The Prosecutor: Magistrate or Government Agent The Romanian Dilemma

1. A brief historical glance

In fact, the dilemma is not a merely specifically Romanian one, since it is related to the very emergence of the prosecutor's institution as a representative of public prosecution; however, recently, alongside the reform of the Romanian judiciary system, the issue has been recalled into question.

Ever since its regulation as a procedural subject in the criminal procedure codes from the beginning of the 19th century, the position of the Public Ministry and, implicitly, that of the prosecutor have sparked controversy: integrated in the executive power, it would subordinate the exercise of criminal action to the political power, whilst as magistrate, it would break the necessary equality between prosecution and defence[1].

In the organization of the Public Ministry, the Romanian legislation followed the Latin model (France, Italy), according to which prosecutors are considered magistrates, just like the judges, but having a different status from that of the judges, enjoying only stability of the position held, but not immutability.

In other European countries, prosecutors are considered to be part of the executive power and may be dismissed by the Minister of Justice, who, in some countries, may intervene in the course of prior investigations[2].

The Constitution of 1886 contains only general provisions regarding the judicial power, but Law No. 982/1865 on the judicial organization recognized the status of magistrates of the members of any rank of the Public Ministry.

The Public Ministry was headed by general prosecutors attached to the Court of Cassation and to each of the Courts of Appeal, appointed by the King, at the proposal of the Minister of Justice, who was also the "supreme head" of justice and the Public Ministry (Art. 74 and Art. 137).

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[1] For more information, see I. Tanoviceanu, *Tratat de drept și procedura penală,* 2nd Edition, Vol. IV, Curierul Judiciar Publishing House, Bucharest, 1924, pp. 131-146.

[2] Sophie Durbecq, Perrine Lannelongue, Marion Metellus, Des parquets d'Europe à un parquet européen- www.ejtn.eu/.../THEMIS%20written%20paper%20-%20Fran...; Comparative analysis on the appointment of senior prosecutors in Europe, according to a comparative study conducted by the Ministry of Justice in 2004, published on the Ministry of Justice's website at: https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F

The Constitution of 1923, considered by some to be the most liberal constitution of Romania, included a whole chapter devoted to the judiciary (Chapter IV, Title III), but did not refer to the Public Ministry; however, the 1924 Judicial Organization Act assimilated the prosecutors to the magistrates, recognizing their stability on the position held, without recognizing their immutability.

Given that the Minister of Justice subordinated both the courts and the prosecutor's offices, obviously, one cannot speak of independent justice. Regarding the independence of prosecutors in the exercise of their judicial duties, over time, this was somewhat illusory.

The Constitution of 1952 contained, in Chapter 6, regulations on "Courts and Prosecutor's Offices"[3], justice being performed through the Supreme Court and the lower courts, while the Prosecutor's Office exercised the oversight of the law enforcement by the other state bodies, including the courts. Regarding the independence of prosecutors in the exercise of their judicial duties, over time, this was somewhat illusory.

Law no. 6/1952 for the establishment and organization of the Public Prosecutor's Office[4] removed from the legislative texts the phrase "Public Ministry", replacing it with the term "prosecutor", and the Public Prosecutor's Office becomes the Prosecutor's Office or Procuratorate.

The new institution, created following the Soviet model, was a body subordinated to the Grand National Assembly (the Parliament) and, in the interval between its sessions, to the Council of Ministers. The Prosecutor General was appointed by the Grand National Assembly, for a term of 5 years.

In this system, the prosecution exercised wider powers than those related to the judicial activity, supervising and ensuring the observance of the laws by the local bodies of state power, the central and local authorities of the state administration, the state institutions, organizations and enterprises, and the cooperative organizations and enterprises (Art. 1 of Law no. 6/1952 on the establishment and organization of the Prosecutor's Office).

The Constitution of 1965[5] provided a distinct title to the Prosecutor's Office (Title VII), person responsible with overseeing the activity of criminal prosecution bodies and punishment enforcement bodies, "to see, under the law, to the observance of lawfulness, the defence of the socialist order, the legitimate rights and interests of socialist organizations, of other legal entities, as well as of the citizens".

The Prosecutor General, elected by the Grand National Assembly during its first session, for its entire parliamentary term, was liable to the Assembly for the activity of the Prosecutor's Office. Law no. 60/1968 on the organization and functioning of the Prosecutor's Office[6] presented in detail these attributions and competencies.

