# Judicial Independence in Belgium

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## A. Introduction

The independence of the judiciary lies at the core of Belgian thinking about the rule of law.[1] Despite its fundamental character, it has re-

[1] While academic contributions on the issue of the independence of the Belgian judiciary are numerous in the Dutch and French languages, articles in English on this subject are rare. Most notable is P. Lemmens, The Independence of Judiciary in Belgium, in: M. Storme (ed.), Effectiveness of judicial protection and the constitutional order, Belgian Report at the IInd International Congress of Procedural Law 49 (1983). For contributions in Dutch see in particular J. Delva, De onafhankelijkheid van de Belgische rechter ten aanzien van de uitvoerende macht, 43 Tijdschrift voor Bestuurswetenschappen en Publiekrecht, at 175 and 231 (1988); X. De Riemaecker/G. Londers, De plaats van de rechterlijke macht in de Staat en zijn logisch gevolg: de onafhankelijkheid van de magistraat, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat 7 (2000); I. Dupré, Ontwikkelingen inzake de rechterlijke onafhankelijkheid in België, in: J.P. Loof (ed.), Onafhankelijkheid en onpartijdigheid. De randvoorwaarden voor het bestuur en beheer van de rechterlijke macht 43 (1999); K. Loontjens, Het recht op een onafhankelijke en onpartijdige rechter: stand van zaken, 51 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 9 (1996); M. Storme, Betekenis en statuut van de rechterlijke macht als staatsmacht, 33 Tijdschrift voor Privaatrecht 1343 (1996); P. Van Orshoven, De onafhankelijkheid van de rechter naar Belgisch recht, in: P. Van Orshoven/L.F.M. Verhey/K. Wagner, De onafhankelijkheid van de rechter 77 (2001); J. Velaers, De onafhankelijkheid van de rechterlijke macht na de recente herziening van de Grondwet, 26 Limburgs Rechtsleven 373 (2000). For contributions in French see in particular X. De Riemaecker/G. Londers, La place du pouvoir judiciaire dans l'Etat et son corrolaire, l'indépendance des magistrats, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat 7 (2000); F. Dumon, De l'Etat de droit, 94

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233,
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mained an unwritten principle of constitutional law for more than 160 years. The written Constitution, as adopted when Belgium gained independence in 1830, did not make any literal reference to the independence of the judiciary. The only relevant provision seemed to be Article 40, the basic provision underlying the organization of justice, which stated (and to date, still states) nothing more than "[t]he judicial power is exercised by the courts". Some other provisions of the Constitution, however, have always contained implicit applications of the principle of independence to more concrete situations. For instance, Article 152 contains the principle of lifelong tenure; Article 154 states that the salaries of members of the judiciary and the Prosecutor's Office are determined by Act of Parliament; and Article 155 deals with the positions incompatible with the office of judge. Notwithstanding the absence of an explicit legal provision, the principle of judicial independence has always been considered to have supreme normative value in Belgium. Any doubt that could have risen about that, was dispelled when the concept of judicial independence was qualified by the Court of Cassation as a "general principle of law",[2] which under Belgian law is considered a category of binding sources of law. The binding character of that principle also stemmed from Article 6 of the ECHR and Article 14 of the ICCPR, two provisions in human rights instruments to which Belgium is a party and which are self-executing in the Belgian legal order.

Despite this long tradition of independence as an unwritten norm, the principle of the independence of the judiciary was expressly enshrined

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Journal des Tribunaux 473 (1979); W.J. Ganshof van der Meersch, Les garanties de l'indépendance du juge en droit belge, in: Rapports des juristes belges au IVième Congrès de l'Académie internationale de droit comparé, 6 Revue de Droit International Comparé 155 (1954, special edition); J. Van Compernolle, L'indépendance et l'impartialité du juge, in: P. Lemmens/M.Storme (eds.), Vertrouwen in het gerecht – Confiance dans la justice, 17 (1995); J. Van Drooghenbroeck/S. Van Drooghenbroeck, Les garanties constitutionnelles de l'indépendance de l'autorité judiciaire, in: E. Dirix/Y.H. Leleu (eds.), The Belgian reports at the Congress of Utrecht of the International Academy of Comparative Law (2006).

[2] Court of Cassation, Annual Report 2002-2003, at 107-110, available at <http://www.cass.be>. The application of this principle in the case law is, however, rare. See, e.g., Constitutional Court, No. 67/98 (10 June 1998, available at <http://www.constitutionalcourt.be>) and Court of Cassation, No. C960429N (22 June 1998, available at <http://www.juridat.be>).

in the Belgian Constitution in 1998.[3] Since then, Article 151 of the Constitution has stated that "Judges are independent in the exercise of their judicial duties." The addition of this provision came in the context of a wider reform of Belgian justice that year which had as one of its objectives the strengthening of judicial independence *vis-à-vis* the executive branch while ensuring judicial accountability. This was done through the creation of an autonomous High Council of Justice and the introduction of evaluation schemes for judges seeking promotion or having managerial functions.

Despite the constitutional guarantees there are current challenges to the independence of the courts in Belgium. These challenges have received considerable attention from the public and the legal profession in the aftermath of what is known as the Fortis demise. Fortis was a multinational banking and insurance group which, due to the effects of the financial crises in September 2008 and after the Belgian Government's intervention, was dissolved and sold to a French competitor.[4] Disgruntled about not having been consulted, a group of shareholders launched summary proceedings before the President of the Brussels Commercial Tribunal and, on appeal, before the Brussels Court of Appeal. Due to a conflict which arose between the three judges handling the case in the Court of Appeal, one judge refused to sign the judgment, triggering a hectic and confusing series of consultations involving the President of the Court of Appeal, the President of the Court of Cassation, the offices of the Minister of Justice, the Minister of Finance and the Prime Minister and the Prosecutor-General of the Court of Appeal. When a judgment was pronounced by only two judges an unprecedented sequence of events unfolded, where the Minister of Justice resigned after refusing to direct the Prosecutor-General of the Court of Appeal to submit the case for an extraordinary review by the Court of Cassation. Soon afterwards the Government resigned too after published letters from the Prime Minister and the President of the Court of Cassation revealed contacts between government officials and prosecutors. The findings of the ensuing special investigation by the Parliament and the High Council of Justice have led to new insights into the relationship

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[3] Amendment to the Constitution of 20 November 1998 (Belgian State Gazette, 24 November 1998).

[4] For an overview of these events (from a corporate and financial law perspective), see De zaak Fortis, 2 Tijdschrift voor Rechtspersoon en Vennootschap 156 (2009).

between the executive and the judiciary in Belgium.[5] They will be discussed extensively later in this text.

The following account of the state of affairs concerning judicial independence in Belgium aims to present Belgium's key achievements and shortcomings in the field of judicial independence in the *post Fortis* era. Its primary focus is on the members of the Bench.

## B. Structural Safeguards

In the Belgian system, the judiciary is composed of *magistrates*, which is a generic term used for both judges and prosecutors. Although many judges started their careers as prosecutors and occasionally have offices in the same court building, they exercise their functions completely separately from the prosecution. Judges are usually assigned to one or more chambers of the courts, generally numbering either one or three judges. At first instance, there are judges of the peace, police judges and judges in the labour tribunal, the commercial tribunal and the tribunal of first instance. Judges in appellate jurisdictions – courts of appeal and labour courts – as well as the highest jurisdiction, the Court of Cassation, are referred to as *counsellors* (*conseillers*, *raadsheren*). Prosecution before the courts of first instance is conducted by the Crown Prosecutor, leading a team of Deputy Crown Prosecutors.[6] Prosecution before the appellate jurisdictions and the Court of Cassation is handled by a Prosecutor-General, assisted by Attorneys-General and Deputies-General.

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[5] Commission of Inquiry, Parliamentary Documents: House of Representatives 2008-2009, No. 52 1711/007, available at <http://www.dekamer.be>; High Council for Justice, Report of the special investigation into the functioning of justice following the Fortis case, approved by the general assembly of the Council on December 16th, 2009, available at <http://www.hrj.be>. For a first discussion of these reports, see M. Rigaux, Les illusions perdues. Réflexions à propos du rapport de la commission Fortis, 6347 Journal des Tribunaux 221 (2009); M. Rigaux, Le rapport du Conseil supérieur de la justice sur l'enquête relative au fonctionnement de l'ordre judiciaire à l'occasion de l'affaire Fortis, 6385 Journal des Tribunaux 137 (2010).

[6] In the labour tribunals prosecution is handled by the so-called Labour Auditor and a team of Deputy Auditors.

## I. Administration of the Judiciary

### *1. Organs in Charge of the Administration of the Judiciary*

In Belgium, a federal State divided into entities called Communities and Regions,[7] the administration of the justice system falls within federal jurisdiction. In the federal state structure, the administration of the courts is primarily in the competence of the executive branch, which is hierarchically structured and comprises different organs and departments. While Belgium traditionally followed the executive model of court administration, the justice reform of 1998 created a new system with a mix of executive power and intervention by an independent institution. This was done through the establishment of the High Council of Justice as an external organ with a significant role in the recruitment and promotion of judges as well as the evaluation of courts' performance. The purpose of this innovation was to ensure more objectivity in judicial selections and improve the quality of judicial services.

The federal Minister of Justice is to date still the highest official responsible for the administration of justice and the organization of the judiciary. The Minister is accountable to the federal Parliament, which consists of the House of Representatives and the Senate. Generally, the House of Representatives, and more specifically its well-respected Justice Commission, takes on the role of democratic watchdog of the functioning of the courts, while the Senate has its calling as a meeting place for dialogue, reflection and fundamental reform. Headed by the Minister of Justice, the federal Department of Justice (*Federale Overheidsdienst Justitie – Service Public Fédéral Justice*)[8] is in charge of the daily management of the justice system. It consists of four Directorates-General, of which the Directorate-General for Judicial Organization is in charge of the operations of the judiciary,[9] in particular its logistics and human resources policy.[10] The Minister of Justice and his depart-

[7] Article 1 of the Constitution.

[8] FOD Justitie, available at <http://www.just.fgov.be>.

[9] The other Directorates-General (DG) are the DG Legislation and Fundamental Rights and Freedoms, the DG Penitentiary Institutions and the DG "Justice Houses".

[10] Courthouses and other Department of Justice buildings, like all State buildings, are managed by an administrative entity called "the State Buildings Agency" (*Regie der Gebouwen / Régie des Bâtiments*), which falls under the authority of the Minister of Finance. L.P. Suetens, Bestuursstructuur

ment are assisted by several advisory councils, such as the Advisory Council of Magistrates[11] and the Commission for the Modernization of Justice. The High Council of Justice also issues advice, *inter alia* on proposed legislation.

In respect of the administration of the prosecution, most noteworthy is the College of Prosecutors-General comprising the Prosecutors-General for the Courts of Appeal.[12],[13] The Prosecutors-General for the Courts of Appeal are in charge of prosecution in these courts but are also the hierarchical superiors of the Crown Prosecutors, who handle prosecution before the lower courts. The College of Prosecutors-General co-ordinates the application of criminal law policy and oversees the good functioning of the prosecution in the courts. Its decisions are binding upon all prosecuting officers. It operates *under the authority of* the Minister of Justice, theoretically implying a hierarchical subordination, while in practice it enjoys significant autonomy.

On the level of each court individually, the judge acting as President is in charge of its daily management and organization.[14] One of the most important functions of a Court President is the assignment of cases to judges.[15] He/she has wide discretion in assigning judges to their respective chambers, which enables him/her to exercise significant influence on judges. However, given the extended centralization and the far-reaching competence of the federal administration with respect to management and organization, the powers of the Court Presidents as well as the budget at their disposition have remained very limited. For example, a President cannot hire or discharge his own administrative staff or court clerks, purchase computers for his staff or order renovation or significant building repairs. Generally, this is not considered as a threat

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rechterlijke organisatie, 2 Algemeen Juridisch Tijdschrift 101 (1995-1996, special file). See also <http://www.buildingsagency.be>.

[11] See *infra*, B. I. 2. Organs in Charge of the Administration of the Judiciary and B. IX. Associations for Judges.

