The Political role of the judiciary

The Belgian case

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Only someone with a narrow view of the meaning of "politics", for instance in the sense of "partisan politics", will doubt the fact that judges and the judiciary play a political role in our societies. Naturally, this role can be interpreted in very different ways. We are going to set out by tracking the political vicissitudes of the administration of justice in the past few years and their connection with a wide range of events. After that, we shall take a critical look at partisan politicisation, to wind up with an examination of the way the government that was formed in June 1995 paid very special attention to the courts and the administration of justice. If a political role by the judiciary system is indeed inevitable, it remains to be seen whether the far-reaching proposals made actually provide the necessary guarantees for the proper administration of justice in future. This immediately raises the question as to whether it suffices to tinker with the system of the administration of justice alone... We do not believe this is the case!

I. Events and reactions

The following conclusion was reached in 1982: "measured by their election programmes (for the general elections of November 1981) the political parties have in general no (clear) ideas about a policy regarding penal law and penal justice". Considering the coalition agreement and the policy statement of the centre-right government, the author noted that they contained no special references to penal or judiciary policy: not a single section or paragraph. But apparently that had been the case for two decades already. Admittedly, the policy statement did mention some of the token issues: the fight against fiscal and social fraud, the abortion issue, the protection of privacy, the fight against crime and violence. During the discussions in parliament, however, not a word was said about such policies, not even by the socialists, who had nonetheless made some provisions for them in their election programme (Fijnaut, 1982: 93-98).

On 16 May 1987, a seminar was held in Leuven about the preliminary draft for a new penal code. The keynote speaker held forth about the so-called "unease" in the administration of penal justice. "It is being said everywhere, in many different ways, that penal law is in crisis." He then linked that crisis to that of the welfare state. But he continued by quoting F. Blankenburg and H. Treiber: "The smaller the degree of politicisation within a certain problem area, the bigger the influence of those working in this area on the formulation of problems and policy-making in this field". Lawyers or penal experts tend to monopolise the field and have closed ranks. "Applied to penal law, this means that those who belong

to the "implementing staff" are awarded a monopoly in penal policy-making within the margins they have been granted by the political institutions."(Dupont, 1987: 395-398)

"The judiciary in our country never was a glass house really. It used to shun the light that science [1], public opinion and the media want to shine on judges and their work from time to time. In a sense that is understandable. Judges are usually concerned with the darker side of society... It is harder, however, to accept the tendency of declaring the judges themselves off bounds as well. This has resulted in an office that has become deaf and blind to the cries of society. Many magistrates did not notice that the world around them was changing. Neither were they forced to react to the excesses taking place in their own circles." (Huyse, 1993: 7)

For quite some time, courts and judges were simply neglected by politicians. Our colleague Storme was in the habit of saying that more money was spent on meting out the mail than on meting out justice. During the past few years, however, the budget for the judiciary has gradually been raised from 21 billion to 35 billion Belgian francs, a 60 percent rise. However, just as important is the fact that since the beginning of the eighties, and certainly from 1988 onwards, a politicisation process, in the sense of wide social attention, developed under the eyes of the centre-left governments. Rather than an originally governmental or parliamentary awareness, the causes for this are found in a series of events. In 1979, the Judicial Police and the Court of Brussels launched an inquiry and a lawsuit against the lawyer Michel Graindorge, who had defended a German RAF activist. This was done in a somewhat curious way, and the judicial apparatus did not fare well under the scrutiny! But the increasingly audacious behaviour of the private militias, mainly the "Front de la Jeunesse" and the "Vlaamse Militanten Orde", including racist actions, arson and violent attacks, raised questions about the willingness of the police and the judiciary to enforce the available legislation. Doubts were even cast on the effectiveness of the penal system as a whole. These events led to the creation of a parliamentary investigation commission by the Upper House (Senate) on the 19th of March 1980: the so-called Wijninckx Commission. Its mission was: "to study the maintenance of law and order in general and the implementation of and compliance with the law of 29 July 1934 outlawing private militias, complemented by the law of 3 January 1933 regarding the manufacture, trade and carrying of weapons as well as the trade in ammunition, in particular." The commission's report was approved in June 1981. Already by that time, many questions were being asked about the activities of the Public prosecutor's office regarding the enforcement of the law on private armed and uniformed militias, as well as about the supervision of the police and the courts, for example as regards to links between private and/or political militias and political organisations, the role of private security and surveillance firms, and the acquisition and processing of information on all kinds of so-called subversive organisations. Finally, the question was raised as to whether parliament should not supervise the administration of justice on a more permanent basis. (Eliaerts, 1981: 525-532) The inquiry by the House of representatives after that, of 6 June 1985, investigated the Heysel disaster (during the football match between Liverpool and Juventus Turin on 29 May 1985) and the shortcomings of the forces of law and order, whereas another investigation commission, created on 8 January 1987 by the

