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ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

Informal Judicial Practices in the Belgian Legal Order: A Story of Incremental and Reactive Development

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Abstract
This article discusses the existence and development of informal judicial practices in the Belgian legal order. It starts with the observation that the Belgian legal system is already highly formalized and suggests two reasons for that. Further, it shows that despite this rather high degree of existing formalization, important informal practices have nevertheless taken shape. However, over time the legislature intervenes, often as a reaction to some kind of external catalyst, and formalizes those previously informal aspects of the Belgian judicial system. This article therefore describes the Belgian legal order as a process of incremental and reactive formalization, taking place between the judiciary and the legislature.

Keywords: Belgian legal order; incremental formalization; reactive development; European influence; external catalysts

A. Introduction

If someone were to be asked to describe the Belgian legal order, "informal" would not be an answer that came readily to mind. Due to its history, the Belgian legal system is marked by the strong French Napoleonic tradition to write down the laws in extensive *codices*. As is the case in almost all countries, the Belgian Constitution sets out the basic tenets in terms of fundamental rights and freedoms, government institutions, and the balance of powers, which are given more concrete shape via formal laws, which, in turn, are concretized further by lower-ranking forms of law, such as royal or ministerial decrees, and authoritatively interpreted by the judiciary. A system like that would generally be understood not to leave much room for informality. A search via the existing legal databases indeed shows that scholars rarely describe the Belgian legal regime in terms of informality, barely even using the word at all.

All that of course does not mean that more informal institutions, conventions, or practices, sometimes even of a constitutional nature, have not taken shape throughout the years. However, as is generally the case,[1] mention of such (constitutional) conventions or practices within the Belgian legal order is made virtually exclusively within the realm of politics, between actors of the

[1]*See, e.g.*, Miloš Brunlík & Michal Kubát, *Constitutional Conventions in Central Europe: Presidents in Government Formation Process*, 70 PROBS. OF POST-COMMUNISM 42, 44 (2021); Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37 (2012) See for an exception, though in the rather peculiar jurisdiction of the UK: Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 Oxford Journal of Legal Studies 750 (2021).

legislative and executive branches.[2] Informal judicial institutions, on the contrary, are a concept that has not yet gotten any prominence in Belgian legal scholarship.

So why would this be the case? Is it because the Belgian legal system simply does not have any such informal institutions and practices that relate to the judiciary? Or are they there, but have they simply escaped scholarly attention and interest? This article will argue that both those statements hold some measure of truth. First, the Belgian legal order is marked by a great measure of formality, especially where the judiciary is concerned. This article will suggest several reasons for that (B). Second, such a degree of formalization does not, however, mean that informal practices or institutions cannot be found, and this article will point to several of them. Yet, over time the legislature intervenes and formalizes those previously informal aspects of the Belgian legal order. A third part of this article will point to three such instances (C). This means that the topic of informal judicial institutions in the Belgian legal order can be described as a process of incremental and reactive formalization, taking place between the judiciary and the legislature (D).

B. An Established History of a Formalized Judicial System

When one looks into the Belgian judicial system, it becomes readily apparent that it is formalized to a large degree. Virtually every aspect of judicial proceedings and the status or position of judges is laid down in generally binding rules, whether of constitutional, statutory, or lower-ranking nature. One can wonder why this is the case. While the abovementioned Napoleonic roots of the Belgian legal order are certainly a part of the puzzle, it is suggested here that at least two separate yet mutually reinforcing elements also play a role.

The first element is historic in nature. The Belgian Constitution is marked by great trust in parliament and the legislative branch, and distrust in the executive.[3] Many constitutional provisions require the legislature to take action, without it being able to delegate its power. That faith in the legislative branch can also be found in the provisions relating to the judiciary. The Belgian Constitution regulates a comparatively wide variety of matters relating to the judiciary at large and to the career and status of judges,[4] and it entrusts the power over several of these fundamental aspects to parliament. In this respect, parliament is required to establish the courts and tribunals,[5] to rule on their jurisdiction *ratione materiae* and *ratione loci*,[6] to decide on the retirement dates and pensions of judges,[7] to determine their remuneration,[8] to establish a system of evaluation,[9] and to decide on incompatibilities.[10] In the Belgian legal order there is thus a broad requirement of formal legality regarding the judiciary. That principle of legality is moreover

[2]*See, e.g*, JAN VELAERS, DE GRONDWET: EEN ARTIKELSGEWIJZE COMMENTAAR (2019). Throughout his book, Velaers paid great attention to constitutional traditions and conventions. Yet, in the index at the back of the book the notion of Constitutional Convention (*Grondwettelijke gewoonte*) refers exclusively to provisions of the Constitution that deal with the political branches of power.

[3]*See* Willem Verrijdt, *Belgium*, *in* NATIONAL CONSTITUTIONS AND EU INTEGRATION 1, 3 (Stefan Griller, Lina Papadopoulou & Roman Puff eds., 2022). Some examples: Most fundamental rights and freedoms that are mentioned in the Constitution can only be limited on the basis of a formal law by parliament; Article 105 of the Constitution mentions that the King has no powers other than those explicitly afforded to him by the Constitution and the special laws. The reason for this is that the drafters of the Constitution during the Belgium's preparations for independence wanted to break with the governing "by decree" of King Willem of the Netherlands.

[4]Part of the reason for this can again be found in the period during which Belgium became independent. When Belgium was still part of the Netherlands, disputes with the government were removed from the judiciary. It was the intention of the Belgian Constituent body to better protect individuals against the government by entitling them to have their dispute settled by a court that met the constitutional requirements of due process. *See* PATRICIA POPELIER & KOEN LEMMENS, THE CONSTITUTION OF BELGIUM: A CONTEXTUAL ANALYSIS 181–82 (2015).

[5]1994 CONST. (Belg.) art. 1.

[6]*Id.* at arts. 156, 157.

[7]*Id.* at art. 152.

[8]*Id.* at art. 154.

[9]*Id.* at art. 152, §3.

[10]*Id.* at art. 155.

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interpreted rather extensively by the Belgian judicial and advisory bodies.[11] The Constitutional Court and the advisory section of the Council of State regularly state that the principle implies that the legislature must itself organize the essential elements of those subjects and can delegate only precisely defined aspects to the executive.[12] Thus, the essential rules relating to the organization and functioning of the courts and the procedures before them, as well as the status of judges, must be detailed in formal laws.[13] Clearly, this requirement of formal legality assists in the reaching of a higher level of formalization regarding the judiciary.

