

**Bristol, Budapest, Ghent, Göttingen, Groningen,  
Turku, Uppsala**

**Annual Legal Research Network Conference 2010**

21-22 October 2010, hosted by the University of Groningen

**University of Ghent, Faculty of Law**

**Lay judges in labour courts**

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September, 2010

**Working Paper Annual Legal Research Network  
Conference 2010**

# Lay judges in labour courts

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## Abstract

In Belgium labour-related disputes are treated by specialised courts with a particular composition. Besides professional judges, there are two lay judges appointed by the King, on the basis of a nomination made by the employers' associations and the trade unions.

The Belgian labour Courts sprang from the Napoleonic *conseils de prud'hommes*. This system was abandoned in 1926, when appellate tribunals were established and a legal assessor was added. In 1967 independently functioning labour courts were established, which were however construed as being part of the judiciary. Unlike Germany, no specialised Supreme Court was established. Instead, the Belgian *Cour de Cassation* was endowed with a social chamber.

The choice in favour of labour courts with lay judges, seems to reflect a majority tendency in Europe. Also in Germany, Hungary, Finland, Great Britain, Ireland and Sweden labour-related disputes are treated by courts with lay judges, nominated by employers' associations and trade unions. In Italy and Spain separate labour courts exist, but they are solely composed of professional judges. Various reasons explain lay judges' popularity: they are cheaper than professional judges, they provide professional knowledge and experience and they strengthen the confidence in the institutions. Furthermore, they enable citizens to supervise the functioning of the judicial system and contribute to the acceptability of the judicial decisions. Thus, the choice for lay judges relies also on other factors than those related to expertise.

Although the functioning of the labour courts has never been seriously criticized, successive Ministers of Justice have tried to put the dream of a unified judiciary into effect. Such a design still exists at the present day, though it seems that a political agreement of 31 March 2010 has alleviated the risk (at least temporary). The principle of including lay judges has at times been questioned, predominantly based on the principle of judicial impartiality. In an old judgment *Langborger v. Sweden* of 22 June 1989 concerning the nomination of lay judges in a Housing and Tenancy Court by landlords' and tenant associations, the European Court on Human Rights ruled that Article 6 of the Convention had been violated. However, the Court came to a different conclusion in *Kellermann v. Sweden*. It considered that in the absence of lay assessors' interests contrary to those of the applicant, the Labour Court did not fail to meet the requirement of impartiality. In similar cases, the Belgian *Cour de Cassation* has recently refused

to withdraw a judge, nominated by a representative trade union, in a matter related to the nomination of candidates at the social elections, although such a right to nomination constitutes another prerogative of the representative trade unions. The nomination by a representative organisation was considered as not giving rise to any appearance of partiality. By his appointment the lay judge is no longer construed as a representative of his organisation, but becomes a member of the judiciary.

Keywords: labour courts, lay judges, judgement by one's peers, due process

# Lay judges in labour courts

## 1 Introduction

Whenever courts have to judge a case, they can invoke the assistance of one of more external experts. Still, there exist courts which don't have to rely on external experts, because they have already experts among their members. This is also the case for the Belgian labour courts which lay assessors can be seen as internal experts, even though the choice for mixed courts with lay judges relies also on other factors than those related to expertise. In this paper the history, merits and challenges of the mixed system are analysed.

## 2 The origins of mixed courts

### 2.1 From Napoleon to Van Reepingen

The Belgian labour Courts sprang from the Napoleonic *conseils de prud'hommes*. Like in France, the *werkrechtersraden* were initially established to prevent workers from instituting legal action against their employers for regular courts, as employers wanted them to be “un veritable palladium pour les fabricants contre les exigencies souvent injustes de leurs ouvriers »<sup>1</sup>. Although the first bodies were installed in 1810, only since 1859 they consisted of an equal number of workers' and employers' representatives. Meant to pursue reconciliation, judgements were rare<sup>2</sup>. Over the years the *werkrechtersraden* underwent many changes. Finally, the French model was abandoned in 1926, when appellate tribunals were established and a legal assessor was added<sup>3</sup>.