1 It must be said that there was indeed very little scientific research material available to base this article on.

Vlaamse Raad, the Flemish parliament, focused on the workings of the judiciary. Granted, a judicial inquiry into fraud during the implementation of the regional plan of Halle-Vilvoorde-Asse had been set in motion in 1981....But judicial inquiries into irregularities during the implementation of other regional plans had also been running for some time by then. MPs wanted to know why the courts were not passing any sentences. And the parliamentary inquiry launched on 17 March 1988, this time again by the Lower House, "into the scope, the causes and the consequences of the possible fraud scandals and of any infringements of the non-proliferation treaty by the Study Centre for Nuclear Energy (S.C.K.) or related companies", also cast doubts upon the role played by judges. The latter two parliamentary boards of inquiry were forced to settle disputes over jurisdiction: to what extent are such boards allowed to question magistrates? Can a parliamentary inquiry coincide with a judicial inquiry? To my mind it was at that moment that a breach began to open up between the political and the judicial spheres. Whereas up until then distrustful questions had been asked and all sorts of suspicions raised, the following parliamentary inquiry "into the way in which the fight against gangsterism and terrorism is organised", again set up by the Lower House on 21 April 1988, dug deep into the bowels of the judiciary and came up with a number of concrete proposals. This commission was the so-called "Bande de Nivelles" commission. It should be pointed out that a series of raids had taken place between 1982 and 1985, killing 28 people. Some people spoke of "terrorism", others even today talk of "right-wing terrorism". The whole of Belgian society became not just worried but also increasingly impatient when no apparent progress was being made in the inquiry and all kinds of strange data regarding the activities of the police and the judiciary emerged: conflicts between police forces and between magistrates; the merging and separating of files; the disappearance of documents; the sudden removal of police officers and magistrates; the disappearance of witnesses...phenomena that perhaps sound familiar to Italians... "The investigation commission (has) apparently laid bare some new data. We are using the word "apparently" here because we believe the board brought up more secondary facts than elements related to the "hard core" of the matter. There is an impression that the board, instead of setting up careful fact-finding missions into the crux of the matter, let itself be tempted into drawing a large series of concentric circles around the heart of the case". (Ponsaers, 1990: 504) The investigation commission also called upon a number of honorary magistrates to dissect a series of judicial and administrative files. They discovered organisational, technical and tactical errors in the judiciary inquiry, as well as inadequate or blatantly non-existent guidance by the magistrates. The board itself added a whole shopping list of complaints: insufficient support of the investigators; understaffing of judicial officials; insufficient communication with the police forces; poor leadership; work overload and a lack of support from the judicial authorities. The board found in particular that any non-statutory preliminary investigation had in reality been turned into a criminal investigation, replacing the actual judicial inquiry. According to the board, such preliminary inquiries also had to be placed under the responsibility of the public prosecutor's office...although the executive power should determine the general policies to pursue. The examining judge (le juge d'instruction) had to be released from his double role: he should no longer be an officer of the criminal police but restrict his office to that of independent examining judge, for all inquiries. The best thing to do was to appoint "National magistrates" with jurisdiction for prosecution in the whole territory. The board also seemed to have been won over in favour of a more accusatorial as opposed to inquisitorial criminal investigation (Verstraete, 1990: 533-535; 539-540) Apart from this, several proposals were made as regards the regulation and supervision of

special investigative methods and the workings of the police forces. Not all of the proposals were related to the findings: the commission was obviously trying to bring more things out into the open! The government nevertheless took the case seriously and published its "Pentecost Plan" on 5 June 1990. However, all the matters mentioned still had more to do with the police than with the judiciary. In the introduction to the Plan, the government even noted that our penal institutions are in order; they are just misapprehended and misused... Our judiciary is described as "high-standing". Yet in 1991, the government created the so-called Franchimont Commission, consisting of university professors and magistrates; they were to revise the penal procedure, which dates from 1808. But at that time, parliament was clearly more aware of the shortcomings of the penal justice system than the government.

