

# The Belgian High Council of Justice Presentation



# Introduction

The Dutroux Case and the gigantic impact it had on the people were the direct cause of the formation of the High Council of Justice.

During the “White March” of 1996, the general public expressed its displeasure collectively and massively about the lack of a coherent and global vision and many dysfunctional aspects of the judiciary: the backlog in the administration of justice, the dilapidated buildings, the faulty infrastructure, and, in particular, the political appointments that gave rise to the impression on the part of the public that magistrates could no longer judge objectively and impartially.



With the formation of the High Council of Justice, the intention of the Parliament was to restore the confidence of the people in the operation of the Belgian judicial system.

Elsewhere in Europe and also outside of Europe, comparable institutions have long been in existence: Italy has had a High Council for the Magistracy since 1947. The same institution has also existed in France since 1958 and is headed by the President of the Republic. Spain, since 1977, has had a “General Council of the Judicial Branch”, and Canada, too, has a Judicial Council as do several other countries. The powers of these authorities do differ, but all, to a greater or lesser degree, restrict the influence of the executive branch over the judicial branch.

# The constitutional position of the High Council of Justice

The High Council was created by the constitutional legislator specifically on 20 November 1998 with the passage of the new Article 151 of the Constitution. This constitutional foundation places the High Council beyond the reach of the ordinary legislator, which is intended to enable it to execute the assigned tasks in all independence.

The new Article 151 of the Constitution makes it clear that the High Council is not subject to the King and that it must not receive instructions from, or need to justify itself to, any existing administrative authorities. It is crystal clear that it does not belong to the executive branch.

Although the High Council might show certain affinities with the Parliament, it is certainly not an *ad hoc* institution of it, which can be said of the Court of Auditors, the P Committee, and I Committee, and the federal ombudsmen. Therefore, the High Council certainly does not belong to the legislative branch.

The High Council also does not belong at all to the judicial branch. The independence of the High Council, which is also manifest from its financial statute – it is funded in the budget of the grants, like that of the Court of Arbitration – excludes this possibility. Moreover, in the establishment of the High Council, its belonging to the judicial branch was expressly denied because half of it consists of non-magistrates and because it exercises no jurisdictional functions. Therefore, the High Council does not belong to any of the three branches.

This point of view has been expressly emphasized in Parliament in the establishment of the new Article 151 of the Constitution and of the organic law of 22 December 1998, the implementation law of the Article 151. Indeed, it has been repeatedly stated that the High Council of Justice is an institution *sui generis* that can be subordinated to none of the three branches of the State. In the explanatory memorandum accompanying the bill, which was approved on 22 December 1998, we read that the High Council must bridge the judicial branch, the independence of which it must respect, and the executive and legislative branches. The High Council can

best fulfill this function as an institution that is completely independent of each of the three branches.

## Composition

### Parity between magistrates and non-magistrates

A significant presence of non-magistrates on the High Council was, according to the legislator, necessary *not only to avoid a corporatist reflex on the part of the magistrates in the framework of the tasks of the High Council but also because the vision and experiences of the everyday “consumers” of the judiciary can constitute a very valuable contribution.*

This general distribution formula, therefore, can also be found in the various organs that compose the High Council of Justice. More in particular:

the full Council (44 members) must consist of 22 magistrates and 22 non-magistrates;

in each of the two colleges of the Council the same parity must be observed per language role (11 magistrates and 11 non-magistrates);

each of the two commissions (the nomination and appointment commission and the advisory and investigation commission) (14 and 8 members) is subject to the same obligation.

Finally, the law clarifies in this regard that the concept of “magistrate” here must be understood exclusively in the sense of *working professional magistrates*.