The second element that needs to be mentioned here is the very open attitude of the Belgian legal system towards the international, and especially the European, legal orders. It is well known that the Belgian legal system is very accommodating towards international law. This is especially true for its judiciary, which conscientiously refers to European standards, thereby incorporating them into domestic case law. This, in turn, also has an effect on the level of formalization of the judicial system in Belgium. Overall, the standards that can be found in European instruments and case law can be seen as pushing towards a rather formalized judicial system, striving for transparency, and eliminating overly broad forms of discretionary power. By incorporating those European standards into the Belgian legal system, the various bodies within the Belgian legal system thus effectively push towards greater formalization. One example in that regard can be found in the abovementioned requirement of formal legality in the organization of the judiciary. The considerations of the Constitutional Court and the Council of State were grounded at least in part on the case law of the European Court of Human Rights.[14] Another example can be found in a recent amendment to the judicial code regarding the type of chamber that would decide cases. Briefly put, the amendment established a system in which cases would normally be decided by a single judge, but which would allow the court president to assign it to a chamber of three judges. In the original draft of the amendment, the court president had complete discretion in assigning the case. Yet, the Council of State,[15] with reference to the European Court of Human Rights' case law on the right to an independent tribunal established by law,[16] raised doubts about this and urged the legislature to circumscribe that power of the court president. In response, it was added that the court president could only assign a case to a collegial chamber "when the complexity or the importance of the case, or special, objective factors so require."[17] Thus, by relying on the standards that can be found in European law—which generally favor formalization, especially when the judiciary is involved—the advisory opinion of the Council of State convinced the legislature to reduce the court president's discretionary power and more heavily formalize the system of assignment of cases.

It is argued here that the two abovementioned elements are at least part of the explanation of why the Belgian judicial system is highly formalized. The system comes from a tradition of codification, is founded upon a requirement of formal legality, and is continuously inspired by

[11]*See* Daan Bijnens, *Het Parlement bekleedt in toenemende mate een figurantenrol als regelgever: een stelling gefundeerd op los Zand? Het oprichten van rechtscolleges als wetgevend prerogatief, in* PARTICIPATIE VAN DE BURGER IN DE RECHTSORDE 74 (Niels Appermont & Ulrike Cerulus eds., 2017).

[12]*See, e.g.*, GwH [Constitutional Court], Oct. 15, 2015, n°138/2015, para. B.40.1, http://www.grondwettelijkhof.be; CE [Council of State], Jul. 11, 2013, n°53.519/3, para. 5, http://www.conseildetat.be.

[13]*See also* CE [Council of State]. Mar. 12, 1997, n°25.663/2, http://www.conseildetat.be.

[14]*Accord.* Coëme v. Belgium, App. 32492/96 (Jun. 22, 2000), https://hudoc.echr.coe.int/eng?i=001-59194; Pandjikidzé v. Georgia, App. 30323/02 (Oct. 27, 2009), https://hudoc.echr.coe.int/eng?i=001-95396; Fruni v. Slovakia, App. 8014/07 (Jun. 21, 2011), https://hudoc.echr.coe.int/eng?i=001-105236; Oleksandr Volkov v. Ukraine, App. 21722/11 (Mar. 9, 2013), https://hudoc.echr.coe.int/eng?i=001-115871.

[15]CE [Council of State], Jun. 11, 2015, n°57.529/2–3, paras. 88–91, http://www.conseildetat.be.

[16]*See, e.g.*, Buscarini v. San Marino, App. 31657/96 (May 4, 2000); Gorguiladze v. Georgia, App. 4313/04 (Oct. 20, 2009), https://hudoc.echr.coe.int/eng?i=001-95242 .

[17]The Constitutional Court later accepted that this addition provided sufficient safeguards to prevent undue discretion being exercised by the court president and further required Court presidents to provide reasons for their decisions on the matter. GwH [Constitutional Court], May 31, 2018, n°62/2018, paras. B.16.1–B.22, http://www.grondwettelijkhof.be. Later confirmed in: GwH [Constitutional Court], Jan. 12, 2023, n°4/2023, paras. B.3.1–B.3.4, http://www.grondwettelijkhof.be.

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the ever-tightening European standards regarding the judiciary. All of that is not to say, however, that every single aspect that relates to the judiciary is laid down in formal rules. There is, for example, no written *sub judice* principle in the Belgian legal order.[18] Even so, there is no doubt in that order that judges may not experience any form of pressure when making their decisions, whether from the executive, the legislature, the High Council of Justice, the media, or any other body, either directly or indirectly via public statements. Overall, there is no real evidence that members of the political branches of government actually try to influence the way in which judges decide (sensitive) cases. One issue that does pop up, now and again, is politicians criticizing a certain judgment that they do not agree with. One recent example is the Flemish Minister of Justice, who tweeted that a sanction of four years in jail for a rapist was too light. In another example, the political party behind the then state secretary of asylum and migration started an online campaign against "out of touch judges" a few years ago, after the Council of Alien Law Litigation had forced the state secretary to provide a visa to a Syrian family.[19] Yet, every time something like this happens, there is an immediate and sharp response from other politicians, or from other actors, such as the High Council of Justice, the magistrates' association, or academics, who remind everyone of the importance of judicial independence and stress the separation of powers.

C. The Incremental Formalization of Informal Judicial Practices

The last example in the previous section showed that there are at least some aspects of the Belgian judicial system that still remain more informal. Yet, those seem increasingly to be exceptions. It seems to be more difficult to find such informal judicial institutions and practices that are still around today. The general trend seems to be one in which the legislature, after a while, intervenes and formalizes the previously informal aspects of the Belgian legal system, often as a consequence of a specific catalyst. The Belgian legal order thus slowly but surely seems to be formalizing further. In what follows, this article will point to three such instances: the system of appointment and promotion for judges, the use of substitute judges, and the secondment of judges.

I. The Appointment and Promotion of Judges in Belgium

As far as the traditional courts and tribunals are concerned, the system of appointment of judges has undergone a fundamental evolution in the Belgian legal system. When the Belgian state was being conceived, the drafters of the Constitution opted for a system in which the executive appointed judges. At the time, that was considered the "modern" way, which better protected judges against external pressures than did the alternatives, such as election by the people.[20] While it was the King that made the formal appointment, the real decision was taken by the Minister of Justice. Regarding lower-ranking judges the Minister enjoyed absolute autonomy. For hierarchically higher positions, such as in the courts of appeal and the Court of Cassation, and appointment to the position of court president, he had to choose from candidates that were nominated via two lists, one compiled by the court in question and the other by the legislative branch. This way, the legislative and judicial powers retained some influence over the appointment of the highest judicial officers.

This system *de facto* led to a judiciary filled with people from the upper classes, making it into a socially closed-off corps. After World War II, that system gradually changed, in part due to greater access to higher education. The focal point of the appointment process moved from the King/Minister of Justice to the political parties. Appointment on the basis of social standing was

[18]This principle is understood to be safeguarded by the general principle of judicial independence in Article 151, §1 of the Constitution. *See* Jan Velaers, De Grondwet: een artikelsgewijze commentaar, III, 155 (2019).