[12] Article 143*bis* of the Judicial Code (*Gerechtelijk Wetboek / Code Judiciaire*), introduced by Act of 10 October 1967; Belgian State Gazette 31 October 1967, available at <http://www.juridat.be>.

[13] The Minister of Justice presides over the meeting when he is present, which in practice is said to be the exception. The Federal Prosecutor may also participate in the meetings of the College.

[14] Article 90 of the Judicial Code.

[15] *Infra*, B. V. Case Assignment and Recusal.

to judicial independence. However, there have been many debates about the efficiency of such a system.[16] Magistrates have come out to testify in the mainstream media about the poor quality of management provided by the central administration. Too slow and too bureaucratic are complaints that are often heard. These discussions further intensified after reports about poor management in the Brussels Court of Appeal and Commercial Court in 2008 and 2009.[17] Many observers have since called for an increase in the role of the local courts and the curtailment of the powers of the central administration, so as better to meet the needs of each individual court organization.[18] Critics say this may not work so well, because Court Presidents – being judges – have not been trained for management functions. Rather, it would be more preferable to recruit professional managers to perform these functions. Some magistrates have nevertheless resisted that idea for fear of seeing their independence undermined. A compromise was found by the Government in April 2010, when it was decided to give the local courts more autonomy and a bigger budget, while at the same time providing for the appointment of professional court managers working under the supervision and authority of a college of court presidents.[19] The dis-

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[16] See e.g. T. Toremans, Het Themisplan: het varkentje nog lang niet gewassen – Verslag van een debatavond van de Vlaamse Juristenvereniging, 27 Rechtskundig Weekblad 1078 (2006).

[17] See in this respect the various reports of the High Court of Justice, attesting to various dysfunctions in these courts (apart from the special Fortis report which has already been mentioned): Special investigation into the Commercial Court of Brussels, report approved by the general assembly on 21 April 2010, available at <http://www.hrj.be>; Updated audit report on the Court of Appeal of Brussels, approved by the general assembly of 16 December 2009, available at <http://www.hrj.be>; Audit report on the Court of Appeal of Brussels, validated by the joint advisory and audit commission on 10 April 2008, available at <http://www.hrj.be>; Audit report on the Court of Appeal of Brussels, approved by the general assembly of 30 June 2004, available at <http://www.hrj.be>.

[18] See e.g. R. Van Ransbeeck (ed.), De toekomst van de Belgische rechterlijke orde, (2009); J.-L. Franeau, Réflexions à propos de la réforme du paysage judiciaire en Belgique, 15 Journal des Tribunaux 258 (2010); R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk (2005).

[19] The political agreement has not been published (yet) but is based on the proposals put forward by the Minister of Justice. See S. De Clerck/I. Dupré, Naar een nieuwe architectuur voor Justitie – Het Gerechtelijk Landschap. Oriëntatienota, available at <http://www.just.fgov.be>. Also S. De Clerck, Het

missal of the Government shortly thereafter casts doubts on the probability of this plan being executed in the short term.

Finally, it is noteworthy that the law has given the prosecution and the Minister of Justice some responsibilities in respect of the proper functioning of the courts. Indeed, the Judicial Code has in vague terms given the prosecution supervision over each court.[20] In addition, the same Code states that prosecutors watch over the preservation of order in the courts, adding that they do so under authority of the Minister of Justice.[21] Similarly, the Belgian legislator has empowered the Minister of Justice to instruct the Prosecutor-General of the Court of Cassation to submit for the Supreme Court's review any judicial act whereby a magistrate exceeds his legal powers.[22] Until recently, these provisions were regarded as of very little practical importance. In the Fortis case, however, reference was made to these at various times and the question was raised as to their conformity with the separation of powers.[23]

### 2. *High Council of Justice*

The High Council of Justice (*Hoge Raad voor de Justitie / Conseil supérieur de la Justice*) plays an important role in the selection of judges and is an authoritative voice in the justice policy debate. It was created in 1998 and started working in 2000.[24] Its constitutional foundations are laid down in Article 151 of the Constitution,[25] while detailed rules are laid down in Part II of the Judicial Code which deals with judicial or-

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gerechtelijk landschap: naar een nieuwe architectuur voor Justitie, in: R. Van Ransbeeck (ed.), De toekomst van de Belgische rechterlijke orde, 117 (2009).

[20] Article 140 of the Judicial Code.

[21] Article 399 of the Judicial Code.

[22] Article 1088 of the Judicial Code.

[23] This issue will be discussed further *infra* in section C. I. Separation of Powers.

[24] J. Laenens, Samenstelling en werking van de Hoge Raad voor de Justitie, in: J. Laenens/M. Storme (eds.), In de ban van Octopus / Dans l'encre d'Octopus, 25 (2000); M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans (2005); M. Verdussen (ed.), Le Conseil supérieur de la justice (1999). See also <http://www.csj.be>.

[25] It was introduced by amendment to the Constitution on 20 November 1998 (Belgian State Gazette, 24 November 1998).

ganization.[26] Article 151 section 3 of the Constitution lists the powers and functions of the High Council of Justice. The Council has three main objectives. First, it aims to make more objective the nomination and the appointments procedure of magistrates. To that end, it has received the authority to set the exams for the judicial selection process and to make nominations for every vacancy.[27] In addition, the Council drafts guidelines and programmes for judicial traineeship. Second, the Council is expected to bring in a form of external control over the functioning of the justice system, over and above the existing internal mechanisms. It does that through a centralized complaints system for citizens,[28] as well as the undertaking of extensive court audits (*infra*, this section). Third, it provides advice to policy makers on the better functioning of the judiciary. This involves mainly the issuing of opinions on legislative proposals and policy memoranda.

The High Council of Justice is a *sui generis* body which does not belong to any of the existing branches of state power.[29] Indeed, this Council is independent of each of the three branches of the State in order to facilitate objective, external control over the judiciary. Article 151 paragraph 2 of the Constitution explicitly states that the High Council of Justice respects the independence of the judiciary. The Council consists of 44 members and is composed of a Dutch–speaking and a French–speaking commission, each with 22 members. In each commission, there is a nomination and appointments committee, and an advice and audit committee. Each commission is comprised of equal numbers of, on the one hand, judges and members of the Crown Prosecutor's Of-

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[26] Article 259*bis*1 – 22 of the Judicial Code, introduced by Act of 22 December 1998 (Belgian State Gazette, 2 February 1999).

[27] *Infra*, B. II. Selection, Appointment and Promotion of Judges.

[28] *Infra*, B. VI. Judicial Conduct Complaint Process.

[29] On the subject of the constitutional position of the High Council of Justice, see F. Delpérée, Le statut et la composition du Conseil supérieur de la justice, in: M. Verdussen (ed.), Le Conseil supérieur de la Justice, 57 (1999); P. Van Orshoven, De staatsrechtelijke positie van de Hoge Raad voor de Justitie, in: J. Laenens/M. Storme (eds.), In de ban van Octopus / Dans l'encre d'Octopus, 11 (2000); P. Van Orshoven, Het statuut van de Hoge Raad voor de Justitie. Enkele kanttekeningen, in: M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans, 3 (2005).

fice,[30] and, on the other hand, of other members appointed by the Senate with a two thirds majority of the votes cast.[31] The magistrates of the High Council are elected by their peers in a Dutch-speaking and a French-speaking electoral college, in direct and secret elections.[32] The members of the High Council have a four year mandate, which may be renewed once. The Council may terminate a mandate prematurely for "serious reasons" and by a two thirds majority in each commission.[33]

After ten years of operation, the appraisal of its operation is quite positive. Bearing in mind its three objectives, it is fair to say that the High Council has achieved at least two of them.[34] First, it has indeed made the judicial selection process more objective. Through its professionalism, it has increased the attractiveness of a judicial career and the credibility of the recruitment process. It is beyond doubt that this has had a very positive effect on the overall quality and aptitude of newly appointed judges. Second, it has proven a reliable and skilful advisor to the policymakers, bringing added value to the policy debate and commanding respect from all other stakeholders. As far as its third objective is concerned, that of exercising external control over the justice system, there is still room for improvement. While the High Council has undertaken some remarkable audit investigations into the performance of certain courts – their conclusions often being extensively covered by the

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30 The fact that half the members of the High Council of Justice are themselves magistrates is seen as a guarantee of sufficient independence.

31 Article 151 section 2 of the Constitution, and Arts. 259*bis*-1 and 259*bis*-2 (2) of the Judicial Code. The members appointed by the Senate are deemed to represent society in general.

32 For details concerning the election procedure see Article 259*bis*-2 section 1 of the Judicial Code and the Royal Decree of 15 February 1999 (Belgian State Gazette, 26 February 1999).

33 Article 259*bis*-3 of the Judicial Code.

34 Compare with G. Vervaeke, C. Malmendier, J. Siscot, M. Bertrand, J. Vandescotte, D. Vyverman, C. Vandresse, R. Van Nuffel/P. Van Wassenhove, De bijdrage van de Hoge Raad voor de Justitie tot de modernisering van justitie, 41 Orde van de dag, 35, at 35 (2008). For earlier evaluations of the High Council's operation see M.L. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen (2005); C. Matray, Le Conseil supérieur de la Justice: de quelques perplexités, in: Institut d'Études sur la Justice, Une justice en crise: premières réponses, at 153 (2002); K. Kloeck, De Hoge Raad voor de Justitie. Motor voor een humane en communicatieve justitie?, in: L. Dupont/F. Hutsebaut (eds.), Herstelrecht tussen toekomst en verleden. Liber Amicorum Tony Peters, 357, at 357 (2001).

national media – it lacks the necessary instruments to conduct thorough investigations in case of serious irregularities and to follow up adequately on its findings and recommendations. Also, there are problems with information streams, such that the committees dealing with the application for promotion of a certain judge often are not aware of disciplinary or criminal investigations against that same judge or even of relevant findings in the report of the Council's own advice and audit committees. Finally, it has turned out that the process in which citizens can turn to the High Council with complaints about the justice system is not very accessible, too cumbersome and not efficient.[35]

## II. Selection, Appointment and Promotion of Judges

Belgium follows the continental European model of a career judiciary. Judges are primarily recruited from junior legal professionals who go through additional judicial training but also, though to a lesser extent, from more senior legal professionals who, apart from their professional experience, have demonstrated their skills in an entrance exam. Judicial appointment is within the purview of the High Council of Justice and the executive branch.[36] In a two-stage procedure applicants first have to demonstrate their eligibility by means of a judicial examination and may then apply for nomination. In both of these stages, the key role is for the High Council of Justice which sets out the content of the exams and conducts the hearings for nominations. The executive branch comes in only when the appointment has to be formalized, upon nomination by the High Council of Justice.

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[35] For that reason, the High Council has itself proposed to delegate most of its responsibilities in respect of complaints to the local courts and keep only a right of supervision: see Motion of the General Assembly of the High Council of Justice, approved on 30 September 2009, at 3, available at <http://www.hrj.be>.

[36] For a comprehensive and critical overview see H. Van Espen, Het menselijk kapitaal van de magistratuur – Selectie, aanwerving en vorming van magistraten (2009).

*1. Eligibility*

For all positions on the Bench[37] candidates must be proficient in the Belgian official languages[38] and hold a Master of Laws degree or a Doctorate in law.[39] Moreover it is necessary to pass a professional exam to become eligible.[40] The law does not provide for a quota or special modalities for women, minorities or the disabled. There are three pathways to entering the judiciary which depend on the level of prior professional experience. For candidates with little legal professional experience, there is a written and oral comparative entrance exam for judicial traineeship.[41] The number of vacant positions for judicial trainees is determined every judicial year by a Royal Decree.[42] The Minister of Justice appoints the trainees in the order of their results in the comparative entrance exam. There are two types of judicial traineeship, namely the short traineeship of 18 months which leads only to a position with the Public Prosecutor's Office, and a long traineeship of three years which allows appointment either to the Public Prosecutor's Office or to the Bench. A judicial traineeship includes a theoretical component organized by the recently established Institute of Judicial Training (*Instituut voor gerechtelijke opleiding / Institut de formation judiciaire*).[43] It also

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[37] Except for the lay judges at the Labour and Commercial Courts.

[38] Article 287*quinquies* section 1 of the Judicial Code.