In the 1950 the proliferation of bodies having jurisdiction for labour and social security disputes compelled for a reform. Royal Commissioner Van Reepingen's project of the new *Code judiciaire* aimed to integrate these bodies within the judiciary. However, Van Reepingen did not assign the competence for both civil procedures and labour law disputes to a single judge, like the *kantonrechter* in

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<sup>1</sup> S. SCHOLL, “De Gentse Werkrechtersraad de oudste van België (1810-1889)”, *Bijdragen tot de geschiedenis der Gentse Arbeidsbeweging*, Brussel, 1957, 227, geciteerd in J. F. DEKEERSMAECKER, “Van werkrechtersraad naar arbeidsrechtbank” in X, “30 jaar Belgische arbeidsverhoudingen”, Belgische Vereniging voor Arbeidsverhoudingen, Deventer, Kluwer, 1977, 322.

<sup>2</sup> H. LENAERTS, *Sociaal Procesrecht*, Gent, E. STORY-SCIENTIA, 1968, 49-50.

<sup>3</sup> J. F. DEKEERSMAECKER, “Van werkrechtersraad naar arbeidsrechtbank” in X, “30 jaar Belgische arbeidsverhoudingen”, Belgische Vereniging voor Arbeidsverhoudingen, Deventer, Kluwer, 1977, 327.

the Netherlands<sup>4</sup>. Labour-related disputes would be treated in separate chambers, but workers and their unions were not convinced that the project would guarantee sufficient protection<sup>5</sup>. In 1967 a compromise was reached. It sought to establish independently functioning labour courts, which were however construed as being part of the judiciary. The chosen option resembles the German system. Yet, no specialised Supreme Court with workers' and employers' representatives was established<sup>6</sup>. Instead, the Belgian *Cour de Cassation* was endowed with a social chamber which is solely composed of professional judges.

Apart from the social chamber of the *Cour de Cassation*, all Belgian labour tribunals and courts consist of both professional judges and lay judges. In every labour tribunal or court two lay judges are appointed by the King, on the basis of a nomination made by the employers' and workers' associations. The nomination procedure substituted the original objective to elect the lay judges every six years which in practice had happened only twice in forty years<sup>7</sup> and to which Van Reepinghen was opposed<sup>8</sup>.

## 2.2 Explaining the choice for lay judges

The choice in favour of labour courts with lay judges, seems to reflect a majority tendency in Europe. Also in Germany, Hungary, Finland<sup>9</sup>, Great Britain, Ireland and Sweden<sup>10</sup> labour-related disputes are treated by courts with lay judges, nominated by employers' associations and trade unions; although each legal system has its own particularities for competence, appeal, access to justice and participation of lay judges. By contrast, in Italy and Spain separate labour courts exist, but they are solely composed of professional judges.

How can the popularity of lay judges in labour courts be explained? In composing courts out of professional judges and lay judges two perceptions of fair trial are conciliated: on the one hand the right to be judged by one's equals or peers, and on the other the right to be judged by an impartial third party. Whereas in the

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<sup>4</sup> L.P. ASSCHER-VONK, W.H.A.C.M. BOUWENS and H.L. BAKELS, *Schets van het Nederlandse arbeidsrecht*, Deventer, Kluwer, 2007, 181; C.J. LOONSTRA and W.A. ZONDAG, *Arbeidsrechtelijke thema's*, Den Haag, Boom Juridische Uitgevers, 2006, 44; C.J. LOONSTRA, "De kantonrechter als arbeidsrechter", Deventer, Kluwer, 2000, 46 p.

<sup>5</sup> H. LENAERTS, *Sociaal Procesrecht*, Gent, E. STORY-SCIENTIA, 1968, 87-88.

<sup>6</sup> M. WEISS and M. SCHMIDT, *Labour Law and Industrial Relations in Germany*, Kluwer Law International, 2008, 149-152; [www.bundesarbeitsgericht.de](http://www.bundesarbeitsgericht.de).

<sup>7</sup> J. F. DEKEERSMAECKER, "Van werkrechtsheraad naar arbeidsrechtbank" in X, "30 jaar Belgische arbeidsverhoudingen", Belgische Vereniging voor Arbeidsverhoudingen, Deventer, Kluwer, 1977, 331-332.

<sup>8</sup> H. LENAERTS, *Sociaal Procesrecht*, Gent, E. STORY-SCIENTIA, 1968, 107.

