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The secondment of magistrates of the Office of the public Prosecutor to ministerial cabinets.

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A. General introduction to the ethics of magistrates in Belgium

1. What is the difference between ethics and discipline?

The ethics and discipline are traditionally linked. The discipline is 'the strong arm' of ethics in the sense that the discipline will sanction breaches of ethical standards. Where the ethics intervenes at the level between the magistrate and the litigant and therefore must take into account the public interest, discipline is more focused on the internal relationships within the judiciary as a whole and within the courts that are part of it in particular. The ethics is the totality of conduct, both written and unwritten, which constitute the professional obligations resting on those belonging to a particular profession and which relate to both their internal relationships as their relationship with a third party. The discipline is the instrument to maintain the internal cohesion (e.g. breaches of the hierarchy and collegiality) or the appearance to the outside (e.g. the degradation of the dignity of the profession) of the judiciary.¹

Today in Belgium, and by extension in Europe, a change of mentality is going on. Previously, violations of ethical standards were only sanctioned when the internal cohesion between the members of the judiciary or the reputation of this order to the outside was affected. It was essentially corporatist and certainly not intended for the litigant. At present the ethics consist of positive rules of conduct, which the public confidence in the judiciary need to recover. The ethical rules are framed in what society would expect of the magistrate. Positive ethics.² The ethics leave the premises of the prohibition, and moves into the realm of the recommendations.

The amended art. 404 of the Belgian judicial code is an example of this positive ethics. This article contains the general ethical standard to which the behavior of the magistrate should be compared, which although sounds rather vague and abstract³. By Act of July 7, 2002 a second member was attached to this article: *“The disciplinary punishments provided in this chapter may also be imposed on those who neglect the duties of their profession and thus undermine*

¹ DERIEMAECCKER, X., LONDERS, G., 'Deontologie en tucht', in Statuut en deontologie van de magistratuur, Brugge, Die Keure, 311-312

² LAMON, H., Een nieuwe deontologie voor magistraten?, *Juristenkrant* 2008, afl. 13, 17

³ As will be proved later in the text, Belgium has a lot of written and unwritten deontological rules. The unwritten deontological rules are derived from art. 404 Judicial code. They can be grouped around 4 standards, which will be explained later one in the text.

the proper functioning of the judiciary or the confidence in that constitution.” The neglect and failure are now explicitly disciplinary punishable when the proper functioning of the judiciary or the confidence in that constitution are being undermined. Thus, the legislature clearly like to emphasize that the discipline exceeds the level of the judiciary and that the public interest has to be taken into account.⁴

That way the discipline gets a less important function. It will only be exercised if heavy offenses are committed by a magistrate, or when a magistrate keeps making the same mistakes, or in the cases where it is of the utmost importance that a signal is given to the citizens to restore the confidence.⁵

By the virtue of his position the magistrate possesses a lot of power. The magistrate will have to cope with this power. The ethical rules prevent that this power would derail. Citizens must blindly trust that his judge is legally literate and skilled, but also that his judge is independent and impartial.

2.Does a codification of ethical rules exist in Belgium?

Mainly in the Judicial Code there are a number of legal provisions regarding to the ethics of the magistrate. Some examples of written rules: art. 458 of the Belgian Criminal Code provides a penal protection of the professional secret, art. 828 of the Belgian Judicial Code provides in different grounds of recusal, art. 246 of the Belgian Criminal Code prohibits a magistrate to accept a gift or donation in some situations, ... In addition, there are many unwritten rules that rely on art. 404 of the Belgian Judicial Code (*supra*).

There is no codification of the ethical rules in Belgium. Or not yet. A debate flares on. After all, many, especially young magistrates begin to feel insecure. There is a call for clearly defined rules of conduct, which are centrally consolidated. A codex would be the compass of the magistrate.

Secondly, a codification also has the advantage that the citizens exactly know what kind of behavior they may expect from the magistrate. This also gives citizens certain rights with

⁴ LONDERS, G., Artikelsgewijze commentaar, *Gerechtelijk recht*, Kluwer, Art. 404, nr. 4-6

⁵ LONDERS, G., De tucht en de deontologie van de magistratuur, in LUST, S., LUYPAERS, P. (eds.), *Tucht en deontologie. (In)effectiviteit van het tuchtrecht ter handhaving van de waardigheid van het ambt.*, Die Keure, Brugge, 2007, 332

respect to their judge. It can also provide reassurance that the citizens know that the judge is bound by certain obligations. Thereby they do not need to expect any randomness, which the confidence in justice will benefit.