[39] More stringent requirements apply to a number of judicial functions. For instance, in order to be appointed as a Justice of the Peace or as a judge in the Police Court, a candidate (i) must be at least 35 years old and (ii) must have wide experience as a magistrate or in legal functions. The law defines wide experience in objective terms, listing the different professional functions which count as experience and the necessary seniority required in those functions: Article 187 section 2 of the Judicial Code.

[40] Depending on the professional background of the candidate there are three types of exams. This requirement, however, does not apply to "substitute" judges (*plaatsvervangende rechters / juges suppléants*).

[41] I.e. the candidate must have been a trainee at the Bar or have performed another legal function for at least one year during the three years prior to enrolment for the exam.

[42] Article 259*octies* of the Judicial Code.

[43] Act of 31 January 2007 concerning judicial education and the creation of an Institute of Judicial Training (*Wet inzake de gerechtelijke opleiding en tot oprichting van het Instituut voor gerechtelijke opleiding / Loi sur la formation judiciaire et portant création de l'Institut de formation judiciaire*; Belgian State Gazette, 2 February 2007), which was amended by the Act of 24 July 2008

provides for practical experience with the Public Prosecutor's Office, the prison service, the police, the Federal Prosecutor's Office, and a notary or a bailiff, or the legal department of a public economic or social institution. In the long traineeship, there is in addition practical training with a trial court. During the traineeship, the trainee is under the supervision of two magistrates of the court or public prosecutor's office where he or she is training, who evaluate his or her performance. Moreover, all judicial trainees are evaluated by a commission for the evaluation of judicial traineeship, which is composed of magistrates and education experts.

For experienced lawyers there is a professional capabilities exam.[44] This exam is similar to the one described above, but provides for direct access to the Judiciary without the need to complete a traineeship. The candidates who pass the exam obtain a certificate of professional ability which gives them the right to apply for a judgeship within a period of seven years. For lawyers with a minimum of 20 years' practice at the Bar who want to enter the Bench, there is an oral evaluation exam.[45] This involves a meeting with three hearing groups drawn from the nomination and appointments committee of the High Council of Justice. Discussions deal with the motivation of the candidate and his ideas about his future career, his knowledge of the law, and his abilities relevant to the function of a magistrate. The nomination and appointments committee gives its decision on the basis of the reports of the three hearing groups and the advice of a representative of the Bar. If successful, the candidate will obtain an evaluation attestation which is valid for three years. The maximum number of judges recruited by means of the oral evaluation exam is 12% of the total number of magistrates at the level of the Court of Appeal in the relevant judicial district.[46] In recent

(Belgian State Gazette, 4 August 2008). It is in operation as of 1 January 2009. The Institute develops its programme for judicial trainees taking into account the directives of the High Council of Justice. See *infra*, D. II. Training.

[44] I.e. lawyers with a minimum of 10 years' professional experience at the Bar (Article 190 (2) of the Judicial Code).

[45] Article 187*bis* of the Judicial Code.

[46] The Constitutional Court has held that the fact that experienced lawyers do not have to pass a written exam does not violate the constitutional equality principle, taking into account this maximum percentage (Constitutional Court, No. 142/2006, 20 September 2006). Previously, the Constitutional Court had annulled the Act which provided for the exceptional system for experienced lawyers because it did not include a maximum percentage (Constitutional Court, No. 14/2003, 28 January 2003).

years, the High Council has continued to improve this process and make it as professional as possible. For example, new exam forms were developed, behavioural interview techniques were introduced and research was undertaken on the use of innovative psychological tests.

### *2. The Process of Judicial Selection*

Each vacancy for the position of judge is published online. Previously, judges were in principle appointed directly by the executive branch, which led to the *politicization* of these appointments.[47] The creation of the High Council of Justice in 1998 has curtailed the responsibility and the powers of the executive in respect of the appointment of judges.[48] Though judges continue to be appointed by the executive branch, the appointment is based on a motivated nomination of the candidate after an evaluation of competence and qualification by the relevant appointments committee of the High Council of Justice. The nomination can only be made with a two-thirds majority. The executive branch can reject the nomination but it will have to state its reasons for doing so.[49] The High Council then has 15 days to issue a new nomination. There are no data available on the frequency of rejection but it is said to happen rarely if ever. After the 1998 reforms, the High Council almost immediately acquired a moral authority in the selection process which the executive branch is very reluctant to challenge.

While the reform is broadly approved, critics say that there is still a degree of political and ideological influence in the nomination and promotion process, and that the transparency of the nomination process is still subject to improvement.[50] Their concern is centred round the composition of the High Council, half of its members being appointed by the Senate (with a two-thirds majority). They fear that these members

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[47] See Lemmens (note 1), at 57-60.

[48] A distinction must be drawn between appointment as a judge, which is for life, and the appointment of a judge to a specific "mandate", which is for a limited period of time (see *infra*, B. III. 2. Promotion).

[49] The procedure is described in Article 259*ter* section 5 of the Judicial Code.

[50] R. de Corte, Benoeming, aanwijzing en selectie, in: M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans, 33, at 48-59 (2005); A. Delvaux, Nominations judiciaires: l'arbitraire survit encore, 23 Journal des Procès 10 (472nd ed. 2004).

will let political or ideological labels influence their assessment. The selection process being confidential for reasons of privacy, evaluating these comments is difficult. However, when recently questioned by the specialized press about these concerns, former members of the High Council stated without exception either that they had never observed any political or ideological influence or, alternatively, that even when they suspected some bias, the diversity in the selection committee and its vast autonomy was a more than sufficient guarantee of the objectivity of the outcome.[51] They added that full objectivity is utopian and that 95% of fully objective nominations is in any event the highest attainable level. The result of the process in the last ten years, with highly qualified lawyers being selected and its outcome relatively rarely contested, seems to support these statements.

The appointment of lay judges in the labour and commercial courts, on the other hand, is still largely within executive discretion without nomination by the High Council of Justice.[52] Following revelations about an important creditor of the President of the Commercial Court in Brussels having been appointed a lay judge (and later also a judicial expert) at the same court, some have called for a more objective system of appointment of lay judges.

### *3. Length of Office and Reappointment*

Since appointment to the function of magistrate is for life, there is in principle no need for reappointment.[53] However, in addition to the functions as a magistrate, there are several "mandates" at the various Courts. Indeed, there are the mandates of President (of the courts), of "vice-mandate" (vice-presidents) and "special mandates" (investigating

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[51] B. Aerts/R. Boone, Hoge Raad voor de Justitie na 10 jaar. '95 procent objectieve benoemingen is het hoogst haalbare' , 207 Juristenkrant 8 (2010).

[52] Lay judges are appointed by the executive branch for five years upon nomination by respectively the Minister of Labour and the Minister competent for small business and the self–employed, and drawn from candidates submitted by unions and employees' organizations, and by employers' associations (Arts. 198-199 of the Judicial Code). A similar process applies to the appointment of the lay judges in the Commercial Court (Arts. 203 et seq. of the Judicial Code).

[53] The abovementioned lay judges in the Labour and Commercial Courts are, however, appointed for a renewable term of five years (Arts. 202 and 204 of the Judicial Code).

magistrates, youth magistrates, etc.).[54] While their function as judge has no time limit, holders of a mandate occupy their office for a fixed term of three to five years, which is in principle renewable after evaluation.[55]

## III. Tenure and Promotion

### *1. Tenure*

Article 152 of the Constitution provides that judges are appointed for life. No judge can be removed from office or suspended except by court order. This provision implies that judges may be removed from office only as a result of a decision of a disciplinary authority, or of a conviction for a serious crime. Thus only a judicial decision may deprive a judge of his office or suspend him. Further, Article 152 of the Constitution explicitly provides that legislation is to determine retirement age and pension rights.[56] Besides security of tenure it also provides that the transfer of a judge may not take place except by way of a new appointment and with his consent. On reaching retirement age, a judge is automatically deemed incapable of exercising his function. He is accorded emeritus status in order to emphasize that he retains the status of a judge and remains subject to the disciplinary authority of the Court of Cassation.

### *2. Promotion*

Promotion of judges to higher functions in the judicial hierarchy is organized as an appointment to that vacant higher position, which is always published by means of a call for applicants in the Belgian State Gazette. The High Council again plays a key role: it conducts the hearings, collects the underlying information and makes the nominations. It ensures the objectivity and integrity of the process. This way of proceeding does not seem to pose a real threat to judicial independence, although some have claimed the contrary.

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[54] Article 58*bis*, 2°-4° of the Judicial Code.

[55] On the subject of evaluation see *infra*, B. VII. 6. Evaluation. See Arts. 259*quater* – *sexies* of the Judicial Code for more details.

[56] Article 383 et seq. of the Judicial Code (see *infra*, B. IV. 3. Retirement).

While appointment to a higher position is sometimes open to candidates who have not served on a lower level,[57] in practice the vast majority of these appointments are for judges in function, serving at a lower level. As such, although not in so many words set out in the law, there is an informal career path for judges depending on the prestige and financial remuneration linked to each function. However, the relatively minor variations in financial remuneration means that seeking promotion is not a must for every judge and frequently higher positions remain open for lack of candidates.

For promotion to a higher position, special requirements as to eligibility always apply.[58] These requirements are set by law and are transparent, fair and objective; most of them simply refer to professional experience and seniority. Obviously, criteria such as motivation, commitment, social and management skills and the ability to cope with stressful situations will also play a role. These are however not mentioned in the law. In the case of the appointment of a judge of the Court of Appeal or of the Court of Cassation, the full Bench of the relevant Court delivers its opinion, supported by reasons, in advance of the nomination by the High Council of Justice.[59] This is also the case for appointments to the position of President of the Court of Cassation or President of the Court of Appeal. The Vice–President of the Court of Cassation, the Chairmen of its Chamber panels, the Presiding Chairmen of the Chamber panels of the Court of Appeal, and the Vice–Presidents of the lower courts are selected for their positions by the judges of these Courts from among their own members.

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[57] See *infra*, footnote 59.

[58] For the Court of Appeal, e.g., 15 years' experience in legal functions, the last five years of which as a judge, is required in principle (Article 207 of the Judicial Code).

[59] This information applies to the promotion of lower court judges to the post of a judge of the Court of Appeal or the Court of Cassation. Note however that judges in the Court of Appeal may also be selected from lawyers with 15 uninterrupted years of experience who have passed the professional capabilities exam (Article 207 section 3, 2° of the Judicial Code, cf. *supra*).

## IV. Remuneration and Incompatibilities

### *1. Remuneration*

Members of the judiciary are able to function independently only if they are also financially independent of the executive. That is why pursuant to Article 154 of the Constitution the salaries of members of the judiciary and the Public Prosecutor's Office must be determined by Act of Parliament. Salaries are set by the Legislative branch according to an abstract table, based on objective criteria such as seniority and function, and never assigned to specific individuals. This is considered a sufficient safeguard against unlawful influence by the Parliament over the judiciary. The Government and, *a fortiori*, the Minister of Justice must strictly follow the salary scales set by the Parliament and are prohibited from granting any additional fees, bonuses or other forms of financial remuneration, even if this is extended to all magistrates on an equal basis.[60]

Arts. 355 to 365 of the Judicial Code contain detailed provisions on the salaries of judges at all levels so that there is no discretion for the executive as to the level of remuneration (except for promotions, which involve a salary increase). The salaries, which are due from the day of taking the oath until the day of ceasing in function[61], are generally paid correctly. The concrete salary depends on the level of the judicial hierarchy in question and the seniority of the judge. The basic salaries range from approximately 60,000 EUR per year for regular first instance judges to approximately 100,000 EUR for the First President of the Court of Cassation.[62] There is an automatic increase in salary on the ba-

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60 J. Velaers, De Grondwet en de Raad van State: Afdeling wetgeving, at 506 (1999).