### Representation of the magistracy

This representation must be assured both geographically and structurally. In order to achieve this twofold objective, the Judicial Code prescribes that each of the two colleges of the High Council consists of at least:

of a magistrate of a court and a magistrate of the public prosecution service;  
of a magistrate of a higher court, irrespective of whether he or she is a magistrate of a court or the office of public prosecution of this higher court, and irrespective of whether this higher court is a Court of Cassation, a court of appeal, or a labor court, of a magistrate from each jurisdictional area of

the five courts of appeal. With this distribution formula, candidates who receive fewer votes than others can still be elected!



The election procedure for the magistrates is regulated by the Royal Decree of 15 February 1999. The Royal Decree prescribes that a polling station and a counting station be established in each court of first instance and that each voter must in principle go to the polling station of the judicial arrondissement in which he or she is appointed.

## The external members

A supplementary distribution formula was established in order to form the group of non-magistrates: 11 members in each college per language role. According to the Judicial Code, it is required that each of these colleges consists of at least four attorneys who have been members of the bar for at least 10 years; three professors of a university or college of higher education with professional experience of at least 10 years; four members who hold a university or equivalent diploma as well as 10 years of professional experience.

For the composition of the last category, the comment on the bill expressly refers to *people from the media, the welfare sector, the governmental sector, the consumer sector, the business world, the management sector or specific professional groups such as clerks of courts, secretaries of public prosecution services, judicial officers, notaries, and so on.*

## Representation per language role

This balance between Dutch-speakers and French-speakers is required both for the member magistrates and for the external members. In addition, the French-language college must have at least one member (magistrate or not) who must provide proof of knowledge of German.

