

STATUS, AUTONOMY and SELF GOVERNMENT OF PUBLIC PROSECUTION: MODELS and ISSUES at NATIONAL LEVEL

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This contribution was made for the FIRENZE conference where some public prosecutors from different European countries were asked to talk in 20 minutes about the subject below.

While I was writing my oral contribution, I read an excellent article written by a scholar Julie ALIX in a book supervised by Christine LAZERGES : Public prosecutors figuresⁱ.

In this article, I have learned that public prosecutors are part of the Judicial system since the 14th century.

Our status comes from The French Constitution of the 4th of October 1958 and the Act of the 22nd of December of 1958ⁱⁱ. Public Prosecutors are members of the Judiciary which is an authority and not a power in our constitutionⁱⁱⁱ. He ensures, therefore as the judges, that individual freedoms are preserved. But even if it is part of the judicial system, he has not the same status as the judges. This status is flawed / defective and furthermore it has room for improvement. Julie ALIX uses the word: hybrid status. He is kind of self-governed but not independent.

Public prosecutors (I will continue to speak of prosecutor) are placed under the supervision and control of their superiors and under the authority of the minister of justice. He has one foot in the judicial system and another one in the executive power.

By statute and contrary to judges (sitting magistrates or magistrates of the bench), their career and discipline depend on the executive power (for judges those questions fall within the only competence of the CSM = Conseil supérieur de la magistrature The Higher Council of the Judicial system).

Facing this equilibrium between these two powers and pushed by rulings by European courts, reforms were led (legislative^{iv} and constitutional^v) and tried to tip the balance toward the judicial system.

But none of these reforms were led to the end and the French public prosecutors are still facing this hybrid status.

Just to remind you, the French prosecutor's office (le parquet) is governed by those principles:

The hierarchy links = subordination in the chain of command (we will see this in more details in a few moments)

The indivisibility of the prosecutor's office = the members of the prosecutor's office are considered to embody one single person since they act in the name of the prosecution office as a whole. Therefore, members of the Prosecutor's Office can replace each other mutually, including during the judgment phase of a case (which is not the case for judges).

The principle of prosecutorial discretion = a prosecutor can decide whether he pursues or dismisses a case on other grounds than legal ones of the offence is or not constituted (contrary to Italy)^{vi}.

Concerning training

One of the reasons, our status may be seen as flawed is the training. (to me It's a strength)

Prosecutors are trained at the French National School for the judiciary as the judges. They have, until they choose their first position, the same training. When you finish the school, you are first and foremost a magistrate. They have the same oath. During the training, they must be as good judges as good prosecutor. And it is part of another principle of the judicial system in France: the unity of the judicial system^{vii}. You can change position from judge to prosecutor or prosecutor to judge as you like. (with a little training to help you to upgrade)

The appointments

It's the sinews of war: to whom do you owe your nomination, who do you have to please to get a good position...

Prosecutors can be moved without their consent. They do not have the security of tenure as the judges^{viii}.

It is rare but legal. In practice, the person will be asked to choose a new position, to transfer to a new tribunal.

In practice, those appointments result from a dialog between a special branch from the minister of justice and The Higher Council of the Judiciary.

The prosecutor division of The Higher Council of the Judiciary issues a simple notice/opinion on the appointment (it has to be a compliant notice/opinion for the judges). Since 2008, even if there were no changes in the law, the different minister of justice solemnly committed themselves not to overrule those simple notice.

It is not a problem for most of the appointments. It is not the same for the higher ranks of public prosecutor's office: the general prosecutor (court of appeal) and the prosecutor of prestigious and specific Court as Paris, Marseille and other big cities in France. For those appointments, the executive has the power. It has to be done during a Minister Counsel and without any intervention of The Higher Council of the Judiciary. Executive power decision only

Inevitably, with this type of appointments, some Prosecutor or General Prosecutor may feel compelled to please the one who has the power... Not long ago, when it was time to replace the Prosecutor of Paris (former François MOLINS), the former Prime Minister (Edouard PHILIPPE) said in public that he wanted a public prosecutor "at ease" with the majority in power^{ix}. And it was also said in several newspapers that MACRON himself had erased 3 names of prosecutors that were proposed at the beginning...

Concerning disciplinary proceeding

As I said a prosecutor has not the security of tenure, he can be removed aside from any disciplinary procedure.

The disciplinary procedure is in the hand of The Higher Council of the Judiciary, the prosecutor division. The disciplinary council issues an opinion that is transferred to the minister of justice. It is the Minister of justice (the keeper of the seals) who takes the final decision. The only safeguard is that he cannot pronounce a severer sanction than the one proposed by the disciplinary council.

The subornation in the chain of command

As soon as I said this, I have to add another particularity: you have this principle, but you also have a counterparty: “à l’audience la parole du parquetier est libre” – during a public hearing /in a courtroom a prosecutor benefit from the freedom of speech^x.