[19]The case ultimately led to a case before the Strasbourg Court, which found it inadmissible due to a lack of jurisdiction. *See* M.N. a.o. v. Belgium, App. 3599/18 (May 5, 2020), https://hudoc.echr.coe.int/fre?i=001-202468.

[20]Oscar Orban, Le Droit Constitutionnel de la Belgique 619 (1908).

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replaced by appointment on the basis of political affiliation.[21] This political specter loomed quite openly over the appointment process. The Minister of Justice felt strong pressure from his or her party to let partisan motives influence the appointment decision.[22] In that new system, the various party leaderships and some informal commissions distributed judicial appointments via a difficult calculation, even making these decisions part of the discussion during coalition negotiations.[23] The original justification for that state of affairs was that the judiciary should be a reflection of the pluralist society in its entirety.

It is, however, not difficult to see that such an appointment system would give way to the politicization of the judiciary, difficult to square with the image of independent judges. Both the political system and the older system on the basis of social standing also negatively affected women's opportunities in the judiciary. It was not until 1948 that the first woman was appointed as a judge.[24] It was not until the mid-1990s that something else changed. After a big scandal involving mistakes made during the capture and investigation of Marc Dutroux, who had kidnapped, raped, and killed several young girls, the so-called *White Demonstration*—to date one of the biggest demonstrations that Belgium has ever seen—pressured the government into wide-scale reform. The crown jewel of this reform was the creation of the *Hoge Raad voor de Justitie* (High Council of Justice, hereafter also HCJ), a judicial council with a *sui generis* statute and consisting of equal numbers of judicial members, appointed by their peers, and non-judicial members, appointed by the Senate.[25]

The creation of the HCJ has been a true game changer for the appointment of judges in Belgium. The main reason for its creation was to objectify the appointment procedure and to transform the "institutionalized politicization"[26] that was inherent in the previous system into a system based on merit and qualifications. Since then, the focal point of the appointment process has lain with the Appointment and Selection Committee of the HCJ, which, after a long and extensively prescribed selection process, nominates with a two-thirds majority one candidate for each vacancy. While it is still the King who formally appoints the judge, it is in reality the HCJ that decides who the judge should be. The King only has two options. He either appoints the nominated candidate or gives a reasoned decision as to why he is refusing that candidate. He cannot appoint a candidate that was not nominated by the HCJ. Over time, this recommendation has become increasingly binding in practice. Whereas the King/Minister still refused 25 out of 333 nominations by the HCJ in 2001, in 2021 four out of 216 were refused, and in the preceding three years no nominated candidate had been refused.[27] The King's eventual appointment decision is seen as an administrative measure which is amenable to judicial review before the Council of State.[28]

[21]François Perin, Cours de Droit Constitutionnel IIb, 239 (1986).

[22]This state of affairs was well-known. For example, in 1986 a Belgian newspaper wrote on the upcoming retirement of an important member of the public prosecutor's office and speculated on who could be his replacement. The article then went on to openly list only members of the political party of the then Minister of Justice, including information on which important politicians supported which candidate. Information taken from: Michael Faure, *Politieke benoemingen in de Belgische magistratuur*, *in* Nederlands Juristenblad 647, 648 (1986).

[23]Piet Taelman, *De toegang tot de magistratuur*, *in* Statuut en deontologie van de magistraat 167, 168 (Xavier De Riemaecker & Raf Van Ransbeeck eds., 2020); Luc Huyse, *Politieke benoemingen in de magistratuur Een probleemformulering*, *in* Panopticon 122, 124 (1985). This apparently went so far that at a certain point there was a system in place where every party had a certain number of points, based on electoral weight, with the appointing of a specific type of judge costing a certain number of points.

[24]For a depressing account of the pushback women received see Éliane Gubin, *L'accès des femmes aux professions juridiques*, 4 Sextant 104 (1995).

[25]Const. (Belg.) art. 151, §2.

[26]Magali Raes, *Les femmes dans la magistrature belge: la loi et les faits*, *in* Les femmes et le droit 175, 176 (1999).

[27]*See* Hoge Raad voor de Justitie, Jaarverslag 2021 (Nov. 23, 2022), https://hrj.be/admin/storage/hrj/jaarverslag-2021.pdf.

[28]During its review, the Council looks "through" the formal appointment decision by the King and also assesses the content of the decision by the HCJ to propose the candidate in question. *See, e.g.*, CE [Council of State], Oct. 24, 2011), n°215.964, para. 9, http://www.conseildetat.be.

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Overall, the current system of appointing judges to ordinary courts is thus marked by a formal, merit-based system that allows for judicial review.[29] The discretion and informality that marked the older systems have disappeared. This more objective system also seems to have had a positive effect on the equality of chances to enter the judiciary. As soon as the appointment process became more objective, the number of women started to rise tremendously, and since 2013 there have been more female than male judges.[30]

The situation is, however, completely different for the Constitutional Court. That court's appointment system has not changed since it was established in 1980 and is still marked more by convention. The Constitution and the special law on the Constitutional Court prescribe that the Court shall consist of 12 judges, with a double, overlapping parity regarding language and background. There are six Dutch-speaking and six French-speaking judges.[31] On top of that language parity, there is a parity in professional background. In both language groups, there must be an even number of judges with a parliamentary background and judges with a certain number of years of legal experience in the highest echelons of the judiciary or who are full professors.[32] That formally prescribed double parity in the composition of the Court is further compounded by an informal rule.[33] Since the Court's conception, it has been understood that its composition must offer a certain ideological representation of society. That means that the ideological background of the judges must—approximately—represent that of the political landscape.[34] The idea behind this rule is that, because the Court has an important impact on the legislative branch and at times makes decisions that may have a political impact, it should reflect the various political views circulating in society.[35] This informal rule can thus be understood as an external judicial complementary institution.[36]

The judges of the Constitutional Court are appointed by the legislative branch, alternately by the Chamber of Representatives and the Senate, with a two-thirds majority, from a list of two possible candidates. Here, too, it is the King who makes the formal appointment decision. While he is in principle free to choose either of the two candidates, it is always the first candidate that is appointed.[37] Because of the rule just mentioned, for each vacancy it is known in advance which political party will nominate the new candidates. In principle the party in question tries to nominate candidates who are acceptable to all the others (and of course satisfy the other

[29]The case law of the European Court of Human Rights has recently evolved in a way that makes it seem that states should in principle allow judicial review of appointment decisions. *See* Bilgen v. Turkey, App. 1571/07 (Mar. 9, 2021), https://hudoc.echr.coe.int/eng?i=001-208367; Gloveli v. Georgia, App. 18952/18 (Apr. 7, 2022), https://hudoc.echr.coe.int/eng?i=001-216686.

[30]While undoubtedly an important factor, the objectification of the appointment process should not be seen as the only reason for the rising numbers. Another, more indirect, reason is the generalized access to higher education for both men and women, leading to a higher number of women with law degrees, which in turn may reach the required level of experience to be appointed to positions as judges.