<sup>9</sup> A. J. SUVIRANTA, *Labour Law in Finland*, Kluwer Law International, 2000, 126-127; [www.oikeus.fi/tyotuomioistuim](http://www.oikeus.fi/tyotuomioistuim).

<sup>10</sup> R. FAHLBECK and B. J. MULDER, *Labour and Employment Law in Sweden*, Juristförlaget i Lund, 2008, 90-91; [www.arbetsdomstolen.se](http://www.arbetsdomstolen.se).

former perception the judge is seen as an equal with a practical knowledge, in the latter he is considered as a delegate of a supreme authority who applies the law by virtue of his profession<sup>11</sup>. This principles not only influenced the labour courts. In majority of countries mixed systems exists with professional judges, assisted by assessors who are part of judiciary, thus guarantying the uniformity and equality of the judicial function.

M. STORME identifies four types of assessors:

- assessors representing the people, ordinary citizens who exemplify the idea of democratisation and restore trust in the judiciary;
- assessors representing a specific profession, like professional corporations and lay assessors of the *tribunal du commerce*;
- assessors representing the various economic and social groups with conflicting interests, like lay assessors in labour tribunals and courts;
- experts in the field, like the assessors in Italy, Poland and the Netherlands, who help the tribunal to make a decision based upon a sound knowledge without the necessity to hire external expertise.

Although recourse to lay judges occurs in different kinds of disputes, the author stretches one common denominator: a functional link between the judicial organisation, judicial competence, civil procedure and the participation of lay judges in the administration of the judiciary. Therefore, the courts are characterized by a specific competence and a simplification of the procedure<sup>12</sup>. This can clearly be seen in labour courts as the finality of labour law to compensate for inequality leaded to special features like a right of the workers and employers to defend themselves, the right of the worker to be represented by a union delegate and proper rules of procedure which aim at making the access to justice easier and less expensive<sup>13</sup>.

B. FRYDMAN indicates the advantages of lay judges: they are cheaper than professional judges, they provide professional knowledge and experience and they strengthen the confidence in the institutions. Furthermore, they enable citizens to supervise the functioning of the judicial system and contribute to the acceptability of the judicial decisions<sup>14</sup>. J. ALLARD describes lay judges as a cooperation between the judicial world and the civil society. By their presence

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<sup>11</sup> B. FRYDMAN, "Juge professionnel et juge citoyen: l'échevinage à la croisée de deux cultures judiciaires" in X, *La participation du citoyen à l'administration de la justice*, Les cahiers de l'Institut d'études sur la justice, no. 8, Brussels, Bruylant, 2006, p. 19-20.

<sup>12</sup> M. STORME, "L'Europe judiciaire vers une laïcisation du statut judiciaire ? », *Journ. Proc.* 2003, nr. 467, 6-7.

<sup>13</sup> F. SCHOENAERS in X, *La participation du citoyen à l'administration de la justice*, Les cahiers de l'Institut d'études sur la justice, no. 8, Brussels, Bruylant, 2006, p. 163-164.

<sup>14</sup> B. FRYDMAN, "Juge professionnel et juge citoyen: l'échevinage à la croisée de deux cultures judiciaires" in X, *La participation du citoyen à l'administration de la justice*, Les cahiers de l'Institut d'études sur la justice, no. 8, Brussels, Bruylant, 2006, p. 22-26.

lay judges will contribute to a better decision and a more positive perception of the judiciary<sup>15</sup>. Thus, the choice for lay judges relies also on other factors than those related to expertise.

### **3 The labours courts challenged**

#### **3.1 The ghost of an integrated judiciary**

Although in Belgium the functioning of the labour courts has never been seriously criticized, successive Ministers of Justice have tried to put Van Reepinghen's dream of an integrated judiciary dream of into effect<sup>16</sup>. Such a design still exists at the present day, though it seems that a political agreement of 31 March 2010 has alleviated the risk at least temporary, since the judicial reform is an issue in the negotiations for the formation of a new government. Workers' and employers' organisation remain vigilant as the election winning Flemish separatist party, N-VA, refused to endorse the March agreement. On the 15<sup>th</sup> of September, in the National Labour Council a new, second, advice in favour of independent labour courts was formulated (nr. 1741), repeating the position expressed in the first advice from the 15<sup>th</sup> of December 2009 (nr. 1716).