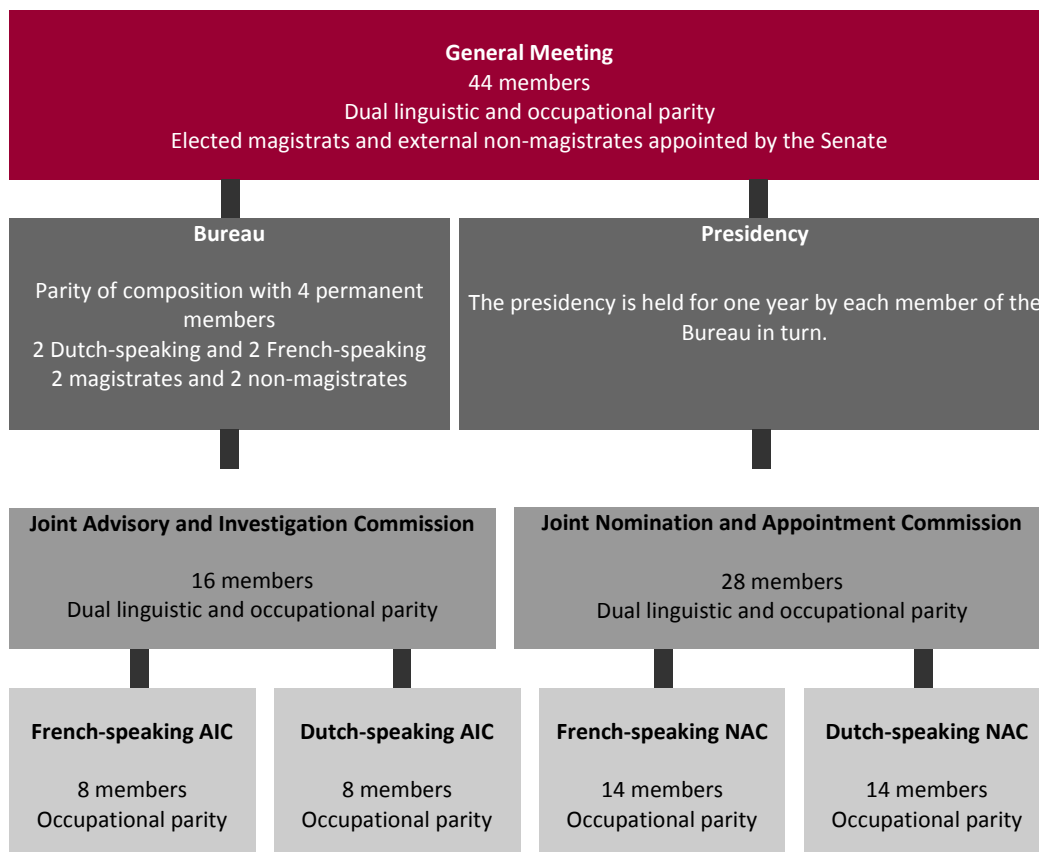
## Representation by sex

It is required here that in each of the two colleges, the non-magistrate group (11 members) has at least four members of each sex.

In the elections of the magistrates, each voter must cast 3 votes, at least one for a candidate of the court, at least one for a candidate of the public prosecution service, and in addition at least one vote must be cast for a candidate of each sex.

## Duration of the mandates

This term is set by the Judicial Code at a period of four years, which can be renewed once provided – depending on the case – there is a new election or appointment by the Senate.



## The organs of the High Council and their respective powers

### The general meeting

As already noted, the general meeting has 44 members. It meets primarily for the definitive approval of the decisions taken by its commissions, particularly the advisory and investigation commission.

This approval is desired by the legislator to give more weight to the advices and recommendations by involving the entirety of the members, even when not all of them have worked directly on these advices and investigations.

The general meeting appoints the bureau.



The general meeting is entrusted the task of compiling an annual report of its activities and of its commissions for the two legislative chambers, the Minister of Justice, the leading judges and chief prosecutors of the higher courts and their respective public prosecution services. Finally, a special role is reserved in the disciplinary area for the general meeting, which also draws up and approves its by-laws.

## The colleges per language role

Within the High Council, there is a Dutch-language and a French-language college. Each of the two colleges consists of 22 members, who belong, respectively, to the Dutch-language and the French-language role. The colleges have no special powers except in the election of the members of the bureau that are nominated by the respective colleges to the general meeting. Each college also appoints its two commissions.

## The bureau

The bureau is composed of four members with observance of a double parity: the language parity and the parity composition of magistrates and non-magistrates.

The bureau of the High Council was manifestly conceived as the permanent organ of this institution of which it ensures continuity in operations and organization without, however, possessing *any autonomous power of decision in the framework of the tasks of the High Council*.

The four members of the High Council that are assigned to this bureau are, moreover, the only ones who exercise their office full time.

Some objected when the law was being drafted that this group of four people will ultimately be clearly insufficient to monitor the various activities of the High Council on a day-to-day basis. Aware that this problem could arise, the legislator held open the possibility of increasing the number of members of the bureau by a later royal decree at the request of the High Council.

## The chairmanship

The chairmanship is assigned each year to a member of its bureau by the High Council by two-thirds of its members with the obligation that this office be exercised in turn by a magistrate and a non-magistrate and that the chairperson belongs to one of the two language roles in turn.

The Judicial Code grants no special powers or attributes to the chairperson of the High Council, who is expected to represent the institution. The chairperson, of course, chairs the general meeting. Other tasks can be assigned to him or her by the by-laws.

## The nomination and appointment commissions (NACs)

Each college indicates by a two-thirds majority 14 people (7 magistrates and 7 non-magistrates) from its members to form the nomination and appointment commission.

The chairmanship of each commission is performed by a member of the bureau indicated by the general meeting.

## **The powers of the NACs**

### **The nomination of candidates for appointment to the magistracy.**

The NACs have to nominate one candidate to the King for each appointment to justice of the peace, judge of a court, justice of a court of appeals or labor court, and justice of the Court of Cassation, or official of the public prosecution service at these judicial colleges.

The NAC that is competent for this is determined by the language role of the vacancy to be filled. If knowledge of Dutch and French is required, as is the case for certain offices in the Judicial Arrondissement of Brussels, then the nomination is made by the joint nomination and appointment commission (JNAC). In these nominations, the NACs and the JNAC act autonomously, thus without subsequent approval of the college or the general meeting.