The opponents of codification rely on the fact that the ethical rules are time-bound and therefore in principle changeable. According to them codification leads to rigidity. The rules are supposed to be flexible to adapt to new conditions and to evolve. Codification would complicate this.⁶

In addition, codification could impede the development of a 'positive' deontology (*supra*). Chances are that the behavior of the magistrate will be compared in an abstract manner with the written rules only to sanction disciplinary breaches. Then the emphasis sets back to repression, rather than to achieve some common objectives

3. The common standards of the Belgian unwritten ethics

Starting from the idea of a 'positive' deontology one must obviously be able to determine to what common standards the actions of a magistrate, both in the performance of his duties and in his private life, must meet. It is also recommended that the magistrates themselves think about these standards. Indeed, these standards must be supported by the entire group and could not be imposed from 'above'.

Since 1988 an open debate is going on in Belgium about what those policies might be. Capturing these standards, two findings are important: a) the magistrate has a lot of power, which necessarily must be kept within bounds; b) the litigant does not choose his judge.

What would these principles be?⁷ It is important to know that these next 4 standards constitute only one possible approach. An open debate on this topic should continue to be conducted, not only at national level but also at European⁸ and at international⁹ level.

⁶ DERIEMAECCKER, X., LONDERS, G., 'Deontologie en tucht', in Statuut en deontologie van de magistratuur, Brugge, Die Keure, 317

⁷ LONDERS, G., De tucht en de deontologie van de magistratuur, in LUST, S., LUYPAERS, P. (eds.), Tucht en deontologie. (In)effectiviteit van het tuchtrecht ter handhaving van de waardigheid van het ambt., Die Keure, Brugge, 2007, 340-344

⁸ "Avis n° 3 du CCJE à l'attention du comité des ministres du Conseil de l'Europe sur les principes et règles régissant les impératifs professionnels applicables aux juges et en particulier la déontologie, les comportements incompatibles et l'impartialité" www.coe.int

1. Ability

On the one hand society expects that the magistrate strengthens his knowledge and his technical expertise, on the other hand the magistrate should also permanently retrain and develop a broad public interest.

2. Loyalty and objectivity

Loyalty expresses that the magistrate should be the first one to respect the law, even in his private life and that the magistrate treats everyone in the same way with respect to the law and the general legal principles, such as the right of defense, the contradiction and the presumption of innocence.

Objectivity requires that the magistrate shall approach the parties unprejudiced and that the magistrate shall not base his judgment on his personal knowledge of belief. The magistrate acts freely, without pressure from 'above'.

In short, the magistrate must be independent and impartial.

3. Discretion

The magistrate must be very discreet with the information that the litigant should deliver him. The magistrate must also keep his serenity in all circumstances, both in the performance of his duties as in his private life.

Next to the fulfillment of his duties, a magistrate makes no mention of his capacity, except when strictly necessary. One avoids that a third party avoids feeling any pressure.¹⁰

4. A flawless private life

This standard is about the social role model and the credibility of the magistrate. How can the magistrate justify the power that is given to him to sue or to condemn, if he is not the first to live up to the law or if he is not willing to respect everyone's rights and freedoms, even in his private life.

⁹ "The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group of Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at te Peace Palace, The Hague, November 25-26, 2002" http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

¹⁰ DERIEMAECCKER, X., LONDERS, G., 'Deontologie en tucht', in Statuut en deontologie van de magistraat, Brugge, Die Keure, 345

4. The role of the High Council of Justice¹¹ (HCJ)

The HCJ is authorized to nominate candidates to become magistrates. Also the HCJ is authorized to provide consultancy services and the HCJ makes proposals to enhance the functioning of the judiciary. The HCJ monitors the use of internal control within the judiciary, handles complaints of the functioning of the judiciary and has investigative powers.¹²

The HCJ wants to develop an ethical guide for magistrates. The ethical guidelines would have to give indications to determine what behavior is desirable in any situation. This guide would consist of two parts:

1. A general part of the core values of the judicial organization. The document "*Ethics of the judges – principles, values and qualities*", developed in 2010 by the European Network of Councils for the Judiciary¹³, would consist as a general part.
2. A thematic section with guidelines for desirable behavior and. This section will be expanded theme by theme.

Codification of written and, mainly, unwritten ethical standards has both its advantages and disadvantages (*supra*). The biggest disadvantage will undoubtedly be the uncertainty among the magistrates. New and concrete situations will invariably lead to a difficult balancing between many interests, which undoubtedly often leads to misconceptions and bad choices. One must be careful not to be sanctioned. Some situations are so common that one does not know if they are ethically approved. Similarly, the political secondment of prosecutors to ministerial cabinets.