61 Article 377 section 1 of the Judicial Code.

62 Article 355 of the Judicial Code mentions the annual salaries before taxation and at an index of 100%. All components of a salary are adjusted to the consumer price index (Article 362 of the Judicial Code). The cited salaries are, respectively, 57,642 EUR and 103,561 EUR (index 1.4859; base salary respectively 38,793.06 EUR and 69,696.16 EUR). For detailed schemes for each post see Adviesraad van de Magistratuur / Conseil consultatif de la magistrature, Vademecum over het sociaal en financieel statuut van de magistraten / Vademecum du statut social et financier des magistrats (2009).

sis of acquired seniority, every three years.[63] In addition to this basic salary, multiple add-ons are provided for judges with the same qualifications and/or holding the same office, such as for judges specializing in cases concerning minors.[64] The financial and social-security rules applying to judges differ significantly from those for lawyers working in the private sector. While the salaries of judges are sometimes considered to be lower than the salaries and fees of legal professionals with a similar level of responsibility or expertise in the private sector, other conditions (regarding such things as pension rights, lifetime appointment, and so on) are more advantageous than in the private sector.

### *2. Social Security and Benefits*

The social security rules applying to judges stem from a complex scheme of statutory and regulatory texts. Judges make social security contributions from their salaries, like any civil servants with a permanent position. Judges generally enjoy equal or similar social security benefits to those of regular employees, including medical treatment cover, family allowance, pregnancy, and work-place accident and illness cover. But judges in principle do not enjoy the usual unemployment benefits, which is generally not problematic since judges are appointed for life. Judges' annual holidays differ significantly from those of regular employees and officials. The judicial year starts on 1 September and ends on 30 June of each year.[65] During the months of July and August, there are court sessions only in the holiday chambers. For most judges, this implies that they have to take their annual holidays during the months of July and August.

### *3. Retirement*

Judges retire at the age of 67, or when they are no longer able to adequately discharge their duties due to serious and lasting impairment.[66]

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[63] Arts. 360 and 360*bis* of the Judicial Code. The increases range from approximately 1,800 EUR to approximately 4,500 EUR depending on position and seniority.

[64] Article 357 of the Judicial Code.

[65] Article 334 of the Judicial Code.

[66] Article 383 of the Judicial Code. For the magistrates of the Court of Cassation, the retirement age is 70 years.

The case of serious and lasting impairment warranting early retirement sometimes leads to discussions when the judge in question refuses to retire. There is a procedure in place to determine objectively whether there is indeed a serious and lasting impairment which prevents the judge from fulfilling his duties adequately. This procedure entails the case being brought before a special commission which will hear the judge and has the medical expertise in house to assess the situation.[67] The power to prevent this procedure from being set in motion lies with the Minister of Justice, because he has the authority over leave of absence.[68] As long as the Minister tolerates the absence and extends leave, there is no case for forced retirement. One could say that this puts the executive branch in a favourable position towards the Judiciary and especially any judges struggling with health issues and absenteeism.

A special honorary retirement regime (*emeritaat / émeritat*) is designed for retired magistrates with at least 30 years' service, of which 15 years were as a magistrate.[69] Magistrates in this retirement regime receive a pension based on the average salary during the last five years of service.[70] This amount is, however, limited to a relative maximum (75% of the reference salary) and an absolute maximum (approximately 70,000 EUR per year). If the magistrate does not have 30 years' service, the pension is reduced by 1/30 for every year by which he falls short. If the magistrate does not have 15 years' service as a magistrate, the pension will be calculated on the basis of percentages (*tantièmes*) of the income earned within and outside the judiciary.[71]

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[67] R. Janvier, Sociale bescherming, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 200 (2001).

[68] Indeed, under Article 332 of the Judicial Code any absence of longer than one month requires the permission of the Minister of Justice.

[69] Article 391 of the Judicial Code.

[70] This is the reference income determined in Article 8 section 1 of the Act of 21 July 1844 concerning civil and ecclesiastic pensions (*Algemene wet op de burgerlijke en kerkelijke pensioenen / Loi générale sur les pensions civiles et ecclésiastiques*, Belgian State Gazette, 31 July 1844).

[71] For a more detailed analysis see Adviesraad van de Magistratuur / Conseil consultatif de la magistrature, Vademecum over het sociaal en financieel statuut van de magistraten / Vademecum du statut social et financier des magistrats (2009).

## V. Case Assignment and Recusal

The Presidents of the Trial Court and the First Presidents of the Court of Appeal are responsible for the assignment of cases in their respective districts.[72] This is considered an administrative task which is far too closely connected with the exercise of judicial office to be entrusted to the central authorities, i.e. the Ministry of Justice. To avoid any appearance of arbitrariness towards the parties, the assignment of a case to a specific judge or bench is subject to pre-set rules promulgated in each court. These are contained in a so-called Regulation of the Court, which is established by Royal Decree and thus by the executive branch upon the advice of certain members of the Bench, the Public Prosecutor's Office and the Bar Association. This specific regulation determines *inter alia* the number of chambers per Court and their respective subject matter jurisdictions, and for the trial courts the schedules for introductory hearings and hearings on the merits.[73] Thus, every citizen and every lawyer can on the basis of this regulation know beforehand to which chamber his or her case will be referred. For each court individually such Regulation is set by Royal Decree. The President of each court can, when it is necessary to guarantee the smooth operation of the court, create temporary Chambers (for example, for cases of unusual complexity or size) or transfer cases from one Chamber to another (for example, if one Chamber is seriously hampered in its functioning due to illness or the absence of its members).[74] Which judge is assigned to which chamber is also decided by the President, usually at the beginning of every judicial working year.[75] This power of the President is completely discretionary in this respect: he may remove any judge arbitrarily from his area of expertise without any possible recourse. This is problematic in many ways: it gives the president too much influence, it is not a transparent process, there is no protection against arbitrariness

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[72] Article 90 and 109 of the Judicial Code. For a commentary on the system for assigning cases see D. Chabot-Léonard, La repartition des affaires au sein du tribunal de première instance, Journal des Tribunaux 391 (1972).

[73] Article 88 section 1, and Article 106 of the Judicial Code.

[74] Specific provisions exist for assignment to special functions, such as judges in juvenile matters or examining judges in criminal matters. Depending on the nature of the function, the assignment is done by the executive branch or, alternatively, the President of the Court of Appeal (Arts. 89 and 90 of the Judicial Code).

[75] Article 79 of the Judicial Code.

and occasionally it is a source of great conflict or tension in the working environment.

If there is any concern about the assignment of cases in civil matters among the different departments, chambers of judges or judges, the question must be submitted to – again – the President of the Court.[76] Such a problem may be raised either by the Court itself or by the litigating parties (who have the right to submit written arguments on this matter). The Crown Prosecutor gives non-binding advice, but the authority to reassign the case is held by the President. Only the Public Prosecutor's Office has a right of appeal against the President's decision concerning reassignment. From the above it is clear that the President has wide powers as to assignment of cases and that protection against abuse of these powers is relatively weak.

Recusal of an individual judge (*wraking / récusation*) is possible in a number of circumstances which are comprehensively listed in Article 828 of the Judicial Code.[77] This provision contains one ground of recusal which serves as a sort of *catch all* rule: the legitimate suspicion of bias. Any circumstance which could reasonably give rise to the belief that the judge is biased is therefore included and may give rise to recusal. Other grounds for recusal listed in that provision are: personal interest in the dispute, family connections, financial relations with one of the parties, hostility, involvement in other litigation relating to the issue or to the parties, serving as the custodian or liquidator for one of the parties, having advised or published on a given dispute, having been involved as a judge in both the first instance and appellate phase of the procedure, having been a witness in respect of the issue concerned, and having received gifts or payments from one of the parties. Every judge who is aware of a ground for recusal against him or her must withdraw from the case.[78] If the judge is not aware of the issue, or knowingly refuses to withdraw, the parties may move for recusal. This motion must be submitted before the beginning of the pleadings, except where the ground for recusal arises afterwards.[79] A judge who has refused to withdraw and subsequently, upon motion for recusal by one of the parties, is ordered to abstain from handling the case, will have to pay the

[76] Article 88 section 2 of the Judicial Code.

[77] See e.g., G. Closset-Marchal, La récusation en droit belge, 17 Tijdschrift voor Belgisch Burgerlijk Recht 605 (2003).

[78] Article 831 of the Judicial Code.

[79] Article 833 of the Judicial Code.

costs of the procedure. He may also face disciplinary sanctions because the duty to withdraw from a case in the event of risk of bias is a professional duty.[80]

A motion for recusal can be made against one judge or even, if need be, against all the judges on the bench. Exceptionally, one can even ask for the case to be withdrawn from a certain court altogether and referred to another court. Recusal of a Court as a whole (*Onttrekking van de zaak aan de rechter / dessaisissement*) is possible both in civil[81] and criminal matters.[82] This procedure may, for instance, be initiated for reasons of public security or in the event of legitimate suspicion, in particular about the independence and impartiality of the Court. Both the parties and the Public Prosecutor's Office may initiate this procedure.[83] It is dealt with by the Court of Cassation.

## VI. Judicial Conduct Complaint Process

According to Article 151 section 3, first alinea, 8° of the Constitution, the High Council of Justice has the authority to receive and follow up on complaints relating to the operation of the judiciary and the Public Prosecutor's Office, as well as to conduct enquiries into the operation of the judiciary and Public Prosecutor's Office.[84] The complaint mechanism is described in Article 259*bis*-15 of the Judicial Code and is open

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[80] X. De Riemaecker/G. Londers, Deontologie en tucht, in: id. (eds.), Statuut en deontologie van de magistraat, 320 (2001).

[81] Arts. 648-659 of the Judicial Code.

[82] Arts. 542-552 of the Criminal Procedure Code.

[83] Except for proceedings on the basis of public security, which may be initiated only by the Prosecutor-General for the Court of Cassation (Article 651 of the Judicial Code).

[84] K. Kloeck/E. Van Dael, Naar een behoorlijke interne en externe klachtenregeling voor de rechterlijke orde, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 339 (2005). For a discussion on whether external control of the functioning of justice is compatible with judicial independence see A. Van Oevelen, Zijn onafhankelijkheid van de rechterlijke macht en externe controle op de werking van de rechterlijke macht onverenigbaar met elkaar?, in: F. Van Loon/K. Van Aeken (eds.), 60 maal recht en 1 maal wijn. Rechtssociologie, Sociale Problemen en Justitieel beleid. Liber Amicorum Jean Van Houtte, at 313 (2001).

to any person, including judges, lawyers, and the general public.[85] The advice and investigation committees of the High Council receive and follow up these complaints of judicial misconduct. A complaint must be in writing, dated and signed, and must mention the full identity of the complainant. The High Council does not deal with complaints which are already the subject of disciplinary or criminal proceedings.[86] Neither will the Council consider complaints about the content of judicial decisions or objections which may be addressed through the use of the existing procedural means (appeal, cassation, etc.). The dismissal of a complaint is final and cannot be appealed.

When a complaint is accepted, it is brought to the attention of the hierarchical superior of the judge against whom the complaint was made. The judge in question is notified in due time and has the right to submit oral or written comments to the High Council. The High Council may request additional information from all magistrates to whom it has notified the complaint. It does not have other powers of investigation. At the end of the proceedings the complainant is informed in writing about the steps which have been taken as a result of the complaint. If it appears that the complaint is well-founded, the High Council of Justice cannot impose sanctions but it may formulate recommendations to remedy the problem and propose actions to improve the operation of the judiciary. These recommendations and proposals are addressed to the entities concerned as well as to the Minister of Justice. Where the matter seems to warrant disciplinary measures it is transferred to the relevant disciplinary authority, but merely on an informative basis as the High Council lacks the authority to decide whether or not there was indeed a violation of professional standards.

At least once a year, every advice and investigation committee drafts a report about the steps which have been taken as a result of the complaints received. For reasons of privacy, no personal information about the complainants or the judges involved is made public. The reports are integrated into the annual report which contains detailed information

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[85] The vast majority of complaints are submitted by the general public. See the annual reports, on the website of the High Council of Justice, available at <http://www.csj.be>.