It would seem something else and more serious had to happen to sensitise the government to the full...and it did. In came the "scandals"! And through the media they gained growing attention from the public. "Once again it became increasingly difficult for the judiciary - which is supposed to tackle the "tangentopoli", the state of bribes - to let justice take its course serenely. On the one hand because certain investigating magistrates show little zealousness [2] in obtaining some results. Witness the "scandals", which are commented on again and again. (The journalist De Moor is familiar with at least six, some of which with respectable seniority). On the other hand, the judiciary has to face the retrospective indignation of some police officers and journalists. In the past months they have tightened certain regulations to such an extent that others at times find it hard to suddenly prove they have "mani puliti", or clean hands. Witness...." (And the same reporter lists another dozen cases!) All in all he arrives at a list of 20 "scandals" of financial, economic and political nature: "Scandalitis - Every day has its own scandal - an outline of the main scandals that rocked public opinion last year (i.e. 1993)." And the reporter stresses immediately "that in that climate, allegations can turn into proof, investigative activities become accusations and suspicions outright judgements." (De Moor, 1994: 12-17) And add to that the new scandals that broke out afterwards: about government procurement and army acquisitions, which likewise led to a parliamentary investigation commission. So it is not difficult to get a full waft of the scent of scandals and to appreciate the question put by many: is something actually being done about this? Apparently some action was indeed undertaken, just in time: legislation aimed at avoiding corruption in the shape of the financing of political parties and election campaigns. Which has not prevented a number of scandals dating from "in tempore non suspecto" from being surrounded by a certain suspicion of kickback corruption and by an aura of political disputes and the settling of reckonings, including the as yet unsolved murder of an important politician. Quite rightly, the financial administrator of one of the political parties, who has been under investigation by the court, recently pointed out in an interview "...because by the end of the eighties things were really starting to get out of hand. No doubt about it. Whereas in the beginning they were mainly spontaneous gifts, in the past few years there was a real "demand" for money. The parties always needed more. And that pushes you to the edge of your weakness, when caution is sometimes thrown to the winds...Especially towards the end of the eighties. That was when the race between the political parties for ever more expensive election campaigns, for all kinds of gadgets, increased enormously. It was madness really. For all parties."(Humo talked to Etienne Mangé; 1995: 12) And today, the judiciary continues to meddle

2 In Italy the judges got the reputation as "doing a lot".

with that political machinery, which used up more and more as its militant stance weakened and as the cost of media coverage and tele-democracy went up and up.

We can round off this analysis of events with the outcome of the activities of yet another parliamentary investigation commission, entrusted again by the Lower House on 23 December 1992 "with the examination of a structural policy aimed at penalising and stamping out the trade in humans." In the meantime it had, after all, been revealed that for years the trade in prostitutes had been allowed to flourish without any intervention from the police or the judiciary whatsoever. It is clear that by now more attention is being paid to actual justice policies. True, a feeling of "déjà vu", "in the light of the conclusions of the "Bande de Nivelles" commission (may) be hard to suppress". But the same commentators also point out: "To wind up this far too brief outline of a number of the commission's resolutions, we should mention that the by now classical weak points of Belgian criminal policy have been brought to light yet again as a result of this inquiry: the inadequately equipped judiciary, the lack of a criminal policy and hence of a real prosecution policy, the breach between a police force in full development and a judiciary that has to cope with a 19th century logistical and operational armamentarium, the lack of a pro-active policy, the need for an integrated approach to tackle multifarious-dimensional phenomena such as organised crime. These are all conclusions drawn on other occasions as well. We nevertheless cherish the hope that the results of this investigation commission will this time be followed up." (De Ruyver, Fijnaut, 1994: 105-106) In the meantime, another scandal has come to light: a hormone Mafia, another one that has been around for some time, but that is now suspected of the murder on a cattle inspector...And the court searches on.

We have already mentioned the creation of the Franchimont commission. 1993 also saw the launch of a long-range plan for the judiciary. Many elements from the plan were included in the June 1995 government programme and so are yet to be implemented. Still, the government has in the meantime adopted so-called "summary proceedings" in order to bring street delinquents to trial and established a "Service for Penal Policy" (Service de Politique Pénale).

II. The partisan politicisation of the magistrature

In what I have just told, you have hardly heard me mention outcomes, verdicts or arrests... It is true, barring a few exceptions, the courts did not reach any results after political assassinations, cases of terrorism with manifest right-wing overtones, corruption by important figures. Should it surprise us, then, that some people are starting to suspect that there must be a connection with a politically highly gullible magistrature? Naturally, this includes the awareness that there is an extreme lack of expertise and means, and that the labour structure of the magistrature is highly antiquated. It is also known that the rivalry between the various criminal investigation departments of the police services is not of a nature so as to encourage effective work. This negative evaluation was, of course, able to thrive in a climate of a kind of structural politicisation of the magistrature. Is it not odd that, barring some recent exceptions, the political hues of every magistrate are more or less public? [3] Hardly surprising, though. Until the law of July 1991 there

3 Indeed, in Belgium the magistrate got the reputation to be political-conservative. In Italy they believe them near to the left.