[31]Organic Law, (Belg.) Jan. 6, 1989, art. 31, https://www.const-court.be/en/court/basic-text#1-la-constitution-de-la-belgique-federale.

[32]Organic Law, (Belg.) Jan. 6, 1989, art. 34, https://www.const-court.be/en/court/basic-text#1-la-constitution-de-la-belgique-federale.

[33]An amendment to explicitly codify this unwritten rule in the special law was not accepted. *Parl.St.* Kamer 1982–83, nr. 647/2, p. 3. The reason for this was that judges coming from the Court of Cassation or the Council of State who became judges of the Constitutional Court would then be required to openly choose a political party.

[34]André Alen, *Kanttekeningen bij de samenstelling en de werking van het Grondwettelijk Hof*, *in* De Grondwet en Jan Velaers: een Vriendschapsgewijze Commentaar 367, 377 (Cedric Jenart, Jonathan Bernaerts, Yannick Peeters, Patricia Popelier, Dirk Vanheule & Vincent Verbelen eds., 2022). Certain parties are excluded because they are considered to be anti-democratic.

[35]Evelyne Maes, *The independence of the Belgian Constitutional Court*, *in* Eur. Yearbook of Const. L. 13, 28 (2019).

[36]Gretchen Helmke & Stephen Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 Persp. on Pol. 725, 728 (2004).

[37]Marc Verdussen, *Le mode de composition de la cour constitutionnelle est-il légitime?*, 1 Revue belge de droit constitutionnel 67, 69 (2013).

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requirements imposed by the law),[38] but in general the nominating party has quite some leeway. The rule seems to be that each party "minds its own business",[39] meaning that in essence the real decision-making power is vested in the political party whose turn it is. It was only in 2020 that the nominated candidate did not for the first time ever obtain the required majority.[40]

Interestingly, this specific system of appointment has recently been questioned as a consequence of a judgment by the European Court of Human Rights. In the Grand Chamber judgment in *Guðmundur Andri Ástráðsson*, the Court emphasized the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the best qualified candidates are appointed. The Court then continued by saying that it goes without saying that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.[41] Two Belgian commentators pointed to this part of the judgment to cast doubts on the viability of the current appointment system for the Constitutional Court, one that is founded on a representative distribution of seats according to the weight of the various political parties and where half its members are nominated as a result of their parliamentary experience and do not necessarily need law degrees.[42] Notably, a legislative amendment has recently been introduced that would, among other things, require all members of the Constitutional Court to have law degrees.[43]

The Constitutional Court is the only court in the Belgian judicial system that has to comply with a gender quota. In 2014, of the 35 judges appointed to the Court, only four were women. Part of the reason for that could be found in the fact that more men than women fulfilled the requirements concerning legal expertise, such as having been full professors or judges in the Court of Cassation for five years.[44] In this way, the understandable aspiration within the appointment requirements to make only established jurists eligible for the Constitutional Court indirectly increased the sticky ladder that women face in academia and the judiciary. In that same year, an amendment to the Special Law introduced a requirement that at any given time neither gender may make up more than two thirds of the judges in the court. This quota has already had some effect: of the eight new judges appointed to the Court, four have been women.

When we move from the initial appointment of judges to their further careers within the judiciary, we see a very similar evolution throughout the years. Here as well, there was originally little in terms of legislative framework, which left a vacuum to be filled by convention and informality. Originally, the decisions to promote judges, either to higher courts or to hierarchically higher positions such as that of court president, were mostly left to the courts themselves. This led to what has been described as the continuation of a system of co-option and selection mechanisms, via mostly male networks with unclear and opaque criteria, which often overlooked

[38]Which is also a natural consequence of the fact that judges must obtain a two-thirds majority.

[39]Toon Moonen, *House of Courts: De vernieuwing van het Grondwettelijk Hof (deel 1)*, 83 RECHTSKUNDIG WEEKBLAD 403, 410 (2019-20).

[40]This happened for the first time ever in 2020 when a judge nominated by the French-speaking green party, Zakia Khattabi, did not receive the required majority in three separate votes. The reason was that she was deemed by some of the more right-wing parties to be too activist for the Court.

[41]Guðmundur Andri Ástráðsson v. Iceland, App. 26374/18, para. 222 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng?i=001-206582.

[42]Sébastien Van Drooghenbroeck & Cécilia Rizcallah, *Nomination des juges et « tribunal établi par la loi » Confirmation, évolution et révolution en marge de l'arrêt Guðmundur Andri Ástráðsson c. Islande de la Cour européenne des droits de l'homme*, JOURNAL DES TRIBUNAUX 573, 580 (2021). There have been debates in the Senate about amending this system and requiring the political members of the Court to have 10 years of parliamentary experience instead of 5 and to pass an exam. *See Parl. St.* Senaat, 7-166/1.

[43]*Parl. St.* Kamer, 55-2850/001. It is nevertheless unlikely that this proposal will be passed in its current form given some of the other amendments that it introduces and which are politically much more sensitive.

[44]Evelyn Maes, *Borrelnootjes voor het Grondwettelijk Hof: een beperkte uitbreiding van wie, wat en hoe*, *in* HET FEDERALE BELGIË NA DE ZESDE STAATSHERVORMING 213, 225 (A. Alen, B. Dalle, K. Muylle, W. Pas, J. Van Nieuwenhove en & W. Verrijdt eds., 2014).

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women.[45] In some courts, including the Court of Cassation and the Council of State, it was the established practice simply to appoint the judge with the greatest seniority as court president.[46] Furthermore, once obtained, such positions lasted until the judges in question retired.

The legislature wanted to change this system, in which "the dangers of corporatism were never far away."[47] Time and again it had been shown that good judges were not necessarily good court presidents, because the position also requires a degree of management and organizational skills. Because those positions were granted for the rest of a judge's career, an unsuitable court president could endanger the smooth functioning of a court for years.

In 1998—in the same judicial reform that amended the appointment system—the legislature also overhauled the promotion system. The system is now as follows. A promotion to a higher court is treated as a new appointment, which means that the judge in question will have to apply for the position and be selected by the Appointment and Selection Committee by the HCJ on the basis of his or her merits. Similarly, in dealing with promotion to a position as court president the Appointment and Selection Committee now also has a key role. The judicial code now provides for an extensive procedure that virtually runs parallel to the appointment procedure, in which the Committee hears the potential candidates and suggests to the King the most suitable one for appointment as court president. During this procedure, the candidate in question must submit a policy plan for how they want to manage the court. The Committee must furthermore obtain opinions from specific actors, such as the president of the court, in which the candidate is currently working.[48] For each specific type of court, standardized profiles have been prepared by the Advice and Examination Committee of the HCJ on what skills its court president should possess.[49] These profiles should then guide the Appointment and Selection Committee in choosing the most suitable candidate.[50] The ultimate appointment by the King as court president is equally seen as an administrative measure amenable to judicial review.