¹¹ <http://www.csj.be>

¹² PONSAERS, P., VERHAGE, A., BEYENS, K., Controle op politie en justitie: een lappendeken met weinig samenhang, Orde van de dag 2011, afl. 55, 10-11

¹³ <http://www.csj.be/doc/divers/deontologie.pdf>

B. Introduction and contextualisation of the Belgian situation

The ‘trias politica’ doctrine of Montesquieu is today an important keystone of most democratic states of law. As the word itself says, this doctrine is based on three independent powers each with their own special task.

The legislature is responsible for lawmaking, the executive provides the execution of these laws and finally, the judiciary is responsible for monitoring compliance of the legislation. Belgium also has this system. As will appear, the division between the three powers is not always strictly.

The legislature is exerted by the parliament. This parliament consists of two chambers, namely the Senate and the Chamber of Deputies. Next to the classical legislative task (submission and vote of bills), the parliament practices also some nearly judicial competences, like the eventual abrogation of the parliamentary immunity and setting parliamentary court of inquiry’s. This was for example the case with the ‘Dutroux’ affair, where by such a parliamentary court of inquiry a lot of dysfunctions within the judiciary were exposed. Another well-known example of a parliamentary court of inquiry is the one who inquires the so called ‘Fortisgate’. Both are mentioned infra. Furthermore the Chamber of Deputies is involved in the appointment and nomination of candidates for certain functions, namely counselors at the ‘Council of State’ and judges at the Constitutional Court.

The executive, also called the Government, runs the country. It provides for the appliance and compliance of the legislation. These laws are implemented by means of Royal decrees. The government consists of ministers and secretaries of state who are appointed by the King. The executive also has a legislative right of initiative. This power can prepare legislation, that is discussed, adjusted and voted by parliament. Once a law is voted, it becomes proclaimed by the King.

The judiciary controls and advises about legislation and possible contradictions to the Constitution, is an arbitrator between the different powers (both horizontal and vertical), decides on disputes and judges offenses and crimes. This power is executed by different courts and tribunals. The judiciary controls also the legality of the actions of the executive.

Although Belgium is a federal country with communities and regions, each with their own legislature and executive, there is only one judiciary who decides about both communities and regions.

As will be discussed, there exists since 2002 an organ to protect the independence of the judiciary, namely the High Council of Justice. This Council guarantees an objective selection of potential magistrates and even provides in their education.

The division of powers *as such*, although a basic principle of the Belgian state of law, is remarkably not expressly confirmed in the Belgian Constitution of 1831. One must deduce this division of the “spirit” of the Belgian Constitution (prof. VUYE, in the Belgian paper ‘De Morgen’ of 19 december 2008). In fact there is more a collaboration between the different powers than a division. This shows in the following articles of the Belgian Constitution:

- Article 36: the federal legislature is exercised both by the Chamber of Deputies, the Senate (the legislature) and the King (legislature (art. 36 Constitution) and executive (art. 37 Constitution).
- Article 151 §4: the King (executive) appoints the judges (judiciary)
- Article 40, 1: judgments (judiciary) are implemented in name of the King (executive).

Within the specific Belgian context, in one particular case there is a possible **blend** of powers. Magistrates (judiciary) can be posted in ministerial cabinets (executive) or in workgroups founded by the executive (although those activities have to do with the modernization of the operation of the judiciary).

Latter problems are the object of the further discussion of this paper.

1. What is a secondment?

From a general employment law position, a secondment comes down to lending employees to a third party. Mostly this happens because of the specific expertise of the employee.

Secondment is mainly a used technique within the private sector. Nevertheless there are secondments within the public sector, namely within the judiciary.

2. Internal secondments: the federal prosecutor

In Belgium the figure of secondment is applied systematically within the federal Office of the public Prosecutor. It is a kind of overarching Office of the public Prosecutor. It is headed by a federal public Prosecutor and consists of posted magistrates (24 magistrates for a period of 5 years), each with their own specialism, from different offices spread over the territory of Belgium.

This federal Office of the public Prosecutor was created to offer a response to the deficiencies of the coordination of the judicial actions noted in the past in cases who exceed the borders of a district on the one hand, and to the treatment of complex, specialized cases on the other hand.