was a formal procedure that would have enabled impartial appointments. After all, article 99 of the Constitution provides for appointments by the King, and hence the Minister of Justice is responsible for the quality of the judiciary, which means he can be held accountable for it. (Vandenberghe, 1981: 52) But the lists of candidates were agreed upon beforehand by the main political parties. They applied a distribution code, while the members of the bodies elected systematically followed the agreements and the party directives. "The partisan-political influence is hence no longer the work of individuals, but of well-equipped party structures." And this was justified in a curious way: by wholesome philosophical and ideological pluralism; by the withdrawal of selection and promotion from corporatism. But the author notes quite correctly: "Moreover, it would seem likely that from the side of the party leaders, their interventions in the appointment procedures were aimed above all at increasing their parties' clients base, for every fruitful intervention brings a few more people to believe that it is worth becoming part of such and such political party." The author we have quoted here, however, also mentions the risks: long political negotiations and delays in the appointments with the resulting backlog in judicial proceedings; loss of quality and of course the politicisation of the jurisdiction itself. There has been no scientific research into this and it may be impossible perform any... Neither is it certain that this happens in all cases, obviously... But the perception that the possibility exists suffices to arouse mistrust; vis-à-vis their clients, lawyers blame the loss of a case on partisan politicisation; politicians, on the other hand, hint at power and influence. "Judges were no longer beyond suspicion." (Huyse, 1985: 124-128) Yet from time to time there are clear indications about such partisan politicisation: services rendered to or protective relations with politicians, the obvious discontinuance of an investigation, but certainly also the taking up of a conservative stance in social matters. Thus, the left-wing terrorists of the "Cellules Communistes Combattantes" (CCC) in Belgium were dealt with suspiciously quickly-...The presumed right-wingers are still around though! There are also judges who will systematically give property rights preference over the right to strike. In one jurisdiction, large chemical companies are acquitted of environmental crimes for the most diverse reasons, whereas other courts would sentence them. (Huyse, 1994: 102-104) Did a well-known journalist not write recently: "In order to understand an investigation, sentence or arrest it is sometimes not unwise to colour the organisational chart of the court and the table of lawyers with their political-ideological tendencies, without forgetting their memberships of certain service clubs. While the Christian-democrats still reign in some courts, the liberals, often within the confines of their lodges, make a grab for power... Talking of which, should magistrates, like some other professionals, not have the decency to stay away from all those clubs and associations in which the contacts with society are in any case restricted to dining and conniving?" (De Moor, 1994: 30) On whose sense of justice do judges base themselves? Protection against state power? What or who is the State? Protection of the right to life, against inhuman punishment? What do "life" and "inhuman" mean to a judge? It is clear that the parallel interests of politicians and magistrates have tipped the balance more than once and that the executive power in particular has a mistaken and unhealthy grip on the judicial power. This easily turns into: "docile au prince, terrible au justiciable".

The training of magistrates has been advised for some time now. However, in a well-known report, top magistrate Krings more or less opposed a school for magistrates, in which he was supported by the former council of Solicitors General.(Krings, 1976) It would appear that they feared a repetition of events in France: the "Ecole de la Magistrature" was the cradle of the "Syndicat de la Magistrature"! As a matter of fact, until very shortly, any attempts to organise groups wit-

hin the magistrature were nipped in the bud either by the Solicitors General or by the Presidents of the Courts of Appeal. This has changed: in the French-speaking as well as in the Flemish parts of the country magistrates (particularly young ones) are now more or less allowed to associate freely and they do so effectively.

III. Conditions for acceptable politicisation

Judges are inevitably involved in political decision-making. Is there any other way? How could they function socially "vacuum clean"?

It can be said that the French and in particular the Italian example have not been without their influence on the Belgian system and still remain important. But to my mind, the main point is to interpret the examples correctly. These two countries have for many years ensured the formal independence of magistrates, but this has apparently not always prevented the continued existence of political-party dependence and connections. I believe that the context of a so-called independent magistrature deserves as much attention as the organisation and functioning of the magistrature itself. Clean hands is one thing, a clean context quite another!

It is nonetheless clear that there are many contextual factors that do not themselves trigger off partisan politicisation but do not therefore form the foundations for the normal, acceptable process of politicisation. Thus, both *overregulation* and *underregulation* may give the wrong results. Highly complex, excessive and obscure legislation can no doubt lead to law evasion. Extensive and complicated procedures likewise leave room for all kinds of disputes, often resulting in the preclusion of criminal proceedings by reason of lapse of time. This seems to be particularly the case for financial and economic matters. The wealthy, assisted by highly qualified and sharp lawyers, make the most of this. These are the characteristics of the inadequate legislation which is said to afflict both Flanders and the whole of Belgium. (Verhoest, 1995: 7-8; 2/1) However, underregulation, which gives the judge ample room to manoeuvre, almost automatically causes the latter to make pseudo-political decisions. Thus, there may be a situation in which parliament or the government is at a loss as to what do with a particular matter or finds it too delicate. In such cases, the judge may be promoted to acting legislator and the problem moved to some court or another: an ordinary court of law, the State Council or the "Court d'Arbitrage." [4] (Huyse, 1994: 105-107) Quite a recent example of this are the laws of 17 July 1990 and of 11 January 1993 concerning the laundering of illegal money and the seizure and confiscation of goods: many eagerly awaited the first judgement...which has since then arrived... [5]

Another weighty contextual factor is the control over the administration of justice, which immediately calls to mind the important issue of the independence

4 The "Court d'Arbitrage" is supposed to settle disputes between and amongst the Federation and the Communities or Regions, but in Belgium it is gradually turning into a kind of Constitutional Court!