[86] When the High Council presumes that a disciplinary offence has been committed, it will notify the competent disciplinary authority of the person concerned with the request to determine whether disciplinary proceedings must be initiated.

and statistics about the complaint mechanism.[87] It appears from these reports that many of the well-founded complaints relate to the judicial backlog and to deficient communication with the parties during the treatment of the case (e.g. inappropriate comments made by a judge during trial). The statistical data also demonstrate that there is generally no backlog in dealing with complaints. Of the files closed in 2008, for example, 60.54% were closed within a period of three months. Only 5.42% of the cases were closed after a period of more than one year. The statistical data also show that over 55% of the complaints are inadmissible because they fall outside the scope of the Council's jurisdiction (e.g. complaints over the merits of a specific claim or the content of a specific judgment). For the remainder of the complaints, which do fall within the Council's jurisdiction, the success rate is 25.57%.

In addition to this formal complaint procedure, every person having an interest may submit a complaint to the hierarchical superior of a magistrate – for judges this is often the President of the Court – which may result in disciplinary action. In order to be examined, the complaint must be written, dated, signed, and must mention the full identity of the complainant.[88] Such a complaint may also be addressed to the Minister of Justice, who will transmit it to the Crown Prosecutor's Office if there is evidence to believe that there may be a ground for initiating disciplinary proceedings. If the complaint involves a judge, the Crown Prosecutor will in turn transmit it to the appropriate disciplinary authority (often the president of the court) who maintains full autonomy in assessing whether disciplinary action is required. For that reason, the possibility of a complaint received by the Minister or the High Council giving rise to disciplinary proceedings should not be considered a threat to judicial independence.

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[87] The annual reports have been published since 2000 on the website of the High Council of Justice, available at <http://www.csj.be>.

[88] In that case, the superior informs the magistrate concerned about the existence of the complaint, the identity of the complainant, as well as the alleged facts (Article 410 section 3 of the Judicial Code).

## VII. Judicial Accountability: Discipline, Removal Procedures and Evaluations

### *1. Formal Requirements*

The complaint procedure which is generally intended to ensure improvements in judicial services may lead to disciplinary proceedings against the judge in question if serious misconduct is involved. Disciplinary proceedings may also be initiated in the absence of a formal complaint, as long as there are objective indications of misconduct. The disciplinary authority charged with initiating disciplinary proceedings is the superior in the judicial hierarchy of the magistrate concerned. For instance, the First President of the Court of Cassation is the superior of the First Presidents of the Courts of Appeal, each First President of the Court of Appeal is the superior of the members of that Court, and so on.[89] The same applies to disciplinary proceedings in respect of members of the Public Prosecutor's Office. Disciplinary proceedings may be initiated *ex officio*, following a complaint or on demand by the Public Prosecutor's Office.[90] The Minister of Justice is always informed when disciplinary proceedings have been initiated.[91]

Disciplinary sanctions may be imposed on magistrates who have failed to fulfil the obligations of their function, such as neglecting to issue a judgment, or who have damaged the dignity of their office by their behaviour, whether in private or in the exercise of their functions. This is also the case where particular tasks have been neglected in a way which damages the smooth operation of the justice system and confidence in the institutions.[92] For instance, a judge convicted of knowingly accepting stolen property had severely breached his duties and the required dignity of his function and therefore was dismissed as a member of the judiciary.[93] Likewise, a judge who was convicted of abuse of confidence and issuing a cheque without funds was removed from office.[94] A magistrate who had been violent to his wife and whose financial situation

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[89] Article 410 of the Judicial Code.

[90] Article 410 (3-4) of the Judicial Code.

[91] Article 405*ter* of the Judicial Code.

[92] Article 404 of the Judicial Code.

[93] Court of Cassation, No. D940025N, 17 November 1994, available at <http://www.juridat.be>.

[94] Court of Cassation, No. D010015N, 29 November 2001, available at <http://www.juridat.be>.

had worsened due to excessive spending and his taking on several loans was deemed to have harmed the dignity of his office.[95] Magistrates who are prosecuted either in criminal proceedings or in disciplinary proceedings may be temporarily suspended in the interests of the judicial service, on the basis of an administrative order of the disciplinary authority until the case has been finally adjudicated on.[96] However, disciplinary proceedings may not be initiated on the basis of *bad* judgments. It is generally assumed that the independence of the judiciary requires an absolute absence of control over the content of judicial decisions beyond the appeals and judicial review procedures.

### *2. Disciplinary Proceedings*

Whether disciplinary proceedings are warranted is in the discretion of the disciplinary authority. In any event, disciplinary proceedings can only be initiated within a timeframe of six months starting from the moment at which the disciplinary authority (very often the President of the Court) obtained knowledge of the facts which justify the disciplinary proceedings. The disciplinary authority commencing the disciplinary procedure is in charge of the investigation into the allegations if these concern facts which are punishable with a mild sanction. Where the disciplinary authority concludes after investigation that a severe sanction[97] should be imposed, the case must be submitted to the National Disciplinary Council (*Nationale Tuchtraad / Conseil national de discipline*)[98] which will issue a non-binding advice concerning the penalty that should be applied.[99] The Council is divided into a Dutch-speaking and a French-speaking Chamber which are each composed of members of the judiciary, of the Public Prosecutor's Office, as well as persons not belonging to the judiciary, such as lawyers and law professors.[100] In principle, the disciplinary authority charged with initiating disciplinary proceedings is equally charged with imposing mild penal-

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[95] Court of Cassation, No. D000010F, 7 December 2000, available at <http://www.juridat.be>.

[96] Article 406 of the Judicial Code. E.g. Court of Cassation, No. D960012N, 13 December 1996, available at <http://www.juridat.be>.

[97] *Infra* B. VII. 4. Sanctions.

[98] Article 411 of the Judicial Code.

[99] Article 409 of the Judicial Code.

[100] See in detail Article 409 (2 - 8) of the Judicial Code.

ties (warnings and reprimands).[101] Severe sanctions, however, may only be pronounced by a chamber of judges of the Court which is immediately superior to the magistrate concerned.[102] The members of the Court of Cassation, which is the supreme court of the judiciary, are judged by the general assembly of that Court.

Importantly, the executive branch does not intervene in disciplinary procedures concerning members of the judiciary. This is not the case for members of the Public Prosecutor's Office, where the King imposes the sanctions of automatic dismissal and impeachment, while the Minister of Justice, the Prosecutor-General for the Court of Cassation, the Federal Prosecutor, or the Prosecutor-General for the Court of Appeal pronounce other sanctions.[103]

### *3. Judicial Safeguards*

In addition to the guarantees outlined above, several safeguards are provided to ensure a fair disciplinary process. The magistrate concerned must be heard during the investigation and has the right to be assisted or represented by a person of his choice. At least 15 days before the hearing by the investigating body, the files are accessible to the defendant and his representative.[104] The defendant is also heard by the disciplinary authority in a public hearing, except where the defendant explicitly demands a hearing *in camera*. At this hearing, the defendant may also be assisted or represented by a person of his choice. At least 15 days before this hearing, the files are accessible to the defendant and the person of his choice, and a copy of them may be freely obtained.[105] The magistrate concerned must be properly summoned to the hearing by means of a registered letter which gives notice of the reasons for the hearing, the facts of the alleged disciplinary offence, the place and timeframe for consulting the files, and the place and date of the hearing.[106]

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[101] Article 412 section 1 of the Judicial Code.

[102] For instance, the first Chamber of the Court of Appeal adjudicates over members of the Courts of First Instance.

[103] Article 412 sections 2 and 3 of the Judicial Code.

[104] Article 419, third alinea of the Judicial Code.

[105] Arts. 421-422 of the Judicial Code.

[106] Article 423 of the Judicial Code.

The disciplinary decision must be communicated to the magistrate concerned within a month of being made and must contain justification for the decision, notice of the opportunity to appeal it, as well as the time-limits and procedures for doing so.[107] An order of removal from the judiciary may be pronounced only by a two-thirds majority in the Chamber dealing with the case.[108] The magistrate concerned may appeal the decision imposing a penalty.[109] Apart from the magistrate concerned, the Public Prosecutor's Office also has the right to appeal all disciplinary decisions.[110] The appeal proceedings must be initiated within a month starting from notice of the decision.[111] When a person has been punished by a disciplinary sanction, he may request the disciplinary authority to revise the decision on the basis of new elements.[112]

### *4. Sanctions*

The law lists the sanctions which may be applied. They are subdivided into mild and severe disciplinary sanctions.[113] Mild sanctions are warnings and reprimands. Severe sanctions are further subdivided into severe sanctions of the first and second degree. Severe sanctions of the first degree consist of the partial deduction of salary, disciplinary suspension, revocation of a mandate (e.g. as president of a court) and disciplinary suspension combined with the revocation of a mandate. Severe sanctions of the second degree are removal measures, namely automatic dismissal, release from office, and impeachment. The law generally does not give instructions as to which kind of conduct triggers which sanction. In principle, the choice of the appropriate sanction remains within

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[107] Article 424 of the Judicial Code.

[108] Article 420 of the Judicial Code.

[109] Article 415 of the Judicial Code. Depending on the hierarchical position of the magistrate and the type of sanction the appeal is heard by the General Assembly of the Court of Cassation, the United Chambers of the Court of Cassation, the First Chamber of the Court of Cassation, or the First Chamber of the Court of Appeal.

[110] Article 415 section 12 of the Judicial Code. Members of the Public Prosecutor's Office may appeal mild sanctions to the Minister of Justice or the Prosecutor-General for the Court of Cassation or the Court of Appeal.

[111] Article 425 of the Judicial Code.

[112] Article 427*quater* of the Judicial Code.

[113] Article 405 of the Judicial Code.

the full discretion of the disciplinary authority. As an exception to this rule, consistent delay in issuing judgments must at least be punished with a severe sanction of the first degree.[114]

### *5. Practice*

Disciplinary proceedings are often used in cases involving infractions of the Criminal Code, such as behaviour relating to the abuse of alcohol. Other cases relate to practices which endanger public confidence in the judiciary, such as indecent behaviour, abuse of the office of judge, or critical comments in the media regarding judicial decisions. Most disciplinary decisions concerning judges are not published. Under the principle of disciplinary discretion, disciplinary proceedings are considered confidential, or at least off-limits to the public. There have been suggestions by policymakers that this system should be reformed to ensure that at least the person making the complaint is entitled to information about the result of the disciplinary proceedings, but these have not yet been turned into law. As a result, it is difficult to assess the disciplinary practice.[115] There are no credible reports about abuse of disciplinary proceedings. Also, it appears that these proceedings are used sparingly. For instance, an assessment of the disciplinary sanctions in the period between 1973 and 1998 demonstrates that in this period only 49 warnings were registered.[116] This assessment also concludes that since 1992 there have been increasingly more disciplinary proceedings, in particular in respect of magistrates responsible for significant delays in the handling of files.

In 2009, when revelations about dysfunctions in the Brussels courts attracted national media attention, questions were raised about the crucial role of court presidents in the disciplinary process. As the hierarchical superior of the judges in his court, the president has discretion over the

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[114] Article 770 section 5 of the Judicial Code.

[115] Article 427 of the Judicial Code provides that the Minister of Justice will establish a central (non-public) database containing anonymous versions of all disciplinary decisions.

[116] However, most warnings are expressed orally and there are no systematic assessments of all individual files (X. De Riemaecker/G. Londers, Deontologie en tucht, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 309, at 370-380 (2000); X. De Riemaecker/G. Londers, Déontologie et discipline, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat, 303, at 356-366 (2000).

initiation of disciplinary investigations and proceedings. Does this pose a threat to substantive independence inside the judiciary? Absolute independence does not exist and is not desirable either. Judges who violate the rules should be subject to sanctions. Until recently, the person judged to be best placed to ensure that unprofessional behaviour is adequately dealt with was the supervising court president. However, practice shows that presidents generally show great restraint in using these powers, which they consider a poisoned chalice.