Overall, there has been a clear move towards a more codified and formalized system for the appointment and promotion of judges in Belgium. It has become increasingly clear that the older systems, which left room for—or even simply completely revolved around—partisan considerations or personal relationships, did not lead to the best results. Eventually, it was the so-called Dutroux affaire which sparked a complete overhaul of the judiciary, leading to the creation of the HCJ. Even though some criticism remains,[51] this undoubtedly led to a more objective and formalized appointment and promotion system.

[45]Eva Schandevyl, et al., *Genderquota in de wetenschap, het bedrijfsleven en de rechterlijke macht in België*, 55 Res Publica 359 (2013).

[46]*E.g.*, Roger Stevens, *Recente ontwikkelingen in de organisatiestructuur van de Raad van State*, *in* Liber Amicorum Marnix Van Damme 491, 498 (Aube Wirtgen, ed., 2021).

[47]*Parl. St.* Senaat, 1998–99, 1-1121/3, 14.

[48]Article 259 *quater*, §2, 1, 1° and 2° Belgian Judicial Code.

[49]These profiles can all be found online.

[50]It is still obvious that it is more difficult for women to reach the higher echelons of the judicial pyramid. While they are well represented in the lower courts, there is still a large majority of male judges in the highest courts. See for an overview of the numbers in 2015: Eva Schandevyl, *De vervrouwelijking van de juridische beroepen*, in Tweehonderd jaar justitie, Historische encyclopedie van de Belgische justitie 578, 587–88 (Margo De Koster, Dirk Heirbaut & Xavier Rousseaux eds., 2015).

[51]Two scholars recently stated that "it is probably one of the greatest challenges for the Belgian judiciary to better reflect the societal structure within the composition of its courts." Karolina Podstawa & Rebecca Aspetti, *National Reports Belgium, Hungary, Italy, Poland, Portugal, Romania, Slovenia, Spain, The Netherlands*, TRIIAL Working Papers 2022/52, 17. *See also* GRECO, *Fourth Evaluation Round of Belgium*, adopted on 28 March 2014, para. 94. It claims that appointments to positions of responsibility were still regarded as "the result above all of an ability to cultivate networks of contacts, particularly because of the composition of CSJ."

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II. The Use of Substitute Judges

In common with those of other countries, the Belgian judicial system is struggling with financial difficulties. Throughout the years, these have increasingly worsened, to the point where there was not enough judicial staff and the judiciary was suffering from an ever-increasing backlog of cases. One of the solutions found for getting out of that situation was the increased use of substitute judges. Those were legal professionals, most often lawyers, notaries, or university professors,[52] that were not officially appointed as magistrates, but were allowed to fulfil a judicial role in order to help reduce the backlog in cases. The reasons for which those legal professionals take up mandates as substitute judges vary, but most do it because they want to obtain extra, complementary experience or are thinking of becoming full-time judges and see this as a good way to find out whether the job suits them.

Originally, the system of substitute judges was designed to replace full-time magistrates that were temporarily indisposed, for example due to illness. Yet, due to the judicial backlog their use became increasingly widespread. Whereas substitutes were originally only used in the lower courts, a 1997 law allowed them also in courts of appeal.[53] Furthermore, substitute judges could be called upon when a court did not have enough staff to validly compose a bench. The practice became so widespread that some substitute judges served in certain positions for years on end and sometimes made up half of a court's judicial staff. In other words, what was originally envisaged as a system to temporarily replace indisposed judges over the years became a structural part of the Belgian judicial system.[54] In fact, in 2004 there were almost as many substitute judges as permanent magistrates.[55]

In the 1990s, this state of affairs increasingly came under pressure. While overall the work of substitute judges and their dedication and selfless commitment were praised,[56] there was also mounting criticism, especially regarding their independence and impartiality.[57] Some of these doubts stemmed from such judges' institutional position. In this sense, substitute judges, as opposed to permanent ones, did not have to pass an exam proving their competency in order to be appointed, and were paid little or nothing for their mandate. Yet, the criticism was also fueled in part by stories of more unsavory practices regarding substitute judges—also seen in the Netherlands—most notably regarding the blurring of the lines between a position as a lawyer and that as a substitute judge. In this respect there were reports of substitute judges who started establishing their own lines of case law, sometimes favoring an interpretation that benefitted the clients they habitually defended;[58] lawyers pleading cases in front of courts where they also acted as substitute judges which creates the risk of the sitting judge being more cooperative towards the lawyer/substitute judge;[59] substitute judges receiving special mandates allegedly as a form of compensation for their services;[60] the use of substitute judges as assistants in prosecutors' offices, which could create confusion in the minds of the public as to the difference between prosecutors and lawyers; and a more general lack of integrity among substitute judges.[61]

[52]Francis Desterbeck, De rechter voor de rechter 17 (2022).

[53]Even though it should have been a temporary measure to quickly reduce the backlog of cases, the system stayed in place for over 10 years.

[54]*See also* Guy Delvoie, *Over pianokrukjes en bijzettafeltjes: what's in a name?*, 60 Rechtskundig Weekblad 169 (1996–97).

[55]2056 substitute judges for 1555 full-time judges and 812 public prosecutors. High Council of Justice, *Ambtshalve advies over de plaatsvervangende rechters*, Apr. 26, 2006, https://hrj.be/admin/storage/hrj/a0042b.pdf.

[56]*E.g.*, Edward Janssens, *Cumulatie advocaat en plaatsvervangend magistraat*, *in* Liber Amicorum Jo Stevens 385, 399 (V. Allaerts, L. Bouteligier, E. Janssens & J. Verstraete eds., 2011).

[57]*See, e.g.*, GwH [Constitutional Court], Mar. 3, 1999, n°29/99, para. B.5.8, http://www.grondwettelijkhof.be.

[58]GRECO, *Fourth Evaluation Round of Belgium*, Adopted on Mar. 28, 2014, para. 83.

[59]Peter Ingelse, *De blinddoek van de advocaat-rechter-plaatsvervanger zit niet goed – Pleidooi van een rechter*, Nederlands Juristenblad 632 (1996).

[60]High Council of Justice, *Ambtshalve advies over de plaatsvervangende rechters*, Apr. 26, 2006.

[61]GRECO, *Fourth Evaluation Round of Belgium*, adopted on Mar. 28, 2014, para. 83.