5 In general it was felt that there was a vacuum in the law regarding the seizure of goods. A judge at the Court of Appeals in Brussels believed that the law does not clearly specify who the competent judge is and he decided that not only the civil judge but also the penal judge may be competent; furthermore, that a new proviso had to be added to the law: it must be clear that the goods have been purchased with criminal funds, otherwise the seizure is rendered invalid.

of both the judiciary and the judges. From what has been said above it will be clear that there are some doubts about such independence...even about the possibilities to achieve it. What we really mean is that it is the judge who is dependent in the wrong way; the judiciary, on the other hand, is said to be too independent compared to other powers. There is a kind of internal control over the judicial decisions made by judges due to the possibilities for appeal or cassation. This, however, requires a separate analysis which cannot be performed in this space. Another kind of internal supervision can take place within the organisation of the magistrature, in the so-called *corps*, the group of magistrates belonging to a court. "La conception militaro-cléricale de la magistrature léguée par Bonaparte a laissé des traces toujours visibles dans la structure judiciaire." (Ringelheim, 1993: 4) In any case, discordant notes about the power relations within these corps are heard regularly. In practice they appear to be little professional, rather discretionary, arbitrary and authoritarian even. This seems they have little to do with real personnel policies or with workload, a division of tasks or job contents. A survey among magistrates claimed that a mistaken kind of authoritarian, hierarchical pressure is being exerted. (Dupont, Christiaensen, Claes, 1992: 222-225; 236-239) It is, for instance, no longer always clear what magistrates may and may not do. "There is a lack of clear texts. Although the adage "la plume est serve, la parole est libre", for instance, is uttered only too easily, it would seem both in practice and in theory...that the hierarchical superior can demand to be informed in advance about an intended oral claim to be announced in a particular trial, so as - in the event of a dispute - to entrust the case to another subordinate or to take over the claim himself. Some people, following the example of solicitor-general Matthijs, would nonetheless wish to stress that, if the subordinate magistrate is not replaced but requested to announce the solicitor-general's personal opinion, he maintains the right, the duty even, to expose his own opinions or convictions orally during the trial."(M en M., 1994: 12). According to the same survey, all this goes hand in hand with "a poignant lack of material means to function." (Dupont, Christiaensen, Claes, 1992: 220-222) and Belgian judges do by no means operate in optimum working conditions. Naturally, this prevents a careful assessment of the situation. All the more so since this state of affairs can so often be used to cover up other shortcomings. Under this aspect the similarity of the Italian and Belgian situation is striking.

Another problem is that of the independence of the judicial power vis-à-vis the legislative and controling powers, as well as vis-à-vis the executive power. This is a long-standing debate, held largely with respect to the Public Prosecutor. At times, the debate becomes side-tracked when tackling the interference of the other powers in specific court cases or if a negative right to injunction of the minister of justice is involved...which is by no means the case in Belgium! It seems to me that the debate about whether the members of the Public Prosecution are civil servants or judges, also misses the point: legally they are considered to be judges, and regarding all other matters presumably the solicitor general of the "Court of Cassation" J. Velu was in the right when he said in his opening speech on the first of September 1994 that when the public prosecutor's offices perform trials or implements judicial decisions, they act as "bodies (organes) of the executive power." (P.D., 1994) But some politicians state quite frankly that the magistrates of the public prosecutor's office are really civil servants. (Verhoest, 1994) To my mind, F. Périn took up the right stance at the time when reacting to the thesis of the sovereign Public Prosecution and the premise of the so-called delegation the solicitor-general receives from the Nation. "La Nation ne peut être au procureur ce que Dieu était à Louis XIV." (Périn, 1987: 87-94) In this respect, the Flemish magistrates' association "Magistratuur en Maatschappij" (Magistrature and Society) re-

cently formulated an excellent stand. "The public prosecutors need to accept that the executive and legislative powers would control its policies (or lack thereof). In a constitutional state, the powers balance each other out by an interaction between autonomy and supervision. Refusing to accept all control risks the withdrawal of the public prosecutor's autonomy. The idea is to regard control positively: it should generate a dialogue between the state powers about penal policies, in which every power has its own responsibilities, rights and duties. Modern penal policy should answer society's current needs and problems. The world of politics has a more sensitive finger on the pulse of society than the aloof magistrature. That is why the minister of justice should be given the authority, within the rules of proper governance, to set out the priorities of penal policy, but without removing all room for a general penal policy from the Public Prosecution agencies. This competence could be allocated to the minister on the basis of his generally acknowledged positive right of injunction, which is already an incomplete policy instrument and could be extended to rise above the level of individual files and constitute a more general penal policy. On the other hand, the political powers should be given the authority to check the solicitor's annual reports and plans and/or guide it in the right direction via their legislative or executive competence, without putting the independence of the public prosecutor at stake. Not just the political powers should have access to the administrative data of the Public Prosecution agencies. Let us point out that today, the minister of justice can already look into criminal files or demand a report about pending cases. Scientific research into penal policies pursued, for example, by the Service for Criminal Policy, might constitute an additional supervisory method." (M en M., 1994: 11) Like in Italy, in Belgium also a clear criminal policy in needed.