At the request of the judiciary, Government and Parliament have started discussions on reform of the disciplinary process which should include delegation of disciplinary powers to an independent and specialized body. Although this process is far from finalized, it is already clear what will be the main controversies. First, should this disciplinary body be composed of only magistrates or should it also be open to external members? Conservative voices within the judiciary are of the opinion that disciplinary proceedings are a matter for the judiciary only, and that external participation poses a risk to their independence. However, recent media stories about dysfunctional judges and long-lasting deficiencies in certain courts has made public opinion lose faith in the capacity of the judiciary to "clean up its own mess". Stakeholders demand more transparency and accountability, which requires external participation. A second point of discussion is whether or not disciplinary reform should follow an integrated model. The integrated model stands for bringing together the disciplinary powers with the power to nominate and promote judges and to examine the smooth operation of courts. In the current system, this would mean assigning the disciplinary powers to the High Council of Justice, which has already publicly shown interest in this new role. However, this ambition of the High Council has been met with some resistance. Some voices within the judiciary argue that disciplinary proceedings cannot be delegated to a body half the members of which are politically appointed without putting its independence at risk. In this respect, the National Disciplinary Council seems to be in a more favourable position, as its external members are not politically appointed but are attorneys and professors assigned by, respectively, the Bar and the universities.

### *6. Evaluations of Judges*

In order to ensure the proper operation of the judiciary judges are subject to evaluation. All judges are assessed one year after taking their oaths and afterwards every three years. The process entails one or pos-

sibly more consultations with the evaluator and a formal, written report. For chief and presiding judges (*chefs de corps*, *korpschefs*) there is an evaluation consisting of a follow-up conversation in the second year of their term, as well as a more extensive evaluation, comprising several consultations and a fully-fledged written evaluation report, at the end of their term. A similar procedure also applies to assisting chief and presiding judges, such as the vice-presidents of the courts.[117] The evaluation of judges is done by members of the judiciary in order to ensure its independence. The evaluation is not related to individual judicial decisions, but only to the functioning of the magistrate.[118] There are no official guidelines or standards for measuring functioning: this seems to be done on a case by case basis. When the evaluation leads to the assessment *insufficient*, there are financial consequences for the judge involved.[119] For the holders of a *mandate*, the evaluation has consequences for the renewal of the mandate.[120]

There is fierce criticism of the way the evaluation process is currently organized. From two surveys among magistrates, taken in 2001 and 2006, it has appeared that almost all consider the process much too tedious, bureaucratic and excessively time-consuming. Also, there is not enough clarity as to whether the evaluation serves merely to help the evaluated judge to perform better, or whether it can also be used in a disciplinary inquiry. The High Council for Justice has recommended simplifying the procedure and preventing the evaluation from being used in disciplinary matters.

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[117] See E Van Den Broeck/J. Hamaide, De evaluatie van de magistraten, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 291 (2005). The Constitutional Court has clearly affirmed that the Presidents (i.e. the President of the Court of Cassation, the Presidents of the Court of Appeal, and the Presidents of the lower courts) are not subject to evaluation (Constitutional Court, No. 122/2008, 1 September 2008).

[118] Royal Decree of 20 July 2000 which determines the specific rules regarding the evaluation of magistrates, the evaluation criteria, and their weighting (*Koninklijk besluit tot vaststelling van de nadere regels voor de evaluatie van magistraten, de evaluatiecriteria en hun weging / Arrêté royal déterminant les modalités d'évaluation des magistrats, les critères d'évaluation et leur pondération*, Belgian State Gazette, 2 August 2000).

[119] Article 259*decies* section 3, and Article 360*quater* of the Judicial Code.

[120] Article 259*undecies* of the Judicial Code.

## VIII. Immunity for Judges

### *1. Civil Liability*

The independence of the judiciary does not imply that no action can be taken in respect of judges who fail to fulfil their obligations. Apart from disciplinary proceedings[121] and the recusal procedure,[122] it is also possible to claim damages from a judge in a limited number of cases. When a wrongful act of a judge committed in the exercise of his function causes injury, there is no personal liability of the judge, save in respect of four professional faults, as for example fraud or for refusal to deliver a judgment.[123] A claim on this basis must be initiated within 30 days before the Court of Cassation which may then order the judge to pay damages or may annul the judgment.[124] If the claim is dismissed, however, the claimant may be ordered to pay moral damages to the judge.[125]

Judges can in principle not be held liable in person for errors made in the exercise of their office, save for some very exceptional circumstances such as fraud.[126] However, since the 1990s, it has been accepted that the State may be held liable under Arts. 1382 and 1383 of the Civil Code[127] for a wrongful act committed by a judge or by a member of the Public Prosecutor's Office.[128] When the act complained of is directly related to the judicial decision, a claim for damages against the State will succeed only if the decision has been revoked, modified, or annulled on account of a violation of a rule of law by a final judgment. The Court of Cassation follows a twofold *fault concept*: liability for damages arises upon violation of a constitutional or a legislative rule prohibiting or

121 See *supra*, B. VII. 1.-5. Judicial Accountability.

122 See *supra*, B. V. Case Assignment and Recusal.

123 The causes are listed in Article 1140 of the Judicial Code.

124 Arts. 1142-1143 of the Judicial Code.

125 Arts. 1146-1147 of the Judicial Code.

126 Article 1140 of the Judicial Code.

127 Belgium's tort law is based on Arts. 1382 and 1383 of the Civil Code, which contain the general principle that one must compensate injuries caused by one's wrongful act. In order to be successful, a claimant must prove that (i) he has incurred damage, (ii) the respondent has committed a fault and (iii) this wrongful act has caused the damage.

128 Court of Cassation, No. 8970 (*Anca I*), (19 December 1991), available at <http://www.juridat.be>; and Court of Cassation, No. C930303F (*Anca II*) (8 December 1994), available at <http://www.juridat.be>.

compelling actions of a certain type, or upon violation of the general duty of care. Since 1991 the State has, however, rarely been held liable for damages for a wrongful act by or omission of a member of the Judiciary.

### *2. Criminal Liability*

The Criminal Procedure Code contains detailed rules concerning proceedings against judges who have committed crimes[129] both in a private capacity[130] and in the framework of their judicial office.[131] Judges enjoy a "privilege of jurisdiction" (*voorrang van rechtsmacht / privilège de juridiction*), meaning that in principle they are tried by the Courts of Appeal.[132] Moreover, only the Prosecutor-General for the Court of Appeal has the authority to commence such proceedings.[133] This specific procedure aims to ensure the independence of the judiciary by preventing people from making frivolous claims against judges and by guaranteeing that magistrates are not tried by their immediate colleagues and peers.[134] According to the Constitutional Court this exceptional procedure does not violate the principle of equality.[135]

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129 For minor offences the regular procedures apply.

130 Arts. 479-482*bis* of the Criminal Procedure Code.

131 Arts. 483-503*bis* of the Criminal Procedure Code.

132 The judges of the Court of Appeal come before the Court of Cassation, which may transfer the case to a Criminal Court or to an examining magistrate. The Court of Cassation also has jurisdiction over criminal proceedings regarding courts as a whole (Arts. 481-482 and 485-503 of the Criminal Procedure Code). Political and press offences, except for press offences motivated by racism or xenophobia, as well as crimes which carry a sentence of imprisonment in excess of five years, are tried by jury in the Criminal Assizes.

133 Arts. 479 and 483 of the Criminal Procedure Code.

134 J. de Codt, De vervolging van magistraten, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 151, at 151-152 (2000); J. de Codt, Poursuites contre les magistrats, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat, 143, at 143-144 (2000).

135 E.g. Constitutional Court, No. 66/94, 14 July 1994.

## IX. Associations for Judges

There are several non-governmental associations which represent the interests of certain groups of magistrates. Membership of these associations is not mandatory. For instance, the Royal League of Justices of the Peace and Police Court Judges[136] defends the professional interests of those particular magistrates. It serves as a liaison with the media and participates in policy discussions. The High Council of Justice[137] does not represent the judiciary, but can be seen as the liaison between the judiciary on the one hand and the legislative and executive branches on the other. In 1999, an Advisory Council of Magistrates (*Adviesraad van de magistratuur / Conseil consultatif de la magistrature*) was set up by the Minister of Justice.[138] The mission of this official body is to give non-binding opinions and participate in negotiations on all aspects of the status, rights, and working environment of judges and members of the Public Prosecutor's Office. The Council may give advice on its own initiative or at the request of Parliament or the Minister of Justice.[139] The Advisory Council of Magistrates is composed of 44 members from all levels of the judiciary. It is subdivided into a Dutch-speaking and a French-speaking college with 22 magistrates each. The members of the Advisory Council are elected by their peers for a term of four years, which may be renewed once.

## X. Resources

The Department of Justice receives a large amount of funding out of the State budget. For instance, in 2008 more than 1.6 billion EUR was spent

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[136] *Koninklijk Verbond van de Vrede- en Politierechters / Union Royale des Juges de Paix et de Police*, available at <http://www.kvvp-urjpp.be>.

[137] See *supra*, B. I. 2. Organs in Charge of the Administration of the Judiciary.

[138] Act of 8 March 1999 establishing an Advisory Council of Magistrates (*Wet tot instelling van een Adviesraad van de magistratuur / Loi instaurant un Conseil consultatif de la magistrature*, Belgian State Gazette, 19 March 1999). The Advisory Council of Magistrates was, however, actually set up only in 2006. The Advisory Council of Magistrates has a website, which is accessible via <http://www.just.fgov.be>.

[139] Article 5 of the Act of 8 March 1999 establishing an Advisory Council of Magistrates.

on the Department of Justice.[140] A major component of the expenses is the payment of wages.[141] However, there is still much room for improving office and courtroom facilities. In particular, the Justice Department still has a serious backlog in updating and co-ordinating its ICT infrastructure. Several projects notwithstanding,[142] the Belgian judiciary does not yet have a modern and integrated ICT system. While appropriate funding is definitely part of the solution to these logistical problems, the management of the justice system must also be improved. In addition to the need to implement integrated projects for the whole of the judiciary, it is of key importance to grant more financial autonomy and responsibility to the Courts and their Presidents[143] in order to enhance administrative efficiency through the involvement of the judges who are closest to actual practice. However, with such autonomy must necessarily come more accountability. There should be accountability in terms of expenses and financial policy in general. More autonomy will also require accountability for the courts' functioning and performance, for instance by workload measurement techniques.[144] Some magistrates and

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[140] House of Representatives, General Presentation of the Budget, Parliamentary Documents House of Representatives 2008-2009, No. 52 1526/001, at 131. See also the Justice Department's Annual Report of 2008, available at <http://www.just.fgov.be>.

[141] As mentioned above, the salaries of judges are determined by the Judicial Code. These salaries are generally paid correctly. See *supra*, B. IV. Remuneration and Incompatibilities.

[142] For instance the Phenix and Cheops projects. See B. Colson, J.F. Henrotte, V. Lamberts, E. Montero, D. Mougenot, D. Vandermeersch/I. Verougstraete, Phenix – Les tribunaux à l'ère électronique (2007); and I. Verougstraete, ICT in de gerechtelijke wereld: het Phenix-project, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 183 (2005).

[143] R. Depré/J. Plessers, Een trend naar verzelfstandiging van de gerechten. Wat kan België leren van zijn buurlanden?, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 45 (2005). The idea of granting more autonomy and responsibility to the courts is also supported in the coalition agreement of the governments Leterme/Van Rompuy, at 28 (18 March 2008), available at <http://www.belgium.be>.

[144] R. Depré, V. Conings, D. Delvaux, A. Hondeghem, F. Schoenaers/J. Maesschalck, Haalbaarheidsstudie naar een werklastmeting voor de zetel. Etude de faisabilité de la mise en oeuvre d'un instrument de la charge de travail destiné au siège, (2007); R. Depré, Personeelsplanning en werklastmeting, in: R. Depré,

their representative organizations have been wary of such an evolution, fearing that more accountability will undermine their independence. Others had less honourable motives for opposing workload measurement, fearing that its findings could lead to reduction of their overstaffed teams. More and more magistrates, however, acknowledge that workload measurement is essential to good management. They admit that independence of judges in the exercise of their judicial functions does not necessarily rule out the fact that the court to which the judge belongs should be able to justify its use of government money in light of its performance and workload. In other words, there is no reason why independence and accountability could not go together. As an illustration of this growing awareness, the judiciary has made a start with workload measurement as of 2007, which is currently still in process.

