess. There is no formal intention by the Prosecutor’s Office to establish a cause of death; the purpose of this external examination is, from the Prosecutor’s point of view, mostly to rule out (or confirm) that a third party could have played a role in the death of that person. This legal point of view often conflicts with the point of view of a forensic doctor.

When interference by a third party resulted in death cannot be ruled out, the public prosecutor can ask for the initiation of a judicial inquiry. This implies that the public prosecutor has to (temporarily) hand over the investigation to a so-called investigating judge (*onderzoeksrechter – juge d’instruction*). This investigating judge, in contrast to the public prosecutor, is a neutral magistrate who will investigate the case either incriminating or exculpatory (*à charge et à décharge*) and assumes an active, leading role in the inquiry.

The investigating judge will commission a forensic doctor, registered in the National Register for Court Experts, who can accompany the investigation judge while visiting the crime scene (*plaatsafstapping – descente sur lieu*) and to subsequently perform an (internal) autopsy. Once the decision to perform a forensic autopsy is taken by the investigating judge, the next of kin (or any other involved party) cannot oppose this decision.

In Belgium, the medical specialization of ‘forensic medicine’ can result either from a five-year residency in forensic medicine (Ministerial Decree of February 27th 2002) or an eight-year residency (five years in pathology and three years in forensic medicine). The statute of a commissioned forensic doctor is that of a ‘medical advisor to the legal authority’ and the observations he or she makes during the autopsy (or any other examination) are considered ‘authentic’ and ‘a legal source of information’. The investigating judge cannot ignore the observations made by the forensic doctor, but is not bound by the conclusions made in the forensic medical report.

In Belgium, the forensic doctor is not the authority determining the manner of death since he is not allowed to make conclusions that are part of the legal domain or that are considered legal qualifications. The manner of death is thus established at the end of the judicial inquiry by the appropriate legal authority.

A somewhat unique feature of the Belgian legal system is the existence of a ‘reconstruction’ (*wedersamenstelling – reconstitution*). The reconstruction can have a technical character, where technical medical aspects can be tested, or a more formal character, where a suspect gives his version of the facts and these are formally

acted in a *proces-verbal*. This version can then be compared to the forensic findings. The reconstruction is led by the investigating judge and is held in the presence of the Public Prosecutor's Office, the suspect's defense counsel, and civil parties. The forensic pathologist often plays an important role in this part of the judicial inquiry because here he can present his findings to all involved parties. Usually, the reconstruction will be photographed and filmed and a summary of the observations acted in a *proces-verbal*. It is important that suspects initially present and portray their version of the facts and that they are subsequently confronted with medical and technical findings that support or question their statements.

In Belgium's judicial system, the court of assizes (*hof van assisen - cour d'assises*) is the trial court that hears the most serious offenses, namely crimes qualified as murder and manslaughter and lethal terrorist acts. Crimes of this nature are punishable by imprisonment that can be up to a lifelong sentence. No appeal is possible against the decision of an assize court. Only in the case of procedural error(s), after a decision of the Court of Cassation (*Hof van Cassatie - Cour de Cassation*), another trial before another court of assizes can be granted.

Each of Belgium's 10 provinces has an assizes court. These are the only courts in Belgium that hold jury trials. As such the court of assizes will be composed of three judges and twelve jury members (jurors). The jurors are randomly chosen from the Belgian federal election rolls. Some restrictions apply however. Serving on an assizes jury is regarded as a civil responsibility and a legal obligation; as a result, a potential juror can only be discharged from their jury duty if there are valid grounds. The jury acts as the sole assessor of the facts, but the penalty is decided together with the judges. Article 150 of the Belgian Constitution stipulates the procedure of trial by jury. The courts of assizes are not permanent courts, for each new trial a new court of assizes will be put together. The trial is held orally and during the hearings the witnesses and the evidence will be reviewed. The senior judge plays an active leading role in this type of trial and assumes the role of an investigating judge. In this phase (forensic) experts, who were involved during the preliminary investigation of the case, will be heard. The forensic doctor for example will always be present to explain his findings and to allow cross-examination by the involved parties.

In principle, the hearings are open to the general public. If however, the court considers that public disclosure would pose a threat to the public order or morality, it may arrange for a hearing or the entire trial to take place behind closed doors.

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