Within the federal Office it comes to so called *internal* secondments. Several magistrates (judiciary) of the local Offices of the public Prosecutor can be posted temporarily within the overarching federal Office (it also forms part of the judiciary). Secondment to another power such as for example the executive, is in this case out of the question. In that sense inner secondments can't be considered as a problematic issue. The independence of the posted magistrate isn't in jeopardy by working for a specific period for a specialized Office of the public Prosecutor. In the search for an efficient crime fighting, this trend for specialization is only to be cheered.

In particular a secondment may consist in the fact that the Minister of Justice can instruct a member of a local Office, proposed by the federal Prosecutor, to temporarily and for a specific case exercise the competences of the public prosecution within the federal Office. This possibility relates to the case where it is better for practical reasons to post “ a local magistrate” physical” from his local Office to the federal Office. In order to avoid negative consequences for the local Office, because of such a secondment, it is required that this secondment is organized by a ministerial decree and after consultation between the Minister of Justice on the one hand, and the concerned public Prosecutor on the other hand.

Next to this physical secondment, there also exists a possibility that a specific magistrate in a specific case, can practice the competences of a federal magistrate from his own local Office. Also in this case, as a guarantee against dysfunctions within the local Office, a previous consultation is required with the public Prosecutor of the local Office. In addition this decision by the federal magistrate must be reasoned.

3. Problem: external secondments to ministerial cabinets

Above internal secondments were mentioned. We believe they are never a problem, as they take place within the same branch of the judiciary.

Emphasis should be placed here on displacements *within the same power*. This makes a fundamental difference with external secondments. External secondments suppose a displacement from one power to another power. Secondment of magistrates (the judiciary) to ministerial cabinets (the executive) is an example.

Although these secondments to ministerial cabinets and the analysis of their potential dangers will be examined further in this contribution, one can notice that this technique is provided by the legislator himself. Therefore it endures the legality test.

Legislative framework

Article 327,2 of the Judicial code defines, in essence, that the Minister of Justice, on similar recommendation of the General Public Prosecutor, inter alia to magistrates of the Prosecutors office, can instruct to go into service by the King or the ministerial cabinets. The plural form of ministerial cabinets seems to indicate that magistrates of the Prosecutors office can form part of other cabinets than the cabinet of Justice, which is a common practice in Belgium.

It is important to emphasize that the legislator only provides in the possibility of secondment of magistrates from the Prosecutors office to ministerial cabinets and the fact that it isn't a possibility for magistrates-judges.

Although posted in a ministerial cabinet (that forms part of the executive), the magistrate stays both statutory as deontological a "magistrate" and retakes, in principle, his old function when he returns after the secondment.

In Belgium the relations between the judiciary and the executive go traditional through the Public Prosecutors Office (article 140 of the Judicial Code juncto article 399,2 of the Judicial code). These legal provisions also point out that the Public Prosecutors Office is placed under the authority of the Minister of Justice¹⁴. Nevertheless they are independent magistrates. They are independent as a magistrate but in the mean time they have to obey the positive right of

¹⁴ The Minister of Justice fixes the guidelines of the criminal policy after have taken advise of the board of General Public Prosecutors (article 143 quater Judicial code).

injunction of the minister of Justice. A negative right of injunction which the Minister of Justice would impose to the magistrates of the Public Prosecutors Office not to prosecute or not to investigate, doesn't exist.

The positive right of injunction in Belgium is rarely applied. It is certainly not true that the Belgian magistrates only would prosecute what the executive (Minister of Justice) imposes. The Public Prosecutors Office is independent and in practice this independence is well insured.

Problem situation

As to the displaced magistrates, there is only one big problem: they have to play a dual role because they work in ministerial cabinets and therefore exercise a political function, while on the other hand they are part of a corps that rely on its independence as judiciary¹⁵. The displaced magistrates of the Public Prosecutors Office are confronted with incompatible loyalties and practice de facto political functions, as functions on a cabinet are political and no officials functions.

Moreover it seems in the Belgian practice that cabinet functions more than once rise to later appointments, in higher functions within the Prosecutors Office or elsewhere, wherefore from this point of view influence is possible.

The contacts that magistrates in cabinets keep with their colleagues at the Prosecutors Office and that are frequent, because the relations between de Judiciary and the Executive happen through the Prosecutors Office, can have an impact on the independence of the judiciary. In Belgium this has been shown very concrete by the *Fortisgate*, that gave rise to possible misuses or at least thorny situations. This is further discussed in this contribution.

A last remnant of political appointment in Belgium?