## C. Internal and External Influence

### I. Separation of Powers

As mentioned above, the separation of powers and the principle of the independence of the judiciary are entrenched in the Constitution and guaranteed by the Judicial Code. Save for the abovementioned concepts in terms of evaluation and disciplinary sanctions, judges are not accountable to any state body or officials. However, the judicial and the executive branches are not entirely independent from one another: they have shared competences outside the sphere of judicial decision-making. This is illustrated, for example, by enforcement. Judgments and orders are enforced in the name of the King, in his capacity as the head of the executive branch.[145] Indeed, that their enforcement comes within the jurisdiction of the executive is aptly evidenced by the fact that it is the executive which determines the standard terms at the end of each judicial decision which are required to render it enforceable.[146] The Public Prosecutor's Office is charged with the enforcement of judgments.[147] As regards enforcement in criminal matters, the picture is

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J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, at 67 (2005).

145 Article 40 of the Constitution.

146 Article 1386 of the Judicial Code.

147 Article 139 of the Judicial Code.

mixed. In 2007, the executive relinquished to the newly created Sentencing Administration Court (*Strafuitvoeringsrechtbank / Tribunal de l'Application des Peines*) its power to deal with all matters relating to the serving of prison sentences.[148] The right to remit or to reduce a sentence imposed by a judge is however still a privilege of the King.[149]

The Minister of Justice has no authority to order that specific cases or certain categories of criminal offence should not be pursued. This would violate the principle of the separation of powers. However, the Minister of Justice does have the power to order the start of criminal proceedings.[150] Also, as mentioned before,[151] the Minister of Justice is empowered to instruct the Prosecutor-General of the Court of Cassation to submit for the Supreme Court's review any judicial act whereby a magistrate exceeds his legal powers.[152] In the Fortis case, the Minister of Justice was asked to use this power against the judgment of the Court of Appeal which was issued in the absence of the minority judge. The Minister of Justice refused, because the State was too closely involved and had an interest in the outcome of the proceedings. In its report on the Fortis events, the High Council of Justice suggested that this power be taken away from the Minister of Justice and left in the hands of the highest prosecutor in the land, the Prosecutor-General of the Court of Cassation.[153]

As has been outlined above,[154] the executive, despite its primary responsibility for the administration of courts, has only limited powers in the appointment of judges. The creation of the High Council of Justice as a

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[148] Article 157 section 4 Constitution; Act of 17 May 2006 concerning the establishment of Sentencing Administration Courts (*Wet houdende oprichting van strafuitvoeringsrechtbanken / Loi instaurant des tribunaux de l'application des peines*; Belgian State Gazette 15 June 2006).

[149] Article 110 of the Constitution. Article 111 of the Constitution provides that the King cannot pardon a federal Minister or a member of a Community or Regional Government convicted by the judiciary, except on petition by the House of Representatives or the Community or Regional Parliament.

[150] Article 151 section 1 of the Constitution; Article 274 of the Criminal Procedure Code.

[151] *Supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

[152] Article 1088 of the Judicial Code.

[153] Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 45-46.

[154] See *supra*, B. II. Selection, Appointment and Promotion of Judges.

separate organ to ensure judicial accountability and depoliticize judicial selection has limited the potential influence of the executive on judicial decision-making. The 1998 reform, thus, shows a gradual shift from the exclusive competence of the executive branch for the administration of the judiciary to the introduction of formal structures to ensure that administrative powers are not misused in order to impact on core judicial functions. The exclusive competence of the judiciary for the assignment of cases, the legislative guarantee for the remuneration of judges and the exclusive competence of the judiciary to sanction judicial misconduct are essential for the protection of judicial independence *vis-à-vis* the other branches of government.

Another area where the executive and the judiciary have shared responsibilities is the supervision of the proper functioning of the courts. This supervision is a matter not only for the court presidents, but also for the prosecution, which in turn performs its duties in this respect under the authority of the Minister of Justice.[155] In general terms, both the parliamentary report on the Fortis case and the report of the High Council of Justice leave this model largely uncriticized but they have urged the legislator to clarify the scope of this supervision and to limit the influence of the executive in this respect, especially in cases where the State is an interested party.[156]

In order to ensure external independence Article 155 of the Constitution provides that no judge may accept a salaried position from the government, unless it is unremunerated and on the condition that – whether the position is remunerated or not – it is not a position which is considered by the legislator to be incompatible with the position of being a judge. Indeed, some acts contain provisions whereby they proclaim that a certain function can never be held by a judge. In this respect, Article 293 of the Judicial Code provides that a judge may hold no paid political office nor any administrative position, nor hold the office of public notary, bailiff, practising lawyer, nor fulfil any military function, nor be a member of the clergy. By way of exception, the executive branch has been delegated the authority to grant an exemption,

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[155] For a short description of the system, see *supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

[156] Parliamentary Documents: House of Representatives 2008-2009 (note 5); Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 25.

so as to allow judges to hold university teaching positions or to sit on selection committees and examining boards.[157]

In the exercise of its function, the executive sometimes calls upon magistrates for their expertise. This is often organized on an *ad hoc* basis, for example when magistrates take part in working groups composed of civil servants and external experts to prepare legislation. For more long-term commitments, the executive has the ability to request the temporary secondment of a magistrate. This, however, only applies to magistrates in the prosecutor's office. Judges may not be seconded to the executive, as that would be contrary to the constitutional prohibition on judges accepting remunerated office from the government.[158] In 2008, a total of 22 magistrates from the prosecutor's offices were seconded to the executive, *inter alia* to the state agencies involved in national intelligence or the fight against money-laundering as well as to the cabinets of various Government Ministers.[159] This practice, which had gone largely uncontested for decades, has been heavily criticized in the aftermath of the Fortis controversy.[160] Magistrates seconded to the Government cabinets had informal contacts with former colleagues in the judiciary who were working on the case. In their respective reports, both the parliamentary commission and the High Council of Justice criticized these contacts.[161] They recommended banning secondments of magistrates to government cabinets, except for the cabinet of the Minister of Justice. The recruitment of magistrates for the Justice cabinet should no longer be handled by the cabinet itself, but through the intervention of the College of Prosecutors-General.[162] Also, it was suggested that a code of conduct for seconded magistrates, with clear instructions about contacts with magistrates in office, be put in place. Finally, all contacts between the executive and magistrates, whether judges or prosecutors, should be properly documented in writing and should never take place

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[157] Article 294 of the Judicial Code.

[158] Article 155 of the Constitution.

[159] Ministry of Justice, Justitie in cijfers, at 11 (2009).

[160] See e.g. T. Marchandise, Le ministère public et le politique: ordre et désordre, in Association syndicale des magistrats (ed.), Justice et politique: je t'aime moi non plus …, 104 (2009).

[161] Parliamentary Documents: House of Representatives 2008-2009 (note 5), at 68; Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 9-12.

[162] *Supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

directly but through the appropriate channels, meaning the hierarchical superiors.

## II. Judgments

### *1. Basis*

Judgments are based on the *law*, that is, every generally binding rule, irrespective of the issuing authority. This includes the Constitution, self-executing treaties[163] and provisions of European law, statutes enacted by both the federal and the state legislatures,[164] administrative regulations and orders, and general unwritten principles of law. Since Belgium belongs to the civil law tradition, it has no doctrine of precedent. Hence, judgments do not formally have a binding effect on future cases involving either different parties or the same parties in a different case. Article 6 of the Judicial Code explicitly prohibits the judiciary from issuing general decisions. The Constitution considers the authoritative interpretation of statutory law to be the sole prerogative of the Legislature.[165] Yet, in practice, judgments given by the higher courts do enjoy considerable persuasive authority. As most judges do not want their judgments to be overruled, the rulings of the higher courts are complied with for the most part. Also, higher courts are not legally bound by their own decisions. These higher courts, however, generally feel very reluctant to overrule themselves, so as not to endanger the predictability of their decisions. Apart from the Court of Cassation, which does not adjudicate on the merits of a case, meaning that it deals only with

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[163] In the *Le Ski* judgment of 1971, the Court of Cassation ruled that a self-executing treaty prevails over both former and later Acts of Parliament, which therefore should be declared inoperative by any court. The Court of Cassation argued that it is "the very nature of the international law as determined by the treaty that leads to this primacy." (Court of Cassation, 27 May 1971 [*Le Ski*], *Pasicrisie* 1971, I, 886-920).

[164] According to Article 1 of the Constitution, Belgium is a federal State composed of Communities and Regions. Both the Communities and the Regions have legislative authorities and may, within their powers, enact statutes which have the same binding force as federal statutes.

[165] Article 84 for federal Acts; Article 133 for Community Acts. The Constitutional Court has also accepted the authoritative interpretation for Regional Acts (Constitutional Court, No. 193/2004, 24 November 2004 and No. 25/2005, 2 February 2005).

questions of law,[166] the courts must necessarily apply the law to the facts of the cases submitted to them. This evidently involves a personal assessment by the judges.

According to Article 5 of the Judicial Code, a Belgian court may not refuse to deliver a judgment, even if there is no or only an incomplete law governing the situation submitted to it. In order to resolve those situations which were not anticipated by applicable legislative or regulatory rules, the courts have acknowledged the existence of unwritten general principles of law.

In order to ensure adequate legal review and uniform application of the law, the Constitution established a Court of Cassation for the whole of Belgium. The Court of Cassation is Belgium's highest court of ordinary jurisdiction and its principal task is to ensure that judgments comply with the law. The Court must ensure only that decisions made on appeal are not in contravention of the law and have not violated any prescribed procedure which would otherwise render a decision null and void.[167] The Court has no jurisdiction over a possible misinterpretation of the facts.

### *2. Practice*

There is substantial statistical information available concerning the outcome of judicial proceedings, although the management of these data is organized by several entities, which does not promote uniformity and transparency. The Department of Justice provides statistical data concerning the courts.[168] These include the number of acquittals and convictions at the levels of the Police Courts and the Criminal Courts,[169]

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[166] According to Article 147 of the Constitution, the Court of Cassation is prohibited from dealing with the facts of the cases submitted to it. After quashing a decision which it considers illegal, the Court of Cassation refers the case to another court of the same level as that from which the annulled decision issued.

[167] Article 608 of the Judicial Code.

[168] Namely the Permanent Bureau of Statistics and Workload Measurement (*Vast Bureau Statistiek en Werklastmeting / Bureau Permanent Statistiques et Mesure de la Charge de Travail*), available at <http://www.vbsw-bpsm.be>. The Department of Justice also publishes a document called "*Justitie in cijfers / Justice en chiffres*", which presents a number of key figures and statistical data.

[169] Excluding the Criminal Assizes (*Hof van Assisen / Cour d'Assises*).

subdivided by type of crime and judicial district. For instance, of the 270,595 cases tried in 2008 by the Belgian Police Courts, 21,542 resulted in an acquittal. The College of Prosecutors-General[170] also distributes statistical data concerning the operation of the Public Prosecutor's Office in the Criminal Court. Finally the Service for Criminal Policy[171] within the Department of Justice provides data concerning the types of penalties, crimes, offenders etc.

### *3. Structure*

Article 780 of the Judicial Code contains the formal elements which must be mentioned in each judgment, such as the names of the judges who have considered the case, the names of the parties, the subject matter of the claim and the answer to the (written) arguments of the parties, and the date of pronouncement in public hearing. These requirements are generally well observed in practice. Not mentioning one of these elements would render a judgment null and void. Importantly, the judgment must refer to a concise, specific ruling/order (*dictum*) as well as justification for this ruling. Article 149 of the Constitution provides that each judgment must be supported by reasons[172] so that the parties are able to understand the judgment. It also enables the appeal courts to review the lower courts' decisions. Since judges are obliged to give reasons for their rulings in a clear, consistent and unambiguous way, and to consider and answer the arguments put forward, the parties are protected against arbitrary decisions. The constitutional duty to provide reasons is considered to be an essential element of due process, and hence is applicable to all the courts, those of ordinary jurisdiction as well as the statutory courts, such as the administrative law courts.

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[170] Available at <http://www.just.fgov.be>.

[171] *Dienst voor het Strafrechtelijk beleid / Service de la Politique Criminelle*, available at <http://www.dsb-spc.be>.

[172] This obligation is confirmed in Article 780, 3° of the Judicial Code, which states that the judgment must include the answer to the written arguments of the parties. Article 195 of the Criminal Procedure Code imposes a more stringent obligation to provide reasons in a number of criminal cases. It has been explicitly prescribed that judgments emanating from the Trial Division and the Appeal Division of the Criminal Court must justify the nature and degree of the punishment.