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[3] *Official Bulletin of the Grand National Assembly of the People's Republic of Romania, no. 1 of 27 September 1952.*

[4] *Official Bulletin, no. 8 of 4 March 1953.*

[5] *Official Bulletin, no. 65 of 29 October 1986.*

[6] *Official Bulletin,* no. 169 of 27 December 1968.

Following the Soviet model, prosecution thus appeared as a fourth category of state bodies, distinct from the executive and judicial powers, and yet subordinate to the legislature. In fact, the independence of the Procuratorate was illusory, with it being a mere instrument of the State-Party[7].

The status of the prosecutors was, in fact, not that of magistrate, but of state agent, the control of their activity, just like in the case of judges, being exercised by the Minister of Justice.

2. The current regulation and the functional competence of the Public Ministry

The Constitution of 1991 brings once again the magistrature within the judiciary, the Public Ministry being enshrined in Chapter 6, Section II of the Constitution.

In its judicial activity, the Public Ministry represents the general interests of society and defends the legal order, as well as the rights and freedoms of citizens.

The Public Ministry shall discharge its powers through Public Prosecutors, constituted into Public Prosecutor's Offices, in accordance with the law (Art. 130 of the Constitution).

If judges are independent and subject only to the law (Art. 123 para. (2) of the Constitution), the Public Prosecutors shall carry their activity in accordance with the principle of legality, impartiality and *hierarchical control, under the authority of the Minister of Justice* (Art. 131 of the Constitution).

The control consists in verifying, through the Judicial Inspection, a body functioning next to the Superior Council of Magistracy, the managerial efficiency, the manner in which prosecutors perform their duties and in which are conducted the relations with the persons seeking justice and with others involved in the activities related to the prosecutor's offices.

The control cannot concern the measures ordered by the prosecutor during the course of the criminal investigation, the Minister of Justice being unable to decide upon the settlement of cases.

The law no. 429/2003 on the revision of the Romanian Constitution does not change the status of prosecutors. Law no. 304/2004 on judicial organization was changed, in the 15 years since its entry into force, 27 times, of which 20 times by means of Government Emergency Ordinances, which illustrates not only legislative instability, but also the excessive intervention of the executive in matters of justice, through Emergency Ordinances, often motivated by a political interest, sometimes with an impact upon the functioning of the Public Ministry.

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[7] T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar, Vol. II,* Lumina Lex Publishing House, 1998, p. 357.

Law no. 303/2004 on the status of judges and prosecutors defines magistracy as the judicial activity *performed by judges* in view of accomplishing justice and *by prosecutors* in view of protecting the general interests of society, the rule of the law and the rights and freedoms of citizens.

The European Court of Human Rights, in the cases concerning Romania, considered that prosecutors, acting under the authority of the Minister of Justice and being hierarchically subordinated to the General Prosecutor of the Republic, cannot be considered as independent magistrates, and, therefore, that their power to order the preventive arrest (detention) constitutes a violation of Art. 5 para. (3) of the European Convention[8].

As a result, a new actor appeared within the criminal trial: the judge of rights and freedoms.

First, the previous Criminal Procedure Code was amended by means of Law no. 281/2003, and then the new Criminal Procedure Code[9], entered into force on February 1, 2014, stipulated the separation of judicial functions, providing that in the exercise of the prosecution function, the prosecutor and the criminal investigation bodies collect the evidence necessary to establish whether or not there are grounds for referral to the court, and that the judge of rights and freedoms decides on the acts and measures during the criminal investigation which restrict the fundamental rights and freedoms of the person.

The judge magistrates are appointed by the President of Romania and are irremovable, while the prosecutor magistrates are appointed by the President of Romania and enjoy only stability of the position held. The Public Ministry performs its duties under the law and is headed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Initially, Law no. 303/2004 on the status of magistrates provided (Art. 50 para. (1)) that the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, their prime deputy and the latter's deputy, the Prosecutor General of the National Anticorruption Prosecutor's Office, their deputies, the chief prosecutors of these Prosecutor's Offices, as well as the chief prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism and their deputies are appointed by the President of Romania, *at the proposal of the Superior Council of Magistracy*, upon *the recommendation of the Minister of Justice*, from among prosecutors who have a minimum seniority of 18 years in the position of judge or prosecutor, for a period of 5 years, with the possibility of being reinvested only once.

In fact, the leading positions within the Prosecutor's Office attached to the High Court of Cassation were occupied by persons appointed by the President of Romania *at the proposal of the Superior Council of Magistracy*, just like the president, vice-president and the section presidents of the High Court of Cassation and Justice.