Belgium knew until 1996 no independent organ that vouched for the selection and appointment of magistrates. This matter was left to the Executive. In other words, the parliamentarians, ministers and their political color decided eventually who were eligible for a function within the judiciary. This method always produced resentment and distrust by the public opinion. Indeed, they had the impression – sometimes rightly – that not always the

¹⁵ STEVENS, Jo, 'Justitie in beweging krijgen' in VAN RANSBEECK, R. "De toekomst van de Belgische Rechterlijke orde", 93.

competences mattered to become a magistrate but rather their connections in the political world.

In the late 90's the trust in justice of the Belgian citizen knew an unknown nadir. Rise was the 'Dutroux' affair¹⁶. One of the root causes is to be found in the persistent and latent displeasure about the defective and the archaic operation of our police and judicial unit. While both the private sector and different public services renewed profoundly their operation, justice kept locked in a 19th century bureaucratic, procedural and hierarchically thinking.

The government and subsequently the parliament were aware of the severity of the breach of trust between the citizen and the judicial authorities and decided to the establishment of a High Council of Justice (supra). The High Council of Justice was established on 1 march 1999 as an independent institution. The High Council of Justice doesn't belong to the executive, legislature or judiciary. It is composed of both magistrates and not-magistrates (f.e. professors and lawyers).

Because of a change of article 151 of the Constitution, this independent institution received very important competences, that were never assigned to a similar institution.

Thus the High Council of Justice is competent to nominate candidates for judicial functions and for the function of chief of a section. The High Council is competent to give advises who effect the operation of the judiciary. Besides it monitors the use of intern methods of control within the judiciary, it treats complaints about the operation of the court and it has a competence of investigation at that matter.

The establishment of the High Council of Justice tantamount to a thorough rearrangement of competences and aimed at an upgrading of our democracy.

The High Council of Justice operates in full independence of the executive who let go their interference in judicial appointments. This independence supplies also in the relations of the High Council of Justice and the judiciary, who for the first time in its history is subjected to control.

¹⁶ Marc Dutroux is a convicted pedophile, who in the nineties conducted girls and kept them into his secret basement of his house in Marcinelle, where they were abandoned and died of hardship. Because of a failing police and judicial mechanism, Dutroux could carry on for years. Despite this case touched the Belgian society, Dutroux was able to escape during for detention and was discovered if you please by a forester; http://en.wikipedia.org/wiki/Marc_Dutroux

Concluding it can be stated that Belgium has had a long tradition of political appointments and that it tried to find a solution with the establishment of the High Council of Justice

Thus the separation between politics and the magistracy is clearer defined. The mechanism of secondments is still to be considered as a remnant of the old culture.

4. What are the potential hazards of external secondment?

A posted magistrate can experience a conflict between on the one hand the ‘deontology of magistrates’ that obliges him *inter alia* to independence, discretion and objective and subjective impartiality¹⁷ and on the other hand to the habits and duties that applies to the personal employees of the minister (*inter alia* the duty of loyalty towards the political points of view of the minister, if necessary of its political party, the contacts that result from the public character of the function).

The fact that a magistrate who was posted in such a way fulfills a role that is socially very difficult and delicate, becomes apparent of *Fortisgate*, that late 2008 provided for a big commotion in the national and international press and even lead to the dismissal of the government.

5. Case study: Fortisgate

The Belgian bank Fortis got late September 2008 into trouble. In order to avert a bankruptcy, the Belgian government took over the bank and sold a part of the bank to the Dutch government (the Netherlands) and to the French BNP Paribas. The shareholders are displeased about the purchase price, what made their shares almost valueless, and go to court.

Both in the treatment of the procedure in summary proceedings in first Instance as during the procedure in appeal, there were several contacts between magistrates of the Prosecutors Office, including two magistrates who had the duty to advise in the Fortis dossier, and members of the cabinet of the Minister of Justice, of the cabinet of the Minister of Finances and of the cabinet of the First Minister¹⁸. The latter gave the impression that there was influence from the political landscape on the magistrature.

¹⁷ Article 6.1 EVRM: right to a fair trial.

¹⁸ High Council of Justice, report about the special investigation to the function of the judicial order , on the occasion of the Fortisaffaire, approved by the General council on 16 december 2009, p. 5-12.

6.Reaction of the High Council of Justice after Fortisgate

The High Council has notified in an advise that they opine that de presence of magistrates of the Prosecutors Office on ministerial cabinets must be limited to the cabinet of Justice¹⁹.