The initiative of the social partners was no isolated incident since also other labour law experts expressed their concern about the future place of the labour courts within the judiciary. This difference of opinion between labour lawyers and other practitioners of law has to be noted. A labour law expert shall rarely advocate for a more extensive integration of the labour courts into the judiciary, while other practitioners of law usually will not support the autonomy of the labour courts.

The same is true for the role of lay judges. Whereas labour law circles are likely to defend the key role of lay judges, other lawyers feel some reticence towards lay judges. VELU questions whether citizens have more confidence in tribunals and courts with non-professional judges. In his opinion non-professional judges received no adequate training, have insufficient experience and enjoy no freedom of conscience because of their economic and social dependence of the organisation by which they were nominated<sup>17</sup>. Still, other authors strike a more positive note<sup>18</sup>.

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<sup>15</sup> J. ALLARD, "Un consensus en faveur des juridictions mixtes", *Journ. Proc.* 2003, nr. 468, p. 7.

<sup>16</sup> H. LENAERTS, "1970-2000: het dertigjarig bestaan en de toekomst van de arbeidsgerechten. Zijn de arbeidsgerechten aan vernieuwing toe? Juridisch-historische benadering", *Soc. Kron.* 2000, 1, p. 1-4.

<sup>17</sup> VELU, "Représentation et pouvoir judiciaire", *Journ. Proc.* 1996, p. 639-640.

<sup>18</sup> J. ALLARD, "Un consensus en faveur des juridictions mixtes", *Journ. Proc.* 2003, nr. 468,

### 3.2 There is no such thing as an impartial lay judge ...

Before the courts the principle of including lay judges has seldom been questioned. The rare attempts to attack the principle have been based on the principle of judicial impartiality<sup>19</sup>.

In an old judgment *Langborger v. Sweden* of 22 June 1989 the nomination of lay judges in a Housing and Tenancy Court by landlords' and tenant associations was examined in the light of Article 6 § 1 of the Convention. The circumstances of the case can briefly be described as follows. Lease contracts concerning apartments in the Stockholm region usually comprise a negation clause making the rent dependable of an agreement between a local landlords' and tenants' union. The applicant was dissatisfied with the rent and the commission of 0.3 % on the rent he had to pay to the tenants' union, so he proposed to the landlord the conclusion of a new agreement with a fixed rent and no negation clause. Since his offer was rejected, the applicant brought the dispute before the Rent Review Board which was composed of a judge/chairman and two lay assessors, nominated by the Swedish Federation of Property Owners and the National Tenants' Union. The applicant challenged the two lay assessors' objectivity and impartiality, but the challenge was rejected. He appealed in vain to the Housing and Tenancy Court, a body with a similar composition of two judges and two lay assessors, and to the Supreme Court.

Before the European Court of Human Rights the applicant argued that the proposal to delete the negotiation clause from the lease threatened the interests of both organisations since they derived their very existence from rent negotiations. Both the Commission and the Court followed his argumentation. The Court noted an appearance of partiality as the lay assessors had been nominated by, and had close links with, two associations with an interest in the continued existence of the negotiation clause. Therefore, the applicant could legitimately fear that they had a common interest contrary to his own and that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim (§ 35).

This outcome may look somewhat surprising. The Court emphasises that there is no reason to doubt the personal impartiality of lay assessors. Nevertheless, it makes an association between the nomination by an organisation and the existence of close links with that organisation. Subsequently, this nomination is presumed to be a prejudice, because of the appearance of impartiality it could

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<sup>19</sup> J. HUBIN, "Les règles d'organisation judiciaire des juridictions du travail de Belgique une paradoxale mais adéquate spécificité", in X, *La participation du citoyen à l'administration de la justice*, Les cahiers de l'Institut d'études sur la justice, no. 8, Brussels, Bruylant, 2006, p. 134-143.



create. Furthermore, the Court ignored the fact that the two lay judges were counterbalanced by two professional judges, of which the president has a casting voice in case of no majority decision, and the absence of instructions by the organisations which have nominated the lay judges, who sit in their personal capacity, and not as representatives of the organisations.