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Even though the institution of substitute judges increasingly became a point of discussion, it took a while before anything changed. In 2006 the High Council of Justice issued a critical opinion, highlighting some of the issues surrounding such judges' institutional position and suggesting reforms.[62] In 2011, it published a follow-up opinion because nothing had changed in the five years since.[63] Overall, the matter seems to have been regarded with a large degree of pragmatism. Substitute judges were simply necessary to keep the judicial system afloat;[64] they provided cheap labor to chisel away at the mountainous judicial backlog.[65] However, in 2013 things started moving, after an opinion issued by the GRECO.[66] In its fourth evaluation round concerning the prevention of corruption in respect of members of parliament, judges, and prosecutors, the GRECO was very critical of the use of substitute judges in the Belgian judicial system for the reasons described above, and recommended avoiding their use as much as possible or otherwise reforming their appointment and employment conditions, and subjecting them to effective supervision and sanctions.[67]

While the opinions of the High Council of Justice yielded no results, the GRECO report did manage to get things into motion. It was ultimately in a 2019 law (colloquially known as the GRECO Act) that the legislature attempted to respond to the GRECO's remarks. The legislature noted that substitute judges were still indispensable for the smooth functioning of the judicial system, but said that measures should be taken to strengthen public trust in the institution of substitute judges. The law changed many aspects of the position of substitute judge, the most important of which are; the requirement to pass an exam in order to be appointed; the express requirement that substitute judges do not have a permanent function; the codification that substitute judges cannot sit in cases in which they have been directly or indirectly involved as lawyers; the prohibition on substitute judges acting as members of the public prosecutor's office; and requiring the High Council of Justice to write a code of ethics for (substitute) judges.[68] With these requirements, the legislature tackled most of the problematic aspects of the use of substitute judges that were flagged by the High Council of Justice and the GRECO.

In a 2021 follow-up report, the GRECO indeed found that the new law satisfactorily implemented its recommendations.[69] Nevertheless, the new law was challenged before the Constitutional Court, one of the arguments being that the possibility of lawyers sitting as substitute judges violated the right to an independent and impartial judge. In its judgment the Court stated that cumulation of the roles of judge and lawyer should be avoided as far as possible, because there is a real risk of a confusion of functions, which raises doubts about the independence and impartiality of the tribunal. Yet, it followed the case law of the European Court of Human Rights[70] and stated that the mere fact that a lawyer is a member of a court does not suffice to raise objective doubts about the court's independence and impartiality. A potential impartiality issue should always be examined *in concreto*. The Constitutional Court then went on to recall that the 2019 law was essentially introduced to strengthen the procedural guarantees surrounding the use of substitute judges and the public's trust in the judicial system. Given the fact that substitute judges were necessary to safeguard the right to a

[62]High Council of Justice, *Ambtshalve advies over de plaatsvervangende rechters*, Apr. 26, 2006.

[63]High Council of Justice, *Advies over de plaatsvervangende rechters*, Oct. 19, 2011.

[64]As also admitted by the High Council of Justice: High Council of Justice, *Ambtshalve advies over de plaatsvervangende rechters*, Apr. 26, 2006.

[65]One scholar stated that the institution of substitute judges was an absurdity only underpinned by financial motives. Matthias Storme, *Report on the state of Professional ethics and procedural fairness in Belgium*, law.kuleuven.be/personal/mstorme/rapportcoimbra.pdf.

[66]*Cf.* Paul Lemmens and Raf Van Ransbeeck, *De onafhankelijkheid van de rechter en de rechtsprekende macht*, *in* RECHTERLIJKE ONAFHANKELIJKHEID 1, 12 (2022) (other authors mentioning that it was GRECO that gave the decisive push in this respect).

[67]GRECO, *Fourth Evaluation Round of Belgium*, Adopted on Mar. 28, 2014, para. 83.

[68]Law of 23 March 2019 tot wijziging van het Gerechtelijk Wetboek met het oog op een betere werking van de rechterlijke orde en van de Hoge Raad voor de Justitie, *BS*, Mar. 29, 2019.

[69]GRECO, *Second compliance report Belgium*, GrecoRC4(2021)5, para. 51.

[70]*See* Wettstein v. Switzerland, App. 33958/96 (Feb. 21, 2000), https://hudoc.echr.coe.int/eng?i=001-59102.

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trial within a reasonable time and the extra guarantees that were established, the new law did not violate the right to an independent and impartial tribunal.[71]

In general, the GRECO report and the opinions of the High Council of Justice thus gave rise to a legislative reform that substantially changed the framework regarding substitute judges in Belgium. The reform (re)acted against many of the rather unseemly practices that had come to surround the broad and systematic use of such judges. In general, the legislative reform strengthened the institutional position of substitute judges and created extra safeguards for their objectivity and impartiality. In doing so it helped to further formalize this part of the Belgian judicial system.

III. The Secondment of Judges

It was pointed out above that the Belgian judicial system pays close attention to judicial independence. The independence of the Belgian judiciary is indeed seen as a general principle of constitutional importance for all courts and tribunals,[72] and is on the whole well respected in the legal culture. Generally speaking, attention is paid to the fact that sufficient distance remains between the judiciary and the political branch. In this respect, Article 155 of the Constitution, for example, dictates that judges may not accept any remunerated mandate from the government.

There is, however, a noticeable exception to this required distance between the branches of power. Article 327 of the judicial code prescribes that the Minister of Justice may, with the permission of the prosecutor general, second magistrates of the public prosecutor's office—meaning that traditional judges are excluded—to work in the service of the King or at one of the federal ministries. This became somewhat of an established and widely used practice in Belgium. One of the arguments in its favor was the undoubtedly useful experience and expertise that magistrates from the prosecutor's office brought to the administrative offices of the ministries.[73]

Yet, the secondment of magistrates to the ministries also raises questions, mostly about their independence and impartiality.[74] The law states that secondment to a ministry may not be for longer than six years, after which the magistrate automatically returns to his or her former function.[75] During the secondment, the magistrate statutorily and deontologically continues to function as a magistrate. While seconded, magistrates thus perform a dual function: on the one hand they are part of a ministry, which is a political function under the hierarchical control of the competent minister, and on the other they remain magistrates, who should be independent.

The institution of seconded magistrates in Belgium was placed more in the spotlight in 2008 with the so-called Fortisgate scandal. Simply put, that involved the Belgian bank, Fortis, which, in the slipstream of the 2008 banking crisis, was nearing bankruptcy. In a bid to save the bank, the Belgian, Dutch, and Luxembourg governments decided to sell Fortis to the French bank, BNP Paribas. This was to the great dismay of the shareholders, who saw the value of their stocks evaporating because of the sale. Some shareholders started interim relief proceedings before the Belgian courts in an attempt to stop the sale from happening.[76]

The case would ultimately go from the first instance court via the court of appeal all the way to the Court of Cassation. While it has raised a multitude of thorny legal questions for the Belgian

[71]GwH [Constitutional Court], Jan. 16, 2020, n°7/2020, http://www.grondwettelijkhof.be. *See also* GwH [Constitutional Court], Dec. 6, 2012, n°146/2012, http://www.grondwettelijkhof.be

[72]Cass. [Court of Cassation] (1st ch.), Sep. 20, 1979, PAS. 1980, p. 96.