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[8] ECHR, judgment from 3/06/2003, case *Pantea v. Romania,* para. (236); ECHR, judgment from 26/04/2007, case *Samoilă şi Cionca v. Romania,* para. (45-53).

[9] Published in the *Official Journal, Part* no. 486 of 15 July 2014.

In 2005, by means of Law no. 247/2005, the above mentioned provisions were modified in the sense that, in the foregoing positions, the President of Romania may appoint, *at the proposal of the Minister of Justice and upon the approval of the Superior Council of Magistracy*, prosecutors who have a minimum seniority of 10 years in the position of judge or prosecutor, for a period of 3 years, with the possibility of being reinvested only once.

The President of Romania may refuse only in a reasoned form the appointment into the aforementioned leading positions, notifying to the public the reasons for their refusal.

This provision was not subject to change by means of the new amendments to the laws of justice, although it has been recommended, by the CVM report of 2016, the adoption of transparent and merit-based selection procedures as a way to establish strong leadership, to avoid political interference in the appointments to senior positions and to support the independence of the judiciary. Political interference in senior appointments is recognised as a key risk factor with regard to judicial independence[10].

The involvement of the executive (the Minister of Justice and the President) in the appointments up to the level of section presidents of the two autonomous departments within the Prosecutor's Office attached to the High Court of Cassation and Justice resulted in an excessive politicization of the process of appointing prosecutors in these positions.

Prosecutors working in prosecution offices attached to the other courts perform their functions in accordance with the law, respect and protect human dignity and defend the rights of the individual. Prosecution offices are independent in relations with the courts, as well as with other public authorities.

Within the Prosecutor's Office attached to the High Court of Cassation and Justice was established, by means of Government Emergency Ordinance no. 7/2005, the Directorate for the Investigation of Organized Crime and Terrorism Offenses (DIICOT), as a specialized structure in the fight against organized crime and terrorism.

In 2002, by means of Emergency Ordinance no. 43/2002 of the Government of Romania, the National Anticorruption Directorate (DNA) was established, as an autonomous structure within the Public Ministry, coordinated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, specialized in the fight against corruption, which exercises its attributions throughout the country.

The National Anticorruption Directorate has legal personality and is headed by a chief-prosecutor, assimilated to the prime deputy of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, assisted by two

[10] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Progress in Romania under the Co-operation and Verification Mechanism, {SWD(2016) 16 final}- https://ec.europa.eu/info/sites/info/files/swd-2017-25_en.pdf

deputies, assimilated to the deputy of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

This specialization and autonomy of the Public Ministry, with the consequence of the exclusive material competence to investigate crimes within their jurisdiction under the sanction of the absolute nullity of the procedural acts, dilutes the principle of the uniqueness and indivisibility of the Public Ministry, thus diminishing its effectiveness.

In our opinion, the combat of corruption would be more effective through the unification of the two autonomous directions in one, led by the prime deputy of the Prosecutor General. Such unification would ensure a more efficient use of human resources, thus largely avoiding the necessity to delegate prosecutors from the prosecution offices attached to the courts directly in the structures of the Prosecutor's Office attached to the High Court of Cassation and Justice. Since the delegation is, according to the law, only temporary (for a maximum of 6 months and can be prolonged, with the written consent of the prosecutor, with 6 months at most), it contravenes the principle of stability on the held position and of the specialization of those investigating corruption offenses and/or organized crime. It would also avoid the overlapping of procedural competences, since corruption is, in general, the means by which criminal groups penetrate state structures.

By Law no. 314/2004, the Superior Council of Magistracy was established as a warrant for the independence of the judiciary, an independent body which is subject in its activity only to the law, and its members answer only before the judges and prosecutors who have elected them.

Unfortunately, the Superior Council of Magistracy failed to ensure a real independence of the judiciary, partly due to the division into several professional associations[11] whose opinions do not match, most of the time.

Within the criminal proceeding, the prosecutor is not a party, having the role of a specialized body of the state, that carries out the judicial activity by conducting the criminal investigations or by supervising the criminal investigation carried out by the criminal investigating authorities of the police in order to discover the offenses, identify the criminals and exercise the criminal action with a view to their sanctioning.