In a rare comment on the case, J. ANDREWS observes the underlying recognition of the Court which perceived the two associations to have a vested interest in the existing negotiation procedure since they derive their existence from the process of negotiation while this procedure is disputed. The author assumes that in other disputes, like the level of rent, the balanced representation would be a fair one. He links the case to the established jurisdiction of the Court which has, even when there is no reason to believe that individual assessors in case were biased, repeatedly recognised that the issue of impartiality must be measured not only in the subjective context of the judge in the given case, but also it must be subjected to an objective test seeking to ensure that there are sufficient guarantees to exclude any legitimate doubt respecting the issue of impartiality. Thus, it can be construed as an elaboration of the Common law principle that *justice must not only be done, but must be seen to be done*<sup>20</sup>.

Be that as it may, the Court must have sensed that it skated on thin ice as with this rigid interpretation of the principle of impartiality all national courts with lay assessors which are nominated by social or economic associations were menaced.

Consequently, in a more recent judgement of 26 October 2004, *Kellermann v. Sweden* the Court explicitly distinguished from *Langborger v. Sweden*. In this case the applicant company alleged that, on account of the composition of the Labour Court, it did not have had a fair trial hearing by an impartial tribunal, as required by Article 6 § 1 of the Convention. The company, which was not a member of any employers' organisation and had refused to sign an agreement of its own, instituted proceedings against the union LO which had taken industrial action, claiming that this industrial action was unlawful. Before Labour Court, the applicant company challenged its composition of two legally trained and qualified judges and five lay assessors, two of which had been nominated by employers' associations and two by employees' associations. The challenge was rejected by a bench of the Labour Court composed of members not representing labour market interests and by the Supreme Court.

Before the European Court of Human Rights the applicant company challenged the objective impartiality of the Labour Court, arguing that one of the lay assessors was a member of LO and that all lay assessors have had a (common) interest which conflicted with its interests. As in the *Langborger* case, the Court

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<sup>20</sup> J. ANDREWS, "Impartial tribunals in Sweden", *E.L. Rev.* 1990, 15(1), p. 94-95.

examined whether the balance of interests in the composition of the Labour Court was upset and, if so, whether any such lack of balance would result in the court failing to satisfy the requirement of impartiality in the determination of the particular dispute before it. The Court first notes that one of the four lay assessors disagreed with the majority's findings, so it could not be said that there was an interest common to all for lay assessors. Furthermore, the Court considered that the nature of the dispute between the applicant and the union was such that the lay assessors' interests could not be contrary to those of the applicant and it would be wrong to assume that their views on these objective issues would be affected by their belonging to one or other of the nominating bodies (§ 67).

S. GUINCHARD points out that the Court initially had accepted an objective concept of impartiality, but that over the years it orientated itself towards a more subjective approach in which the appearance no longer suffices to constitute partiality<sup>21</sup>. Must this decision be understood as an application of this evolution? I am inclined not to think so, because in this case the Court paid no attention to the refining of the concept of impartiality. The Court merely resumed the thread where it had left it in the *Langborger* case, with its question whether the balance of interests in the composition of the Labour Court was upset, and if so, whether any such lack of balance would result in the court failing to satisfy the requirement of impartiality in the determination of the particular dispute before it. Such a criterion tends to make the impartiality of nominated lay judges dependent on the nature of the case which could lead to legal uncertainty. Therefore, will not dispel all the suspicion towards assessors nominated by social or economic associations. Could there be an alternative?

### **3.3 ... or can a nominated lay judge be impartial?**

Some months before the Court's decision in the *Kellermann* case, a case involving the impartiality of lay judges was brought before the labour tribunal of Nivelles<sup>22</sup>, as two trade unions initiated proceedings against a company unwilling to install a works council. In this proceedings the company asked for the withdrawal of every lay judge, member of one of the trade unions. The tribunal rejected the request on the grounds that there is no subordination between the lay judge and the trade union by which he was nominated and that his presence is counter-balanced by the presence of the lay judge nominated by the employers' organisation.

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<sup>21</sup> S. GUINCHARD, "Indépendance et impartialité du juge. Les principes de droit fondamental », in J. VAN COMPERNOLLE and G. TARZIA (eds.), *L'impartialité du juge et de l'arbitre*, Brussels, Bruylant, 2006, p. 24-28.