[73]Yet, this alleged benefit has also been questioned, since the magistrate in question will only ever be able to speak from his or her own experience and thus only has partial information. *See* Thierry Marchandise, *Le ministère public et le politique: ordres et désordres*, *in* JUSTICE ET POLITIQUE : JE T'AIME, MOI NON PLUS 98, 103 (Association syndicale des magistrats (Charleroi), Édouard Delruelle, Simone Gaboriau & Thierry Marchandise eds., 2009).

[74]While the exact institutional position of the prosecutor's office is a thorny issue in Belgian constitutional law that is still disputed today, it is without doubt that its members should remain independent in the exercise of their function.

[75]C.JUD. (Belg.) art. 327, §3.

[76]*See* WIM VAN DEN EYNDE, FORTISGATE: EEN STRESSTEST VOOR JUSTITIE (2016) (for a more elaborate account of the whole saga).

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judicial system,[77] the case is infamous for the relationship between members of the executive and magistrates. At all stages of the proceedings there have been informal contacts between actors from the judiciary and from the executive. For the purposes of this article it is most important to note that in the first instance court there had been contacts between seconded magistrates, working at various ministries, and members of the public prosecutor's office, including the substitute prosecutor who was assigned to issue an opinion in the case.

The Fortis affair caused a storm within all branches of power, and ultimately even led to the fall of the government. While there are many different aspects to this story, it also cast a spotlight on the problematic position of seconded magistrates. Both the parliamentary commission of inquiry that was established to investigate the Fortis affair and the High Council of Justice addressed the matter in their reports. Both bodies were critical of the informal contacts that could exist between the prosecutor's office and the executive, and mentioned that personal relationships, friendships, and political affinity could lead to interventions that could damage the appearance of the independence and impartiality of the judiciary.[78] The parliamentary commission even concluded that the contacts between the members of the ministries and the prosecutor's office had endangered the principle of the separation of powers.[79] While it was acknowledged that seconded magistrates might bring valuable expertise, both bodies suggested that the system of secondment should be curtailed. Whereas the parliamentary commission argued that magistrates should only be seconded to ministries where their work would be indispensable for the policy of the minister, the High Council of Justice suggested that they should be seconded to the Ministry of Justice alone. In its 2013 report the GRECO also touched upon the issue and took note of various controversies surrounding seconded magistrates.[80] It urged the Belgian state to put into practice proposals that would limit the use of secondment.[81] The Minister of Justice at the time of the Fortis affaire also stated later that seconded magistrates could lead to abuse or at the very least tricky situations.[82]

Despite the attention which the institution of seconded magistrates received in the wake of the Fortis affair, it did not immediately disappear. In the next government, several ministries besides the Ministry of Justice, including that of the Prime Minister, still counted seconded magistrates

[77]One such issue that may be of note for the topic of this article as well is the question of the secrecy of deliberation in Belgian law. The Court of Cassation has ruled that the duty of confidentiality covers everything that is said during deliberations, as well as draft judgments or notes, even if those have not yet been deliberated upon. This duty also covers everything that is said during the deliberations, as well as draft judgments or notes, even if those have not yet been deliberated upon among the judges themselves. *See* Cass. [Court of Cassation] Mar. 13, 2012, P.11.1750.N, PAS. 578 (2012). The consequence of this case law is that judges are, in principle, not allowed to discuss or debate any aspect of pending cases with anyone, including their colleagues. Within the judiciary, this case law is criticized as being unduly strict, since it prohibits judges from finding inspiration or seeking advice from among colleagues and would thereby hamper the overall quality of jurisprudence. It would also seem that in practice this interpretation of the law is barely followed, with many judges quite openly mentioning that it is common practice among them to show draft judgments to colleagues, seeking advice from those that have greater expertise in certain matters, or discussing cases in order to come to more coherent and qualitative jurisprudence. *See, e.g,* Paul Martens, *Solitude du juge et cohérence du droit*, JOURNAL DES TRIBUNAUX 805 (2013). The president of a commercial court has, for example, also stated that in some commercial courts the deliberations always happened collectively and even included judges who did not take part in the case. *See* Dirk Vercruysse, *Het beraad: bespreking, overweging, overleg*, FORO 25, 28 (2012). Judicial practice thus seems to disregard the formal legislation as interpreted by the Court of Cassation.

[78]Kamer Van Volksvertegenwoordigers, *Parlementair onderzoek naar de eerbiediging van de Grondwet, in het bijzonder de scheiding der machten, en de wetten in het raam van de tegen de nv FORTIS ingestelde gerechtelijke procedures*, *Parl. St.* 52-1711/007, 71; High Council of Justice, *Verslag over het bijzonder onderzoek naar de werking van de rechterlijke orde naar aanleiding van de zaak Fortis*, 11.

[79]Kamer Van Volksvertegenwoordigers, *supra* note 78. With 13 votes to 2. See for a different point of view: Frank Meersschaut, *Als de rook om ons hoofd (nog niet helemaal) is verdwenen – de scheiding der machten in de storm van de Fortis-zaak*, 2 LEUVENSE STAATSRECHTELIJKE STANPUNTEN 105, 135 (2010).

[80]It has also been alleged that magistrates who complete a secondment are promoted more quickly once they are back in the prosecutor's office.

[81]GRECO, *Fourth Evaluation Round of Belgium*, Adopted on Mar. 28, 2014, para. 110.

[82]Jo Stevens, *Justitie in beweging krijgen*, *in* DE TOEKOMST VAN DE BELGISCHE RECHTERLIJKE MACHT 93 (Raf Van Ransbeeck ed., 2009).

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from the prosecutor's office among their ranks.[83] Nevertheless, the opinions of the High Council of Justice and the parliamentary commission did seem to initiate change. In 2014, a legislative amendment was suggested which would enact the proposals of both those institutions. In this respect, the secondment of magistrates will be allowed only to the Ministry of Justice or to the Ministries of the Prime Minister, Vice-Prime Minister or the Minister of the Interior, as long as this secondment will "undeniably achieve an input of expertise". Furthermore, a secondment will need the permission of all five prosecutors, instead of only one prosecutor general. Lastly, a deontological code specifically for seconded magistrates had to be established.[84] While the suggested law was not voted on in parliament before the elections, it was reintroduced in unamended form in 2019 by the current legislature.[85]

Thus, for the secondment of magistrates as well, it is clear that parliament has taken the first steps towards legislative reform. The Fortis affair and the opinions that were drafted in its wake have prompted a legislative amendment that—if passed—will greatly limit the ability to second magistrates and surround it with more safeguards.