The Public Ministry exercises, by means of prosecutors, the following attributions: to carry out criminal prosecution in the cases and under the conditions stipulated by the law; to run and supervise the criminal investigation activity of the criminal police; to notify courts of law for the judgement of criminal cases, according to the law; to exercise civil actions, in the instances stipulated by the law; to participate in court sessions, under the terms of the law; to exercise the legal means against court decisions, under the terms stipulated by the law; to defend the legitimate rights and interests of minors, of persons laid under interdiction, of missing persons and other persons, under the terms of the law; to act in order to prevent and control crime, under the co-ordination of

[11] The Romanian Magistrates Association, the Association of Judges in Romania, the Romanian Judges' Forum, the Romanian Prosecutors' Association

the Minister of Justice, with a view to achieving a global criminal policy of the state; to study the causes that generate or favour crime, to prepare and submit proposals to the Minister of Justice, aimed at eliminating such causes, as well as perfecting the legislation in this field; to check the observance of the law at the places of preventive detention.

The attributions of the Public Ministry are in line with Recommendation (2000) 19 of the Committee of Ministers of the Member States of the Council of Europe on the role of criminal prosecution in the criminal justice system[12].

In solving the cases, the prosecutor is independent, under the conditions stipulated by the law. The prosecutor may appeal to the Superior Council of Magistracy, in the procedure for checking the conduct of judges and prosecutors, the intervention of the hierarchically superior prosecutor, under any form, in carrying out the criminal prosecution or in the adoption of the solution.

The solutions adopted by the prosecutor can be refuted, upon motivation, by the hierarchically superior prosecutor, when they are judged to be illegal, but the order of refusal is subject to the control of the preliminary chamber judge.

3. Reform and political hypocrisy

The modification of Law no. 303/2004 on the status of judges and prosecutors, of Law no. 304/2004 regarding the judicial organization and of Law no. 317/2004 on the Superior Council of Magistracy is a necessity imposed by the evolution of the civil and criminal legislation, which constitutes the main working tool of the judiciary system.

The declaration as unconstitutional of some provisions from these laws and the need to adapt them to the constitutional provisions is felt by the entire judiciary system.

To this end, in 2016, upon the initiative of the Ministry of Justice, a working group was set up, including representatives of the magistrates from the High Court of Cassation and Justice, the Prosecutor's Office attached to the supreme court, and representatives of the magistrates' associations, which tried to find the most effective legislative solutions that could improve the activity and organization of the judiciary.

Proposals to amend the laws of justice were also taken into account in the Technical Report accompanying the Commission's Report to the European Parliament and the Council on the progress made by Romania under the Cooperation and Verification Mechanism and were publicly discussed[13].

The draft for the amendment of the laws of justice was not submitted by the Government to the Parliament, but the parliamentary groups belonging to the ruling coalition took it over as a parliamentary initiative, the draft amendments to these laws

[12] wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)19.

[13] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Progress in Romania under the Co-operation and Verification Mechanism, {SWD(2016) 16 final}- https://ec.europa.eu/info/sites/info/files/swd-2017-25_en.pdf

being subject to parliamentary debate and adopted together with the amendments proposed by the opposition and by bodies pertaining to the judiciary, including magistrates' associations.

The debate was highly politicized, amid a massive misinformation in the media, emerged from civil society groups and a part of the body of magistrates, misinformation that led to street manifestations and claims which were largely not related to the content of the three laws.

A fierce controversy started from the intention to amend Art. 3 of Law no. 303/2004 on the status of magistrates in the sense that: "Prosecutors operate in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice."

It was argued that this change would result in a subordination of prosecutors towards the Minister of Justice and, hence, towards the political factor.

In fact, this provision is nothing more than the reproduction of Art. 132 of the Romanian Constitution. The objection that this would affect the independence of prosecutors is unfounded as long as the "authority of the Minister of Justice" consists only in the control over the managerial efficiency, the manner in which prosecutors perform their duties and in which are conducted the relations with the persons seeking justice and with other state bodies, without being able to intervene directly in the solving of cases like in other countries, such as Denmark, Finland, France, Belgium or Germany[14].

The hierarchical control, materialized in the fact that the solutions adopted by the prosecutor can be refuted upon motivation by the hierarchically superior prosecutor, which currently exists, is attenuated by the fact that even if the hierarchically superior prosecutor to the one who ordered the solution finds at a later stage that the circumstances that warranted the closing of the case did not exist, rescinds the order and issues a new order to resume the criminal investigation; the order shall be subject to confirmation by the Preliminary Chamber Judge, within no more than 3 days, under sanction of nullity.

Equally fierce was the controversy over the authority that will appoint the persons with leading positions at the top of the Public Ministry: the President, the Minister of Justice or the Superior Council of Magistracy.