The Fortis affair has, according to the High Council of Justice, demonstrated that inter alia personal relations, friendships and political affinity can lead to a variety of interventions, outside the Minister of Justice. Thus the image and the independence and impartiality of magistrates (both those who contact and those who are contacted) become in jeopardy and can give the impression of the existence of collusion and influence.

Furthermore the High Council of Justice specifies that such a presence on the cabinet of Justice only deems appropriate, when this happens in function of the specific expertise of that magistrate for the concerned function in the cabinet and in so far as the acceptance of this function is useful for the concerned magistrate himself when he returns to the Prosecutors Office.

Moreover the High Council of Justice thinks it is desirable that a “certified advise of the concerned General Prosecutor” (article 327,2 of the Judicial Code) to allow a secondment should be expanded to an advise of the council of General Prosecutors, consisting of i.a. 5 General Prosecutors of different jurisdictions, so a better “partition” would be created between the Judiciary and the Executive and said political ticket would be prevented, because the secondment won’t be allowed by one single Public Prosecutor.

Finally, the High Council of Justice thinks it is desirable that deontological or legal rules would be elaborated for posted magistrates, with specific rules about their contacts as member of a cabinet with the judicial world en their financial situation, bearing in mind article 155 of the Judicial code. This article defines that a magistrate can’t accept salaried functions of a government, unless he exercises that function without payment and except in incompatible cases determined by law.

¹⁹ It is customary that the Prosecutors Office gives advice in several civil matters (art. 764-766 Judicial Code.).

7. Current government disregards the advice of the High Council of Justice

Despite the aforementioned recommendations of the High Council of Justice we determine that in Belgium the mechanism of secondments to all ministerial cabinets still is applied. Very recently, in February 2012, the first Minister Elio Di Rupo was questioned about that in Parliament.

Current occasion was the secondment of three magistrates on cabinets of the new government. Two of them working on other cabinets than the ministerial cabinet of the Minister of Justice. In latter cases, it concerns the General Prosecutor of Liège, Cédric Visart de Bocarmé, who works with the Minister of Home Affairs Joëlle Milquet (cdH) and Frank Schuermans of the General Prosecutors Office of Ghent, who is posted to the Minister of Economical Affairs, Johan Vande Lanotte (spa).

Although posted to a ministerial cabinet (part of the Executive), the magistrate stays both statutory and deontological a “magistrate” and in principle will regain his old function after the secondment.

Although since 1996 appointments were objectified through the High Council of Justice, one can determine that magistrates after their return often are nominated in very prestigious functions. The border between magistrature and politics shows its edges.

8. De lege ferenda

The attempts up to now to diminish the importance of posted magistrates on ministerial cabinets, seem to yield few tangible results.

Have the habits of the Executive already changed in this area? We keep finding members of the Prosecutors Office within the staff functions of the ministerial cabinets. Some may think that this is an excellent case, because this allows the minister to be optimally informed about the judicial reality²⁰.

This argument isn't really pertinent considering this information is very fragmented, because the magistrate only speaks in his own name. Moreover this argument is only applicable in

²⁰ MARCHANDISE, Thierry, 'Le ministère public et le politique: ordres et désordres' in "Justice et politique: je t'aime, moi non plus...", Larcier, 2009, 104-105.

case of a magistrate is posted to a cabinet of the Minister of Justice and this isn't the case for a secondment to other ministerial cabinets.

Nevertheless a magistrate has a very delicate function. He represents indeed the social interest and he is serving society. So it is crucial he doesn't surround himself with any flair of partiality. Justice must not only be done, but must also be seen to be done.

Purely spoken about the intrinsic quality it is right that the magistrate can offer a serious value concerning the making of legislation and because of his practical experience he can relatively quickly estimate certain political proposals in the field.

The question arises if this offsets against the crucial principle of independence. It is logical that the citizen, who has no view on the functioning of a ministerial cabinet, considers this as 'nepotism'.

Critically spoken, the judicial practical experience must not necessarily be recruited only from the magistrature. Also lawyers, Ph. D.'s and professors from the academical world can offer a good alternative.

Our recommendations

1. Article 327 of the Judicial code must be modified in a way that secondments of members of the Prosecutors Office to ministerial cabinets, other than that of Justice, must be prohibited and that the Council of General Prosecutors (in stead of the concerned General Prosecutor) gives a homonymous advice for secondments of members of the Prosecutors Office to the cabinet of Justice.
2. It is true that in the Belgian law and order, within the Executive, the Minister of Justice occupies a monopoly position with respect to contacts with the Prosecutors Office. The relations between the Minister of Justice and the Prosecutors Office must go through the usual hierarchical way and according to a clear, transparent, written (f.e. also electronic communication) and traceable procedure, so afterwards there can't arise a discussion about the nature and the target of it.