D. Informal Judicial Practices in Belgium: A Reactive Story between Judiciary and Legislature

The previous title of this article pointed to three instances where aspects of the Belgian judicial system that were once marked by informality were increasingly being formalized via legislative intervention. It is certainly not claimed here that those three cases are the only instances of informal judicial practices or institutions that can be found in the Belgian legal order. Rather, they provide good examples of the role that such informal interactions play in the Belgian legal system. More generally, the Belgian system teaches us more about the way informal practices and institutions may disappear and about the relationship between formal and informal institutions.

The common thread running through all three examples is the fact that at some point the legislature intervened and further formalized a then informal aspect of the Belgian judicial system. That intervention could be an overhaul of the entire system such as could be seen with the appointment of judges, or could be of a more targeted nature, as was the case for the use of substitute judges. The informal judicial practice thus disappeared, or was at the very least significantly modified, because of a legislative intervention.

It is noticeable that the reason for that legislative intervention could always be found in an external catalyst; the appointment system was overhauled after the Dutroux affair, the use of substitute judges was amended after the GRECO report, and a legislative proposal to change the system of secondment of magistrates was introduced after the Fortis case. Each time there was thus an external stimulus which addressed the potentially negative effects of the informal practice or clearly illustrated its dysfunctionalities, shocking the legislature into action.[86] In other words, dissatisfaction with the informal rules motivated the legislature to cure the perceived problems by altering or creating formal institutions.[87]

[83]When questioned about this, the Prime Minister answered that the opinions of the High Council of Justice were not binding. *See* Commissie voor de Justitie van woensdag February 29, 2012, https://www.dekamer.be/doc/CCRI/html/53/ic415x.html. Some politicians have, moreover, defended the system. See the intervention of the then Minister of Economic Affairs, *Hand. Senaat* 2011-12, 26 Januari 2012, nr. 5–45, 22–24.

[84]Wetsvoorstel tot wijziging van het Gerechtelijk Wetboek wat de detachering van parketmagistraten betreft, *Parl. St.* Kamer 54-0382/001.

[85]*Id.*

[86]*Cf.* Helmke & Levitsky, *supra note* 36, at 734.

[87]Azari & Smith, *supra* note 1, at 43.

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Those external catalysts could come in various forms. They could be tragic events or political occurrences such as the Dutroux and Fortis affairs, but equally critical reports, such as the opinions of the High Council of Justice. They may even come from outside the Belgian legal order, as was clearly shown by the reaction to the GRECO's report on the use of substitute judges.[88] Here we clearly saw the Belgian legal order's open attitude to international and European law. From the parliamentary proceedings it becomes apparent how important parliament felt it was to follow the GRECO's recommendations, even though they were formally non-binding, with even the Minister of Justice stressing how important it was that Belgium could point to new reforms during GRECO's next evaluation.[89] Thus, the Belgian legal order shows that the international and European legal orders may also contribute to the further formalization of the judicial system.[90]

Generally speaking, the story of informal judicial institutions in Belgium is thus one of a reactive relationship between the judiciary and the legislature. An external catalyst urges the legislature to intervene. As such it acts reactively, rather than proactively. The consequence of that dynamic is that the Belgian judicial system continuously formalizes further. Previously informal aspects are formalized after legislative intervention. This happens rather incrementally:[91] Every time parliament intervenes in a certain well-delineated area of the judicial system. Therefore, the topic of informal judicial institutions in Belgium can be characterized as a dialog between the judiciary and a legislature which, while not proactive, is at least responsive.

It should also be stressed here that the three examples that were raised above are certainly not the only ones that can be found. There are plenty of other recent examples. One is the Guide for Magistrates, a deontological guide written by the High Council of Justice, which has gotten a formal legislative footing due to a 2019 law which was inspired by the GRECO report.[92] Another is the legal framework surrounding the disciplining of judges, which was completely reorganized in 2013 into a much more transparent, clearly organized disciplinary system, every step of which is detailed in formal legislation.[93]

Those reforms and the slow but steady process of further codification and formalization seem, moreover, to have had a positive impact on the overall trust in the judiciary. While the Dutroux affair marked absolute rock bottom in the way that people in Belgium perceived the criminal and justice systems, trust in those systems has steadily increased since then.[94] It is certainly not the intention of this article to claim a direct causal relationship between the abovementioned processes of formalization and the increase in trust in the judicial system. There have also been other reforms in the last couple of years that are not mentioned in this article but which have likely helped to increase that trust, for example the increased use of press magistrates. Nevertheless, it would seem to stand to reason that the judicial reforms described above, which overhauled the

[88]*See also* Paul Lemmens & Raf Van Ransbeeck, *De onafhankelijkheid van de rechter en de rechtsprekende macht*, Rechterlijke Onafhankelijkheid 1, 62 (2022). The authors mention that since 2014 the GRECO has started to get involved with the Belgian courts and tribunals, though only from the perspective of measures to combat corruption and ensure transparency. That involvement led to further clarifications, elaborations, and adjustments.

[89]*See, e.g.*, *Parl. St.* Kamer 54-3523/003, 6.

[90]*See generally* the article on supranational actors as drivers of formalization in this Special Issue. In addition to the examples that have already been given in this article, we could also refer to the impact that the case law of the ECtHR has had on the institutional position of the advocate general in the Belgian judicial system. In the past, this actor had a privileged position in the courtroom, which, according to the Court, violated the right of equality of arms under Article 6(1) ECHR. *See* Bieke Vanmarcke & Fanny Vansiliette, *La participation de l'avocat général à la rédaction de l'avant-projet d'arrêt de la Cour de cassation: Strasbourg locuta, causa finita?*, Revue Trimestrielle des droits de l'homme 352 (2022) (for a recent overview).

[91]*Cf.* Johanne Poirier & Jesse Hartery, *Para-constitutional engineering and federalism: Informal constitutional change through intergovernmental organisation*, 20 Int'l J. of Const. L. 758, 766 (2022).

[92]Law of 23 March 2019 tot wijziging van het Gerechtelijk Wetboek met het oog op een betere werking van de rechterlijke orde en van de Hoge Raad voor de Justitie, *BS* 29 March 2019.

[93]Law of 15 July 2013 tot wijziging van bepalingen van het Gerechtelijk Wetboek betreffende de tucht, *BS* 25 July 2013.

[94]See generally the various "justice barometers" that have been issued by the HCJ every four years.

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sometimes unsavory informal practices that existed until then, have contributed to a better image of the functioning of the judiciary in the eyes of the public.

E. Conclusions

When all of the above are taken together, it is quite clear that the Belgian system is not one that leaves much room for informal judicial practices and institutions. To a certain extent this is already baked into the country's "DNA." Its history as well as its receptiveness to international and European standards helps to explain why the judicial system is overall prevailingly formal. Yet, the article showed that throughout the years the judicial system has taken regular steps towards yet greater formalization. External catalysts, such as a political scandal, prompted the legislature to intervene and formalize aspects of the judicial system that were once marked by discretion and informality. Therefore, the Belgian system can be described as one of reactive and incremental development towards further formalization.

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