

The Judiciary

General Principles

General⁽¹⁾

In a totalitarian State all the powers are concentrated in the hands of a single person or institution. In a constitutional State, on the other hand, the missions of the State (the Constitution talks of powers) are entrusted to different institutions. This is the principle of the separation of powers: the legislative, executive and judicial powers are independent but must nevertheless work together in a system of checks and balances. The State cannot work without this cooperation and these checks and balances.

A balance of power thus arises: the different powers of the State maintain an equilibrium between themselves. The constitutional State is thus aimed at avoiding abuses of power.

What is the judiciary?

According to article 40 of the Constitution, the judiciary (the judicial power) consists of the courts and tribunals. This is the judiciary in the organic sense of the term. However, the concept of judiciary can also be interpreted in the functional sense, and in this case, concerns all bodies which exercise a jurisdictional function, such as the Constitutional Court and the administrative courts, the main one being the Council of State, Administrative Litigation Division.

Judges have an essential role to play in society: they settle conflicts between citizens and in certain cases between the State and citizens. They punish offenders on the basis of written and unwritten law.

The organisation of the judiciary (in the organic sense)

» The jurisdiction of courts is limited

In space (territoriality)

Each court only has competence for a certain jurisdiction. For example: the Justice of the Peace at the canton level, the Court of First Instance at the district level.

In relation to the nature of the dispute

The law is subdivided into several major branches: civil law, criminal law, business law and social law. The division of the courts to a large extent follows the subdivisions of the law.

Each court only has competence for litigation in a specific area of law: this is called the material competence of a court (for example the correctional courts on the criminal level, the labour courts on the social level, etc).

» Distinction between the State Prosecutors and the judges of the bench

The state prosecutor, also called the public prosecutor, has the task of prosecuting people for crimes. The members of this body are appointed and dismissed by the King. The public prosecutor is independent in the exercise of individual investigations and actions in law.

The judges of the bench consist of judges and counsel of the various courts (the "bench").

» Pyramid structure

To avoid large discrepancies in the interpretation and application of legislation by the different courts, the judiciary has a pyramid structure. Actions are brought before the lower courts. In appeal, the judgments of these courts may be changed by a smaller number of higher courts. Further still, the supreme court of appeal is the Court of Cassation.

The independence of the judiciary

In order to be able to fulfil their role properly, judges must be able to act in complete independence. To this end the Constitution specifies the following.

» Judges are appointed for life (art. 152 of the Constitution)

The career of a judge may only be ended for reasons of health or because he reaches retirement age. The Judicial Code reserves the right to impose "major penalties", including dismissal, for specific courts - disciplinary courts.

1 This sheet should be read together with information sheet 22: The Judiciary, Organisation

» Access to the judiciary and appointment of the prosecutors

Role of the High Council of Justice

To ensure an objective selection process, access to this profession depends on passing an examination organised by the High Council of the Judiciary. There are four different examinations, in which candidates may take part depending on their previous experience: the competitive examination for admission to the judicial traineeship, the professional aptitude examination, the oral assessment examination, and the examination giving access to the position of deputy judge and deputy adviser.

The justices of the Peace, the justices of courts and of the Court of Cassation and the (first) presiding justices of the courts shall be appointed by the King (= the government) on reasoned submission of the Nomination and Appointment Commissions of the High Council of Justice.

The High Council of Justice was set up in 1999 in order to:

- objectivize the appointment and promotion of magistrates;
- introduce external control on the judiciary.

The High Council of Justice competences are stipulated in the article 151 of the Constitution. Some of those competences are: the submission of candidates for an appointment as judge, the access to the magistrature, the good working of the judiciary.

» Judges are irrevocable (art. 152 of the Constitution)

Neither the government nor Parliament may dismiss judges from their positions. Only the judiciary itself, (other judges), may decide that a judge must be dismissed from his position, for example for misconduct.

» Judges cannot be moved (art. 152 of the Constitution)

If the government could require a judge to perform his duties in another area without his consent (for example in Brussels instead of Antwerp) it would be an important tool for applying pressure. The constitutioner wanted to avoid such a situation. Thus a judge cannot be moved without his consent.

» Remuneration (art. 154 of the Constitution)

The remuneration of the members of the judiciary order is fixed by the law, i.e. by the legislative and not by the executive power. This provision also avoids any pressure on the part of the government.

» No other duties (art. 155 of the Constitution)

Judges may not accept any other salaried position of the government. This provision is to avoid judges being able to be influenced. This rule may be departed from when it concerns a teaching role (lecturer, assistant, etc).

Principles aimed at protecting the citizen

Nobody may evade the court assigned to him by virtue of the law, i.e. the court assigned to him by virtue of the general rules of allocation (territorial and material)⁽²⁾. All people in an identical position must be judged by the same courts.

The Constitution also prohibits the creation of extraordinary courts or committees under any name⁽³⁾. The constitutioner wanted to avoid the creation of ad hoc courts judging certain cases.

» Court hearings are public (art. 148 of the Constitution)

The reasons for this article are obvious: the public may attend hearings and thus exercise a certain control on what happens there. Only in the event of a danger to public order or public morals may the court decide that the public is not to be admitted. The judgements and rulings are always pronounced in public hearings (art. 149 of the Constitution).

» Judgements and rulings must be reasoned (art. 149 of the Constitution)

Any judicial decision must be reasoned. This means that judges must specify in their judgements and rulings the reasons for which they have taken a decision. They should answer all the demands and means of defence put forward by the parties in the case under penalty of seeing the Court of Cassation (the Supreme Court of Appeal) quash the judgement or ruling.

» The principle of double instance

In order to protect the parties in question against errors or arbitrariness, every case may be entirely re-examined in appeal by different judges. There are some exceptions to this principle. Appeal in Cassation is not a third instance as the Court of Cassation does not examine the substance of the case (= the facts) but only in law (correct application of the legal rules).

» The judge decides the law for the parties in question

The decisions of the courts and tribunals only apply to the parties in question and are not of a general scope.

More information on the judiciary is available on the website of the Justice Federal Public Service: <http://justice.belgium.be/fr>

2 Article 13 of the Constitution

3 Article 146 of the Constitution