Urgency is in principle no reason to deviate from, but a certain suppleness is in that case acceptable.

Nevertheless it is necessary, despite the circumstances, that every intervention can be traced in terms of ‘nature and target’²¹.

3. A secondment should be limited to one reign. Thus the political label is limited in time.
4. It is recommended not to let magistrates return to their usual Prosecutors Offices but to employ them in supporting services (f.e. the supporting service of the Council of General Prosecutors of within the Service of Criminal Policy of the ministry).
5. There should be legal rules (at least deontological ones) concerning the statute of a posted Public Prosecutor.
6. There also should be provided that the magistrate after his return should ‘detoxify’ politically so he shouldn’t candidate for a managerial function within the Prosecutors Office. In this way the political affinity of the magistrate after a certain amount of time will ‘soften’. Thus the citizen won’t feel affected in his right to a (subjective and objective) impartial magistrate.

C. Conclusion

There is no codification of the ethical rules in Belgium. Therefore deontology is approached on a casuistic manner. Belgium follows the evolution to positive rules of conduct, that must justify the confidence of the citizen in justice. The ethics leave the premises of the prohibition, and moves into the realm of the recommendations.

Codification of written and, mainly, unwritten ethical standards has both its advantages and disadvantages (*supra*). The biggest disadvantage will undoubtedly be the uncertainty among the magistrates. New and concrete situations will invariably lead to a difficult balancing between many interests, which undoubtedly often leads to misconceptions and bad choices. One must be careful not to be sanctioned.

Some situations are so common that one does not know if they are ethically approved. Similarly, the political secondment of prosecutors to ministerial cabinets.

²¹ See the discussion ‘case study: Fortisgate’ and the recommendations of the High Council of Justice in their report.

This secondment is legally provided in article 327,3° of the Judicial code. Nevertheless there is only one big problem: the posted magistrates have to play a dual role because they work in ministerial cabinets and therefore exercise a political function, while on the other hand they are part of a corps that rely on its independence as judiciary²². This blending of powers seems contrary to the ideology of the ‘trias politica’.

A posted magistrate can experience a conflict between on the one hand the ‘deontology of magistrates’ that obliges him inter alia to independence, discretion and objective and subjective impartiality²³ and on the other hand to the habits and duties that applies to the personal employees of the minister (inter alia the duty of loyalty towards the political points of view of the minister, if necessary of its political party, the contacts that result from the public character of the function).

The displaced magistrates of the Public Prosecutors Office are confronted with incompatible loyalties and practice de facto political functions, as functions on a cabinet are political and no officials functions.

The fact that a magistrate who was posted in such a way fulfills a role that is socially very difficult and delicate, becomes apparent of *Fortisgate*, that late 2008 provided for a big commotion in the national and international press and even lead to the dismissal of the government.

The attempts up to now to diminish the importance of posted magistrates on ministerial cabinets, seem to yield few tangible results. We keep finding members of the Prosecutors Office within the staff functions of the ministerial cabinets. Some may think that this is a excellent case, because this allows the minister to be optimal informed about the judicial reality²⁴.

This argument isn’t really pertinent considering this information is very fragmented, because the magistrate only speaks in his own name. Moreover this argument is only applicable in

²² STEVENS, Jo, ‘Justitie in beweging krijgen’ in VAN RANSBEECK, R. “De toekomst van de Belgische Rechterlijke orde”, 93.

²³ Article 6.1 EVRM: right to a fair trial.

²⁴ MARCHANDISE, Thierry, ‘Le ministère public et le politique: ordres et désordres’ in “Justice et politique: je t’aime, moi non plus...”, Larcier, 2009, 104-105.

case of a magistrate is posted to a cabinet of the Minister of Justice and this isn't the case for a secondment to other ministerial cabinets.

We conclude this contribution with following recommendations:

1. Article 327 of the Judicial code must be modified in a way that secondments of members of the Prosecutors Office to ministerial cabinets, other than that of Justice, must be prohibited and that the Council of General Prosecutors (instead of the concerned General Prosecutor) gives a homonymous advice for secondments of members of the Prosecutors Office to the cabinet of Justice.
2. It is true that in the Belgian law and order, within the Executive, the Minister of Justice occupies a monopoly position with respect to contacts with the Prosecutors Office. The relations between the Minister of Justice and het Prosecutors Office must go through the usual hierarchical way and according to a clear, transparent, written (f.e. also electronic communication) and traceable procedure, so afterwards there can't arise a discussion about the nature and the target of it.