In practice, the Minister of justice provides circular (general instruction on prosecution for example on domestic abuses, drug traffic...) that are adapted locally by the Procureur.

The minister of justice still has the right to give individual instruction, but it has to be written and it must be put and registered in the file.

In the decision-making, the prosecutor is autonomous. He can decide what he wants as long as he respects the local policy of prosecution made by his chief. But the autonomy in the decision-making is not explicitly written. It results from a jurisprudence (case law) by the Court of cassation.

In practice, we have seen in some big prosecution service, some Procureurs took away this autonomy by taking away cases, imposing pursuit or a dismissal on a case and even ask what they were going to say at the public hearing.

The subordination in the chain of command is also used by the General prosecutor (in the court of appeal). He has the power to uphold a dismissal decision; in fact, it is called a hierarchical remedy/recourse.

You also have (and it made the news headlines recently) what we called “les remontées d’informations” = feedback on cases which normally concerns criminal cases or mediatic cases or cases involving personalities^{xi}.

You inform the general prosecutor who informs the minister of justice so that if deputies or journalist interrogates him, he has information.

The subordination in the chain of command is a major problem in our status because it is linked with another principle: The principle of prosecutorial discretion

Anyone can think, rightly or wrongly, that the executive is behind either a prosecution decision or a dismissal.

Before ending my presentation with European judgements on our status. I would like to remind you also that our field/scope of competences is much larger than most of our European colleagues. We intervene mostly on criminal cases but also on civil status, we can take away children from their family, we give our opinion on psychiatric detention or receivership...

Those are the main points raised by our hybrid status, but our status is also analysed by the European courts

Consequences on European courts:

This flawed status / hybrid is also visible on European Court judgements.

The European Court on Human Rights points for decades that the French prosecutor lacks independence and cannot be considered as judge – a judiciary authority and therefore cannot be in charge of several powers given normally to judges^{xii}. Those rulings helped changing the law notably on the custody.

Ironically and contrary to this jurisprudence, the CJUE (Court of justice of European Union) ruled in December 2019 that the French public prosecutor's office (as the Belgian and the Swedish prosecutor's office) satisfies the requirement of the independence of the "issuing judicial authority" for issuing a European arrest warrant^{xiii}.

So far, and contrary to the common ground on the matter ^{xiv}there is no one single government right or left (or the one in power as we speak) which went through constitutional reform to let the public prosecutor be independent as the judges^{xv}. Each time, it was the public prosecutor status that stumbled the reforms. When they are in power, political parties realised that it is a nice thing to keep an eye on policy prosecution and to have the feedbacks.

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ⁱ Figures du parquet, sous la direction de Christine Lazerges aux éditions PUF

ⁱⁱ Ord. N°58-1270

https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000339259?tab_selection=all&searchField=ALL&query=ordonnance+58-1270&page=1&init=true

ⁱⁱⁱ Article 5

^{iv} Loi n°2013-669 du 25/07/2013

https://www.legifrance.gouv.fr/loda/id/JORFTEXT000027751362?tab_selection=all&searchField=ALL&query=2013-669&page=1&init=true

^v The constitutionnal revision bill of 23 july 2008

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- vi Code de procédure pénale Article 40-1
- vii Article 1 Ord n°58-1270
- viii Article 64 Constitution 04/10/1958
<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000571356/2019-07-01/>
- ix <http://www.syndicat-magistrature.org/Le-parquet-selon-l-executif-en-ligne-et-a-l-aise-avec-le-pouvoir-mais.html>
- x Code de procédure pénal article 33
https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006574915?codeTitle=Code+de+proc%C3%A9dure+p%C3%A9nale#LEGISCTA000006151873
- xi Circulaire de la DACG du 31/01/2014
https://www.legifrance.gouv.fr/circulaire/id/37952?tab_selection=all&searchField=ALL&query=JUSD1402885C&page=1&init=true
- xii CEDH 29/03/2010 Medvedyev C. France n°3394/03
<http://hudoc.echr.coe.int/fre?i=001-97979>
- xiii <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190156fr.pdf>
- xiv Avis du CSM 15/09 /20 conseil-sup%C3%A9rieur-magistrature.fr ; Note du 02/09/20 de la Conférence des premiers présidents au CSM ; article written after the conference :Clarifier le statut du parquet pour restaurer la confiance par Amaury BOUSQUET et Sélim BRIHI in Dalloz Actualités : dalloz-actualite.fr
- xv The last one was : Projet de loi constitutionnelle n°911 which was registered on the 8th of may 2018 : assemblee-nationale.fr https://www.assemblee-nationale.fr/dyn/15/dossiers/democratie_plus_representative_responsible_efficace