Finally, the controling effect exerted by publicity and the publication of judicial activities and decisions must not be underestimated. (Verhoest 1995: 2/1)

However, several other contextual conditions must be met. These will have to be much more preventive and at the same time make things clearer for the magistrature, should the settlement of a dispute or irregularity ever be called for.

- To begin with, there is a great need for strict and transparent legislation regarding the public contract system. The parliamentary investigation commission dealing with weapons deliveries has already put forward some suggestions.

- Furthermore, anti-corruption legislation, provided with a possibility to ban people from pursuing their profession and with measures concerning seizure and confiscation, is essential.

- Laws on the financing of political parties and election campaign expenses can be highly anti-corruptive.

- Given the, to my mind debatable, existence of a system of parliamentary and ministerial immunity, the criminal responsibility of the members of the legislative and executive powers should at least be brought into line.

- Belgium's administration is starting to become a little less politicised,...that is to say. At least there is regular talk about the rigour of the financial inspectors who check government spending, but the question remains as to whether their advice and remarks are taken into account... I do not think we can gain any insight into that... The Court of Auditors also publishes an annual report they call the "complaints book"... But it is said that the book has few results... The idea of an administration with looser party links is being praised, and quite rightly so. But maintaining the extended political ministerial cabinets, which also involve many civil servants in partisan politics, will do little to further the cause.

- Finally, the French sociologist A. Touraine stressed a very important point. "Si aujourd'hui nous avons l'impression d'un bras de fer entre les juges et des hommes politiques, c'est parce que notre parlement a perdu presque tous ses pouvoirs et n'est pas plus respecté par l'opinion que par les gouvernements. La seule maniére de limiter le pouvoir des juges, qui peut toujours devenir excessif, c'est d'accroître celui des législateurs. Comme nous sommes au plus loin de connaître un pouvoir excessif du parlement, il n'est pas dangereux que des juges, quelles que soient leurs intentions, mordent les mollets des partis et des dirigeants politiques qui exercent un pouvoir de plus en plus absolu. Il est vrai en particulier que les partis ont acquis une puissance excessive puisqu'elle ne correspond plus à la participation active de leurs militants. Il n'est pas sain de parler de démocratie quand n'existent que des entreprises politiques dont les ressources en proviennent qu'en proportion très faible des cotisations de leurs membres. Les distortions de la démocratie produites par la partitocratie sont beaucoup plus dangereuses que les pouvoirs, en effet presque sans limites, des juges d'instruction". (Touraine, 1992: 17)

As a matter of fact, a more attentive parliament, above all as autonomous as possible, playing both a legislative and a controling role, truly concentrating hence on policies regarding the administration of justice, will offer much better guarantees for the politically sound functioning of the judicial powers... And the nearly complete party-political dependence of the M.P.'s is an painful point in Belgium as well!

IV. Assessment of recent government proposals

The federal coalition agreement of 20 June 1995 pays much detailed attention to the "Renewal of Democracy and the Constitutional State", with as important subtitles: "An improved administration of justice"..."Modernisation and accountability of the courts". It would seem that even the government has finally realised that the magistrature should no longer be neglected or left to its own devices...and that this is not just a money matter. Naturally, there is the influence of some of the media, of some political mandatories, of producers as well as recipients of public opinion, who will insist that the judiciary function with the necessary skills and with a certain independence... The Italian example is still there! We are taking the liberty of adding some critical comments, with the aim of finding out whether conditions are being created that might favour an acceptable political/judicial decision-making process.

By way of introduction, the government's policy statement announces *several preliminary bills* that ought to interest us.

- They set out by stating that *criminal and judicial inquiries will be improved*. But it would have been preferable if they had clarified what this means. Particularly since it is precisely the way in which judicial inquiries are carried out in Belgium that is the subject of a rather heated debate, while the Franchimont Commission mentioned before has been working on it for years. The questions raised in that respect are: should such inquiries become contradictory and which things should remain secret and which should not? What would the impact of a modification in the position of the magistrates and the judge of inquiries (le juge d'instruction) be? Although the governments statement does not mention it at all, the Franchimont Commission mooted a "new" proposal at the beginning of 1995 to modify penal procedures. This document was transferred to the State Council by the government in power at the time on 31 March last for consulta-