### **The nomination of candidates for an appointment of leading judges and chief prosecutors**

The appointment by the King of the leading judges and chief prosecutors in and at judicial colleges occurs upon the nomination of one candidate by the (J)NAC. Because the the leading judges and chief prosecutors will occupy the office for a fixed term in the future, they will no longer be appointed by the King but designated.

### **The regulation of the access to the office of judge or of official of the public prosecution service.**

In fact, the NACs take over the powers of the former "Recruitment Board" for the magistrates. They prepare the programs for the examination regarding professional proficiency and the comparative entrance examination for the judicial internship and they also organize these examinations. The manner of operating of the Recruitment Board has also been more or less retained: the JNAC formulates the program proposals; the NACs each organize the examinations. All of this is done under the supervision of the general meeting of the High Council, which has to approve the programs, after which they are ratified by the Minister of Justice and published in the *Belgisch Staatsblad/Moniteur belge*.

## **The training of the judges and the officials of the public prosecution service**

The JNAC prepares the guidelines for the permanent training and the judicial internship. The elaboration, evaluation and execution of the programs (organization of courses, recruitment of the teachers, etc.) is done by the Judicial Training Institute.

## **How does the nomination and appointment proceed?**

*The procedure has three phases:*

### **A preliminary advisory round**

After the announcement of the vacancy in the *Belgisch Staatsblad/Moniteur belge*, the candidates have one month to submit their candidacy to the Ministry of Justice, which asks for legally required advices.

Within a hundred days (one hundred and forty days if a general meeting must issue an advice) of the publication, the dossier is forwarded to the High Council by the Ministry.

### **Nomination of one candidate by the NAC**

The NAC has forty days to submit a nomination of a candidate to the King. Within this period of time, the NAC has to hear the candidates that request it. A report is prepared of the nomination with reasons that is sent to the Minister of Justice. In the absence of a timely nomination, the procedure is completely reopened from the announcement of the vacancy in the *Belgisch Staatsblad/Moniteur belge*.

### **The appointment by the King**

The King has sixty days. He is not obliged to appoint the nominated candidate but is obliged to decide within this period. If he refuses to appoint the nominated candidate in a decision accompanied by reasons, the NAC can submit a new nomination, either the same candidate or another.

If the King still refuses, by a decision accompanied by reasons, to appoint the nominated candidate, the entire procedure is reopened.

When the NAC, after an initial negative decision by the King, does not submit a second nomination, the procedure is also reopened from the announcement of the vacancy in the *Belgisch Staatsblad/Moniteur belge*.

The Constitution requires the NAC to weigh the respective capabilities and suitability of the candidates for nomination. The nominations, therefore, have to be made solely on the basis of objective criteria.

## The advisory and investigation commissions (AICs)

These commissions are also formed by the respective colleges and have each eight members. As for the NACs, the respective chairpersons are also appointed by the general meeting. The AICs are responsible mainly for the external supervision of the functioning of the judiciary. Article 151 of the Constitution provides for four forms of external supervision:

### **The formulation of recommendations and proposals about the general functioning of the judiciary.**

This attribution includes, more in particular, the right to react to each bill or law that may have an impact on the functioning of the judiciary.

Thus, it is provided that the joint commission could also investigate the judicial colleges and the public prosecution services by the organization of audits that would permit the general meeting of the High Council to formulate recommendations later to the political power as regards the improvement of functioning and productivity.

They may be done both spontaneously and at the request of the executive branch (Minister of Justice) or the legislative branch (majority of the members of the Chamber of Representatives or of the Senate).

For the preparation of these reports, the joint commission can obtain all useful information it wants within the judicial system. Thus, the united advisory and investigation commission can go to the premises of the judicial colleges and ask its members for information.