<sup>22</sup> Trib. Trav. Nivelles 16 april 2004, A.R. nr. 78/N/2004 – 79/N/2005, *J.T.* 2004, p. 557.

Four years later, the lay judges in the labour tribunals and courts were again challenged in disputes about the election of works councils. This time, their withdrawal was not asked by employers, but by members of the political party Vlaams Belang. The latter succeeded the Vlaams Blok, when some of his representatives had been convicted for racism. The members contested the refusal of their employer to accept them as candidates for elections of works council. In Belgium, only candidates nominated by trade unions can be eligible for the works councils, while trade union policies tend to exclude active members of Vlaams Belang from membership. As candidate lists has to be post up by the employers, the Vlaams Belang took advantage of this procedure to question the trade union prerogatives, without calling the trade unions into the case, as is foreseen in disputes concerning the election of works councils<sup>23</sup>.

Before the Labour Tribunals of Brussels, Bruges and Tongres could treat the cases, the Labour Courts of Brussels, Ghent and Antwerp had to decide on the demand to withdrawn the lay judges nominated by the workers' organisations on the grounds of an appearance of partiality and high level of hostility.

The Labour Courts of Brussels<sup>24</sup> and Ghent<sup>25</sup> considered the demands in a different composition, with lay judges nominated by organisations of self-employed people instead of workers' organisations. Both courts rejected the demand to withdraw the lay judge. The Labour Court of Antwerp was composed in a normal way, with two lay judges, one of which was nominated by a workers' organisation. As the withdrawal of this lay judge was demanded, the question was transferred to the *Cour de Cassation*.

Like the Labour Courts of Brussels and Ghent, the *Cour de Cassation* was convinced that there were no reasons to withdraw the lay judge<sup>26</sup>. The Court found no ground in the legislation to withdraw the lay judge since this nomination is prescribed by the *Code judiciaire*. There could be no problem of impartiality, because the lay judge exercises his judicial function independently and is no representative of one of the workers' organizations. The Court denied the existence of a high level of hostility between the lay judge and the applicant as there was no proof of any personal hostility of the lay judge.

It has to be noted that although the judgments of the European Court of Human Right were enlisted in the procedures, both the labour courts and the *Cour de Cassation* came to a different conclusion, which was obviously in line with the position held by the Swedish Supreme Court in the *Langborger* case.

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<sup>23</sup> The cases are discussed at length in I. VAN HIEL, "Waarom alleen representatieve werknemersorganisaties kandidaten bij de sociale verkiezingen mogen voordragen", *Or.* 2009, nr. 5, 126-138.

<sup>24</sup> Arbh. Brussel, 29 april 2008, A.R. nr. 50.880 and Arbh. Brussel, 29 april 2008, A.R. nr. 50.881.

<sup>25</sup> Arbh. Gent 29 april 2008, A.R. nr. 08/083.

<sup>26</sup> Cass. 2 juni 2008, A.R. nr. C.08.0215.N; Cass. 2 juni 2008, A.R. nr. C.08.0216.N.

## **4 Summary and conclusions**

In Belgium labour-related disputes are treated by specialised courts with a particular composition. Besides professional judges, there are two lay judges appointed by the King, on the basis of a nomination made by the employers' associations and the trade unions. This model can be found in many other European countries, like Finland, Germany, Great-Britain, Hungary, Ireland and Sweden. Lay judges can be seen as internal experts, but that is not their only role. Their proximity to the belligerents is just as important. Yet, this proximity could raise questions about their impartiality. If impartiality is defined as the absence of an appearance of impartiality, a nomination by an organisation could easily give cause to suspicion, even in the absence of any prejudice by the lay judge who is no lap dog of the organisation which has nominated him. This approach could easily discredit an institution already challenged by a pursuit of uniformity and legal professionalism. Ultimately, it ignores the advantages and accomplishments this institution has for both workers and employers. "In a democratic judicial system it must be admitted that justice is done by professional judges, assisted by non professional judges, coming from organisations defending opposite interests and who in a collegial way give a solution to a conflict that is adapted to reality", like the labour tribunal of Nivelles said <sup>27</sup>.

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<sup>27</sup> This is a translation of the French text.