tion. In a first draft, the commission had suggested that criminal inquiries should be more contradictory but with a stronger position for the judge of inquiries. After hefty criticism from the magistrates in particular, the new version actually went back on some of the defendants' rights, such as the right of access to files and the right to demand inquiries into specific aspects. Now they also propose to deal with procedural matters regarding the inquiry behind the closed doors of the "Chambre d'Accusations" (a kind of Grand Jury), thus effectively removing public control over lapses and mistakes committed by the police and the courts. The government's reticence in its statement is therefore understandable, but so are the protests from court journalists: this is treating the symptoms, not the disease! (De Wit, 1995: 2) Admittedly, the judge of inquiries does get a mention further on in the policy statement, but obviously not as "the judge of inquiries only"; the one thing he can be asked to do now by the Public Prosecuter is to make inquiries, as opposed to leading the whole investigation itself: so, there we have the compromise. Pity also there is no proposal to regulate the use of special means of criminal investigation (undercover etc.) and the monitoring thereof by law, instead of the way it is being done now, through a circular of het minister of justice and hence with no legal basis. This does not give anyone legal security, not even police officers. They could have stated clearly that the penal procedures code should be provided with a better-defined description of the methods of coercion, the arrangement by law of the so-called information inquiry, and, why not, a different way of structuring the autonomy of police inquiries. (Cappelle et Kaminski, 1989: 2-7)

- Another bill calls for *a national advisory body for the magistrature*. If I am not mistaken about the Italian situation, the partisan politicisation chased out of the front door can be let back in through the back one. F. Ringelheim is perhaps a little too optimistic about the value of the Italian model.(Ringelheim, 1993: 5) So everything must be done to avoid the renewed inclusion of this kind of politicising. Criteria other than party-dosage must thus be applied: generational representation, external know-how (professors, lawyers etc.).

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And then it goes on.

- The government is to encourage consultation between the legislative and the judicial powers, partly in order to *simplify legislation*. This is an excellent objective. However, in that case, the government administration and the parliaments will have to be provided with more civil servants and services working on legislation. Otherwise the necessary enhancement of quality will never be obtained. Other parts of the text also promise that the abuse of procedural rules will be dealt with. One has to admit those are excellent remedies against class legislation and class justice!

- The government announces measures to make *the relations between the powers more transparent*.

Giving the council of solicitor-generals a legal status, appointing a chairman with a temporary instead of a permanent mandate and tracing a hierarchical line to the minister of justice are all government proposals that should lead to a uniform and joint criminal policy. The recently created *Service for Penal Policy and "national magistrates"* with truly national and international jurisdiction deserve support. Moreover, the government wants to continue along the same lines by stipulating that *reports about the past and future of criminal policy must be sub-*

mitted to the parliament on an annual basis. This is nonetheless too minimalist a way of putting things. Although elsewhere it is said that the parliament has the possibility to evaluate. But then, is the House of Representatives not the ultimate competent power?

- There is also mention *of a certain relief of the workload, a new division of labor and a faster and simpler administration of justice.* The administrative tasks are to be removed from the Public Prosecution agencies; the extended application of arbitration on sentencing and of alternative punishment; more administrative courts and a simplification of procedures for the State Council will also be installed. But not a word about the famous "summary proceedings" that have now been applied for some time to street delinquents, who turn out to be mainly immigrants: a new kind of class justice with racist overtones! The government wants *to modernise the courts* and make them accountable. The public prosecutor's offices will have to adopt a new division of labor; additional and temporary personal will have to help eliminate the considerable backlog in the administration of justice; magistrates will get fewer holidays; the appointment of corps presidents; the renewed job description of administrative staff; continuous training; an external audit; the creation of a magistrates' corps specialised in organisational consultation and supervision; computerisation and better infrastructure; the appointment of building managers: so many means to reach the goal the government has set itself. Now that is all very well. Particularly the arrival of people other than jurists may help to break through the seclusion. *But more management is needed, as well as more democracy*, and the participation of the magistrates themselves in the decision-making process is another must, just as the freedom of association should be encouraged. For all too long, the magistrature has been kept away from all democratic functioning as if it were on an island. But the government does not seem to have realised this yet! The Italian self-government of the magistracy could be a good model.

- "The staff of the courts and public prosecutor's offices will be *recruited via a state examination*". We do hope that this refers to all kinds of staff, including magistrates! The implementation of the law of July 1991 provided for an entrance examination, meant as a first step to depoliticisation. Experiences from other countries teach us that this attracts graduates from all classes of society, thus breaking the upper-class connection, although it may also mean that those upper-class folk no longer feel at home there. Yet the backdoors stay open, and they are not mentioned. Thus, in the event of a lack of fitting candidates - the sitting staff can make the tests for newcomers as difficult as they want - judges functioning as substitutes can still be appointed according to the old system! The promotion system is not discussed in the policy paper of the government. "The great many advisory bodies through which promotions in the magistrature take place cannot guarantee quality either. And, indeed, neither can the corps presidents. That is precisely why there is little point in making corps heads more accountable, as has been put forward by politicians, as long as the appointments at the top are not more serious and the magistrates at the bottom are hardly or not at all involved in the workings of their jurisdictions. Open assemblies are practically unknown. Seniority - until now the only rule for promotion - is not the only element encumbering certain executive mandates, such as that of first president and president of a chamber. For how long will candidate judges of the courts of appeal, candidate first presidents, presidents and vice-presidents at the court of first instance (according to the constitution) have to go on gathering the necessary votes in the provincial council and the court in order to be appointed? Yet everyone knows that it is not necessarily the best who make it this way. On the contrary.