The requests for information directed to a magistrate, however, must first be communicated to his or her hierarchical superior. The same request directed to another official of the judicial college (clerk, secretary, administrative personnel) may not be met without the approval of this authority.

### **General monitoring of the internal supervision**

The joint advisory and investigation commission, which is bilingual, has the task of monitoring the judicial authorities that are legally charged with exercising internal supervision of the operations of the judiciary.

In the Judicial Code and in the Penal Code, we find the various means of internal supervision: supervision of the public prosecution service by the prosecutors-general, general meetings of the higher courts, disciplinary measures, withdrawal of the case from and challenging of the judge, etc.

### **The follow-up and possible investigation of complaints**

The “follow-up” of the complaints has several meanings. First of all, the concept means that the AIC can decide either to refer the complaint to the competent authority or to deal with it itself.

Second, the follow-up implies that the AIC is informed of the action taken by the authority to which the complaint was referred.

Further, the assurance of the follow-up of the complaint also means that the complainant is informed by the AIC about the course of the handling of the complaints. Even when the AIC decides not to deal with the complaint, it is still obliged to inform the complainant of the decision and the reasons for it. There is no appeal against such a decision.

Finally, each AIC must prepare a written report at least once a year on the follow-up of the complaints received and submit it to the General meeting of the High Council, which, after approval, will send it to the authorities indicated above.



When the AIC decides to handle a complaint itself, it is brought to the attention of, depending on the case, the leading judge or chief prosecutor of the judicial college or of the hierarchical superior or superiors of the person or persons who are the object of the complaint. At least, the existence of the complaint must be communicated without it being necessary for the AIC to give all the available information.

To be admissible, the complaints must be in writing and be signed and dated. The full identity of the complainant must also be given.

In addition, not all possible complaints on the functioning of the judiciary come into consideration for treatment. As already noted, a number of restrictions were included in the law regarding the possibility of handling complaints. These are related first of all with the fact that the AIC may not concern itself with complaints that come under the disciplinary or penal powers of the judicial authorities. It can be that the High Council – when it is of the opinion that the party does not fulfill the obligations of his or her office or by his or her behavior harms the dignity of his or her profession – will inform the competent disciplinary authority of it with the request to determine whether a disciplinary procedure must be initiated. The disciplinary authorities are obliged to inform the High Council, with the justifying reasons, of what they have done in response to this request. Further, this task of the AIC may in no way prejudice the independence noted above of the judicial branch. For this reason, the AIC cannot concern itself with complaints related to the content of a judicial decision.

### **The institution of investigations into the functioning of the judiciary**

This is the most far-reaching power that the constitutional legislator has entrusted to the High Council regarding external supervision.

The initiative for such investigations can be taken directly by the joint commission by majority vote – for example as a result of an individual complaint submitted to it – but also at the request of either the executive branch (Minister of Justice) or the legislative branch (each of the two legislative chambers by majority of its members).

Here, too, the functional autonomy of the magistrates must be observed. Such an investigation may not be prescribed or continued if it would be the object of a penal or disciplinary dossier. The Judicial Code, indeed, provides for the possibility of two kinds of investigation: one of the internal type and another of the external type. In the two cases, the report of the joint commission has to be approved by a 2/3 majority of its members.

The decision to begin an external investigation is reserved only to the joint commission itself (provided two thirds of its members approve) or to the executive branch (Minister of Justice). The powers that are assigned to the joint commission in such a case are extremely wide under the condition that it must assign the direction of the investigation to one of its members who has the capacity of magistrate.

## **The administrative personnel and the financial resources**

The High Council has its own personnel for the administrative support of its activities. The personnel has its own status, approved by royal decree that is discussed in the Ministerial Council.

As already noted, the autonomy of the High Council has been assured by the manner of its financing, that is, by the assignation of a grant that is registered on the grants budget. This grant is fixed by the High Council itself but must, of course, be approved by the Chamber of Representatives.