Urgency is in principle no reason to deviate from, but a certain suppleness is in that case acceptable.

Nevertheless it is necessary, despite the circumstances, that every intervention can be traced in terms of 'nature and target'²⁵.

3. A secondment should be limited to one reign. Thus the political label is limited in time.
4. It is recommended not to let magistrates return to their usual Prosecutors Offices but to employ them in supporting services (f.e. the supporting service of the Council of General Prosecutors of within the Service of Criminal Policy of the ministry).
5. There should be legal rules (at least deontological ones) concerning the statute of a posted Public Prosecutor.
6. There also should be provided that the magistrate after his return should 'detoxify' politically so he shouldn't candidate for a managerial function within the Prosecutors

²⁵ See the discussion 'case study: Fortisgate' and the recommendations of the High Council of Justice in their report.

Office. In this way the political affinity of the magistrate after a certain amount of time will 'soften'. Thus the citizen won't feel affected in his right to a (subjective and objective) impartial magistrate.

It is up to the High Council of Justice in association with the General Prosecutors and the Minister of Justice to satisfy these concerns and ambiguities and to provide in a deontological undisputed statute of a posted magistrate of the Public Prosecutors Office.

The solutions are provided, it only takes the will and political courage to work this out ...

BIBLIOGRAPHY

Legislation

Article 6.1 European convention on Human Rights (Right to a fair trial)

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 151 §1 of the Constitution

“§1. Judges are independent in their judicial competences. The public Prosecutors Office is independent in individual detection nevertheless the right of the competent minister to order prosecution and to capture the binding guidelines of the criminal policy, including the policy of detection and prosecution”.

Doctrine

DERIEMAECCKER, X., LONDERS, G., 'Deontologie en tucht', in *Statuut en deontologie van de magistratuur*, Brugge, Die Keure, 311-312;

KRINGS, E., “Plichten en dienstbaarheden van de leden van de rechterlijke macht”, *R.W.* 1988-89, 169;

LAMON, H., Een nieuwe deontologie voor magistraten?, *Juristenkrant* 2008, afl. 13, 17;

LONDERS, G., De tucht en de deontologie van de magistratuur, in LUST, S., LUYPAERS, P. (eds.), *Tucht en deontologie. (In)effectiviteit van het tuchtrecht ter handhaving van de waardigheid van het ambt.*, Die Keure, Brugge, 2007, 340-344;

MARCHANDISE, T., ‘Le ministère public et le politique: orders et désordres’ in *Justice et politique: je t’aime, moi non plus...*, l’association syndicale des magistrats, larcier, 2009, 137

PONSAERS, P., VERHAGE, A., BEYENS, K., Controle op politie en justitie: een lappendeken met weinig samenhang, Orde van de dag 2011, afl. 55, 10-11;

VAN RANSBEECK, Raf (ed.), De toekomst van de Belgische rechterlijke orde, die keure, 2009, 136 p.

Advices and reports

<http://www.csj.be/doc/divers/deontologie.pdf>

“Avis n° 3 du CCJE à l'attention du comité des ministres du Conseil de l'Europe sur les principes et règles régissant les impératifs professionnels applicables aux juges et en particulier la déontologie, les comportements incompatibles et l'impartialité”
www.coe.int

“The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group of Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002”
http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

High Council of Justice, report about the special investigation to the function of the judicial order, on the occasion of the Fortis affair, approved by the General council on 16 december 2009, 68 p.

Judicial Ethics – Report 2009-2010, www.encj.eu, 15 p.

Opinion N°3 (2008) of het Consultative Council of European Prosecutors on “the role of prosecution services outside the criminal law field”, adopted by the CCPE at its 3rd plenary meeting (Strasbourg, 15-17 October 2008), 11 p.

“Positieve deontologie voor magistraten: een zoektocht naar maatschappelijke relevantie” in Freddy Evers en Pierre Lefranc, ‘kiezen tussen recht en rechtvaardigheid’.

Commissie voor de justitie van woensdag 29 februari 2012, interpellaties van mevrouw Sophie De Wit, Stefaan Van Hecke en Bert Schoofs over “de benoeming van magistraten op kabinetten”, 7 p.

Parlementaire onderzoekscommissie Fortis, DOC 52 1711/007, p. 70-73