Many first presidents, presidents, vice-presidents and chamber presidents bears personal blame for the humiliating agony that is killing off the judiciary." (De Moor, 1994: 30-31) Indeed, we do not arrive at the stage of a public, open recruitment with competition between young people and of an organisation of carreer-pattern without any intervention by the political level: the Italian situation.

- Just as important for a balanced and acceptable political dimension in the jurisdiction is *"more generalised possibility of access to the administration of justice"*. The policy statement of the government mentions this together with "the settlement of disputes" and "breaking down the abuse of proceedings". But this more global access remains a vague notion. The socialists' demand to set up public offices for legal aid and to fix rates for lawyers' fees did not make it. Yet class justice is also marked by the parties to a trial disposing of unequal means in court. Public legal aid, in which stipendiary lawyers systematically deal with specific types of cases, is also an excellent way of monitoring an unjust and wrongly influenced administration of justice. Besides, in that way it would be easier for organisations and associations to take others to court.

- The policy statement also specifies a number of measures, which we called *the preventive contextual aspects of the proper administration of justice* earlier on. Let us summarise them: more financial expertise in courts; more possibilities for seizure and confiscation with the onus of proof resting with the defendant; reduction of sentences for those providing useful information; reduction of the abuse of proceedings; fight against fraud, trade in humans, hormone and drug trafficking; fight against corruption with the possibility of banning people from exercising their professions or bidding for government contracts; adaptation of the purchasing procedures for government procurement. Much of this, however, will depend on the quality of the legislation and the way it is applied.

- The government also wishes to tackle *the criminal accountability of ministers*. For a start, courts will be allowed to question them. But for prosecution and inquiries, permission must first be granted by a "high commission", which can also put an end to the inquiry. After the inquiry, the parliament will pass a resolution behind closed doors. Investigators and members of parliament are enjoined to absolute silence. But we should point out there that this "high commission" consists of former members of parliament from the main political parties. So the risk of partisan politicisation and manipulation by the government raises its head yet again. So does the question as to whether the oath of secrecy can be reconciled with parliamentary prerogatives. And what is to become of the rights of the defendant? This bill looks set to unleash some heated debates! Let us hope that the principle of parliamentary and ministerial immunity itself will not be excluded from the discussions.

The government's statement makes no mention of the relations between the media and the judiciary. Yet both politics, the media and the judiciary badly need to reformulate their mutual relationships: what kind of information may and should be exchanged and made public? What kind of rules for access to courts and files should be put in place?

- Finally, the statement contains *something quite extraordinary regarding the position allocated to the House of Representatives*. Somewhere in the programme there is talk of "an efficient functioning of democratically elected mandatories". But this refers largely to their loss of power vis-à-vis all kinds of advisory and consultation bodies. There is no mention of a possible problem existing in the relations between government and parliament, of the fact that increasingly it is the government that controls parliament instead of vice versa, as it should be

in a democratic constitutional state. Thus, the government itself decides that parliament shall strive to reach consent about party funding, about the execution of the political mandate, about political leave and so on. Elsewhere it had been said that the government was going to encourage consultation between the legislative and the judicial powers regarding judicial policies. And elsewhere still it says that the co-operation between the various police forces is to become the subject of a parliamentary debate. Surely it must be difficult to get more patronising the parliament! And regarding all the rest, the "interdepartmental conferences", i.e. the government, will deal with certain important issues itself: fight against poverty; integration of immigrants; inner-city reforms; drugs policy; action plans to inform citizens and so on. This approach by the government is highly unwise since, as we stressed before, reactivating the parliament is of the greatest importance if we are to reduce the power of the magistrature to its real and proper dimensions.

So, we have reached the conclusion that clearing the judiciary from a wrong kind of politicisation is not enough. The context in which the judiciary works also needs to be overhauled.

Abstract

We set out by tracking the political vicissitudes of the administration of justice and their connections with a range of phenomena:the neglect by politicians;a series of events and scandals and the very curious reactions of the judicial apparatus; several parliamentary investigation commissions without much effect. Then we take a critical look at partisan politicisation of the magistrature: negative evalution of their output thrives to it; but there are also partisan appointments and promotions, even absence and refusal of training. Many contextual factors hinder a normal, acceptable process of politicisation: over- and underregulation, bad legislation, misconception on control over the administration of justice and over judges, non-democratic decisionmaking within the organisation of the magistrature, the development of wrong relationship inside the trias politica; but also other more external conditions were not met neither. We wind up with an examination of the assesment of recent governmental proposals: an improvement of criminal and judicial inquiries; foundation of a national advisory body for the magistrature; simplification of the legislation; modernisation of the courts activities; a more objective recruitment and selection system; more easy access to justice etc. The question raises as to wether it suffices to tinker with the system of the administration of justice alone...Between the Belgian and the Italian situations are similarities and relevant differences.