*4. Public Access*

Article 148 of the Constitution provides that hearings in courts and tribunals are open to the public. Moreover, according to Article 149 of the Constitution, judgments as a whole (i.e. the *dictum* [specific ruling/order] and the reasons together) should also be given in open court. *Open court* protects citizens against arbitrary judicial decisions. The judge is well aware that he is subject to the control of the public present in the courtroom. This guarantee is of practical importance, because some trials (particularly important criminal trials) are attended by journalists and are reported on in the newspapers. Open court must also be seen as a measure to inspire confidence in the legal system, because citizens can see for themselves whether the judiciary is being objective or not. Judgments in civil and commercial cases, however, are generally not reported in the newspapers. Their annotation in law reviews may be regarded as a substitute for the scrutiny of the press in criminal cases. Many important judgments are also published on the website of the judiciary.[173] Magistrates of the Court of Cassation are involved in deciding what is worth being published and what is not.

The rule that judgments must in all cases be pronounced in open court has raised some criticism because it is viewed as a very time-consuming burden. The Legislation Division of the Council of State, however, has stressed that the requirement to deliver judgment in public is absolute and must be applied strictly.[174] Unlike the rule requiring the public pronouncement of judgments which allows of no single exception, Article 148 of the Constitution explicitly provides a number of exceptions to the principle of public hearings, namely in those cases where public access could pose a danger to order or good behaviour. Such an exception requires an order of the court. In practice, some cases where the rule of hearings in public may be deviated from (such as divorce proceedings, child adoption, and child/youth protection cases) are explicitly laid down in statutes. However, in cases of political offences or press offences, proceedings cannot be *in camera* except by unanimous decision of the court.

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173 Available at <http://www.juridat.be>.

174 Advice of the Legislation Division of the Council of State, 8 October 1990, L.19.647/2. However, Article 149 of the Constitution has been designated for amendment, in order to allow legislation to provide for exceptions to the rule that judicial decisions be delivered in public (Declaration for revision of the Constitution of 1 May 2007, Belgian State Gazette, 2 May 2007).

## III. Improper Influence on Judicial Decisions

There are hardly any credible reports of improper influence on judicial decisions. Magistrates who engage in corruption may be punished with severe penalties, including prison sentences ranging from five to ten years.[175] It is assumed that corruption by magistrates is rare. In important criminal cases which are tried by jury in the Assize Court, media coverage is often extensive and sometimes partly biased. However, according to the Court of Cassation, in principle this does not imply any improper influence, taking into account that all evidence is examined during court sessions.[176]

As highlighted above, possible improper influence on judicial decisions played a key role in the events surrounding the Fortis controversy in November and December 2008. As mentioned before, both a parliamentary commission of inquiry and the High Council of Justice made a thorough analysis of these events in order to determine whether the judicial process in the Fortis case had been obstructed or whether undue pressure had been exercised. Having heard from members of both the judiciary and the executive, the parliamentary commission concluded that, regarding the first instance proceedings, the contacts between the Ministers' offices and the Crown Prosecutor's Office of Brussels (which was to issue, as *amicus curiae,* a non-binding opinion on the legal merits of the claim in the Fortis case) had endangered the principle of the separation of powers.[177] With regard to the proceedings before the Brussels Court of Appeal, the commission of inquiry expressed its concern about a number of contacts between Ministers' offices, law firms, and judges because these "might be a violation of the separation of powers principle".[178] However, the commission of inquiry was not able to determine whether or not there had been political pressure put on the Brussels Court of Appeal.

The analysis of the High Council of Justice, which had engaged in a similar investigation, was much more outspoken. The Council was of the opinion that the various contacts between magistrates working on

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175 Article 249 of the Penal Code.

176 Court of Cassation, No. P071648N, 19 February 2008, available at <http://www.juridat.be>.

177 Parliamentary Documents: House of Representatives 2008-2009 (note 5), at 68.

178 Id., at 70-71.

the Fortis case and advisors to the Government were inappropriate and had created an appearance of collusion.[179] The Council also expressed grave concern over the fact that it had been suggested by other members of the Government that the Minister of Justice use his right to have a case submitted to judicial review by the Prosecutor-General of the Court of Cassation. The mere fact of considering such a request in a case where the Belgian State had a substantial interest was sufficient to create a conflict of interest, according to the report. This conclusion, however, was recently contradicted by a remarkable study.[180] After extensive research, the author, a constitutional scholar, concluded that the abovementioned facts were insufficient to amount to a violation of the separation of powers principle, at the same time admitting that ethical considerations and the principle of procedural equality do warrant some concern over the way the case was handled.[181]

In addition, the High Council took the view that in the Fortis case judicial independence had also been undermined by the judiciary itself. Specifically, the Council took offence at the fact that one judge had been excluded from the deliberations by the other two, as well as the fact that the Court President had confided in the President of the hierarchically higher court, the Court of Cassation.[182] A similar conclusion was reached by the scholar cited above, stating that the separation of powers was violated by the initiative taken by the President of the Court of Cassation to write a letter to the President of Chamber of Representatives to denounce the "obstruction of justice" in the Fortis case.[183]

The reports of the Parliament and the High Council both made various recommendations for future reform, most of which have been discussed

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[179] Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 9.

[180] F. Meersschaut, De scheiding der machten in de storm van de Fortis-zaak, in A. Alen/S. Sottiaux (eds.), Leuvense Staatsrechtelijke Standpunten, 189 (2010).

[181] Id.

[182] Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 15 and 34.

[183] Meersschaut (note 180), at 190. The author added that if it would appear that the Prosecutor-General with the Court of Appeals has indeed insisted on a replacement of all three judges that were in charge of the Fortis file at the time of the events, this would also qualify as a breach of the separation of powers principle (id., at 190).

above.[184] They also stressed the sanctity of deliberation: external contact over a case which is in deliberation should be avoided as much as possible, even if the contact is with the president of the hierarchically superior court or is established in the context of the prosecutor's supervision of the proper working of the court and the regularity of the proceedings. In this respect, the two authoritative opinions have without any doubt reshaped the law.

The possible criminal liability of members of the judiciary regarding the Fortis case is currently being examined by the Court of Appeal in Ghent. Meanwhile, the recommendations made by the parliamentary commission and the High Council of Justice have been discussed in parliament and will undoubtedly lead to further debate.[185] Pending the 2010 elections, however, the reform process is currently suspended.

## IV. Security

Belgium does not have a tradition of violence or threats against judges and their families. In high-profile criminal cases, such as proceedings concerning terrorist crimes, it sometimes happens that members of the Public Prosecutor's Office are given police protection. Security measures in and around courts are relatively limited. In principle, everyone enjoys free access to the court and there is generally no systematic identity- or security-check at the entrances of courthouses. Although there have been important improvements in recent years, the security of the courts is still far from perfect. This was, for instance, painfully demonstrated when journalists of the francophone public broadcasting corporation RTBF stayed overnight at the Central Law Courts in Brussels and were even able to examine confidential court files.[186] A number of recent escapes of prisoners from the Central Law Courts in Brussels have made it clear that additional measures must be taken to improve security in and around the courts.

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[184] *Supra*, chapter C. I. Separation of Powers.

[185] See e.g. Complete Report of the 12 January 2010 meeting of the Justice Commission in the House of Representatives, Parliamentary Documents CRIV 52 COM 745, at 10, available at <http://www.dekamer.be>.

[186] Ploeg RTBF overnacht ongestoord in Brussels justitiepaleis, De Standaard, 9 April 2009, at 8.

## D. Ethical Standards

### I. Code of Ethics for Judges

There is no (optional) code of ethics for judges.[187] The deontological standards applying to judges are mandatory and are not written down in a codified text. These standards are, in the first place, determined in the Constitution and contained in statutory law (in particular the Judicial Code). For instance, a judge may not refuse to deliver judgment[188] and must justify his ruling.[189] In addition to these constitutional and statutory obligations, there are a number of unwritten rules, which are elaborated in disciplinary decisions, academic writings and inaugural speeches of Prosecutors-General. These rules are derived from Article 404 of the Judicial Code, which forms the basis for disciplinary proceedings.[190] They include rules concerning competence and diligence, loyalty and objectivity, as well as confidentiality and discretion. On the basis of these unwritten rules, for example, a magistrate is not supposed to participate in carnival parades which lampoon State institutions.[191]

### II. Training

As a matter of professional duty, judges are required to keep their legal know-how up to date, provided they are given the opportunity and the time to do so by their hierarchical superiors.[192] There are however no formal quota or minimal requirements. Nevertheless, whether a judge makes sufficient effort in terms of continuing legal education will often be a topic touched upon during his evaluation, and may also be taken

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[187] X. De Riemaecker/G. Londers, Deontologie en tucht (note 116), at 323; X. De Riemaecker/G. Londers, Déontologie et discipline (note 116), at 312.

[188] Article 5 of the Judicial Code (see *supra* C. III. 1. Basis).

[189] Article 149 of the Constitution and Article 780, 3° of the Judicial Code (see *supra*, C. III. 3. Structure).

[190] See *supra*, B. VII. 1. Formal Requirements.

[191] X. De Riemaecker/G. Londers, Deontologie en tucht, in: idem (eds.). Statuut en deontologie van de magistraat (note 116), at 340-350; X. De Riemaecker/G. Londers, Déontologie et discipline (note 116), at 329-338.

[192] X. De Riemaecker/G. Londers, Deontologie en tucht, in: id. (eds.), Statuut en deontologie van de magistraat, 342-343.

into account by the High Council for Justice if the judge applies for promotion. The training of a judge focuses on legal knowledge and skills, but also on social awareness. Several training sessions deal primarily or incidentally with ethical standards. For instance, in 2009, the Institute of Judicial Training scheduled training sessions concerning deontology and disciplinary law. The implementation of these programmes (the organization of courses, the recruitment of teachers, and so on) and the logistical aspects (classrooms, course materials, and the like) are supported by the Department of Justice. Apart from initial training, every judge has a right to continuing legal education from the Institute of Judicial Training.[193]

## E. Conclusion

The creation of the High Council of Justice in 1998 is largely seen as a positive step in earning the trust of the public and in the independence of the judiciary. While there is still room for more objectivity and transparency in the nomination and promotion process, the creation of the High Council has brought about a more objective decision-making process, in which the Minister of Justice is no longer the sole decision-maker. The Council has also introduced a formally organized complaints mechanism, the results of which are communicated in a transparent way. It also serves as an external advisor on and guardian of the justice system. Another positive element in the development of an independent judiciary in Belgium is the fact that the majority of rules are guaranteed in the Constitution and further specified by statutory laws (in particular the Judicial Code). This produces a situation in which the judiciary does not depend on decisions of the executive with regard to wages, pensions, disciplinary decisions, and so on.

Serious tension between the executive and the judicial branches of the State arose in December 2008, when allegations were raised of political pressure on the Brussels Court of Appeal in the Fortis case. Although the Parliamentary commission of inquiry established to examine this allegation did not find evidence of such political pressure, this important case demonstrates that upholding the independence of the judiciary is a continuous obligation on all actors. Both the parliamentary commission

[193] Article 4 of the Act of 31 January 2007 on judicial education and the creation of an Institute of Judicial Training.

of inquiry and the High Council concluded their reports into the events with a number of recommendations regarding the separation of powers and the functioning of the judiciary. A number of these recommendations may prove useful to further the independence of the judiciary and to prevent new incidents of potential political influence over judicial proceedings. If there is reform along these lines, this will mean a continuation of the change which has silently taken place in the last two decades, whereby the executive's powers in the judicial process have become more and more limited. The question remains what the role of the High Council of Justice will be in this: it has the ambition to gain many more powers and be more actively involved in justice policy, but whether it will succeed in this, remains to be seen.

Another important challenge facing Belgium's judiciary concerns the introduction of more financial autonomy and responsibility for the courts and their heads of personnel. This measure should enable the courts to manage their resources more efficiently. This *decentralization* of financial and logistical management must necessarily go hand in hand with a degree of accountability for the courts' operation and costs, for instance by workload measurement techniques. It is, however, a key concern that this accountability should not hamper judicial independence in any way.