Although the amendment of the law does not aim to change the current regulation according to which the President of Romania, at the proposal of the Minister of Justice and with the approval of the Superior Council of Magistracy appoints the prosecutors invested in these leading positions, many people saw in the limitation of the President's

[14] Sophie DURBECQ, Perrine LANNELONGUE, Marion METELLUS, Des parquets d'Europe à un parquet européen- www.ejtn.eu/.../THEMIS%20written%20paper%20-%20Fran...; Comparative analysis on the appointment of senior prosecutors in Europe, according to a comparative study conducted by the Ministry of Justice in 2004, published on the Ministry of Justice's website at: https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F

right to refuse, upon motivation, the appointment to leading positions as an attack against the independence of the judiciary.

In fact, this amendment is a correlation of the law with the Constitutional Court's judicial practice, which considered this right of the President to refuse the appointment to certain positions, including that of prime minister, as being constitutional, only if the refusal is made only once, thus avoiding situations of uncertainty and political crisis.

The amendments to be made to Law no. 304/2004 are to establish minimum conditions regarding the traineeship and seniority of judges and prosecutors who can present themselves at the annual competition for promotion to the immediately superior courts or prosecutors' offices.

Thus, those who shall be able to participate in the promotion competition for the immediately higher courts or prosecutors' offices are the judges and prosecutors who received a "very good" rating at the last evaluation, have not been disciplinarily sanctioned in the last 3 years, have actually operated for at least 3 years at the court or prosecution office hierarchically inferior to the one to which they wish to promote and meet the minimum conditions of seniority, namely 7 years seniority in the position of judge at the county court or prosecutor at the prosecutor's office attached to the county court, for promotion to the position of judge at the tribunal and prosecutor at the prosecutor's office attached to the tribunal; 10 years seniority in the position of judge or prosecutor for promotion to the positions of judge at a court of appeal and prosecutor in the prosecutor's office attached to such court of appeal and 18 years seniority as a judge or prosecutor, for promotion to the position of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice.

Prosecutors may be delegated, only upon their consent, only to the courts or prosecutors' offices to which they are entitled to operate according to the acquired professional status.

One is intended is the eradication of the practices that circumvent the current provisions through the delegation of some prosecutors from prosecution offices attached to county courts, without fulfilling the conditions of traineeship and with insufficient seniority, directly within the National Anticorruption Directorate within the Prosecutor's Office attached to the High Court of Cassation and Justice.

The Committee of Ministers of the Member States of the Council of Europe recommends (REC(2000)19 on the role of public prosecution in the criminal justice system) to the Member that, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

In this respect, the amendments provide that "upon motivated request, the judges may be appointed as prosecutors to the prosecutor's offices attached to county courts, and the prosecutors in the position of judge at county courts, by decree of the President of Romania, at the proposal of the Superior Council of Magistracy, upon observance of

the conditions laid down by the law. The proposal for appointment to the position of judge is formulated by the Section for Judges of the Superior Council of Magistracy, with the advisory opinion of the prosecutor's office from which they originate, as well as of the court in which they want to operate, and the proposal for the appointment of the judges in the position of prosecutor is formulated by the Section for Prosecutors of the Superior Council of Magistracy, with the advisory opinion of the court in which they carry our their activity and of the prosecutor's office in which they want to operate in the future."

What is intended to stop the phenomenon of eluding the law; this practice consists in having prosecutors from the prosecutor's offices attached to county courts delegated without the minimum conditions of traineeship at the National Anticorruption Directorate, following a competition, organized after the delegation, who end up being appointed as judges at the High Court of Cassation and Justice, the Criminal Section, without having a single day of practice as judges.

If the provisions of the law will be modified in the sense indicated, the same person will be able to perform successively the function of public prosecutor and that of the judge or vice versa, only starting from the foundation of the profession in question, respectively from the county court or the prosecutor's office attached to the county court.

In the case of Law no. 304/2004 regarding the judicial organization, the amendment that sparked the spirits was the one regarding the transfer of the current section on the investigation of the corruption offenses committed by magistrates from the National Anticorruption Directorate, where it was established by order of the chief prosecutor of this department, to the Prosecutor's Office attached to the High Court of Cassation and Justice, under the subordination of the General Prosecutor, with the chief prosecutor of this department following to be appointed by the Magistrates' Council.

This transfer was considered to be constitutional, being intended to strengthen the independence of judges, as some practices were found that exerted pressure on the judges involved in hearing cases investigated by the National Anticorruption Directorate, through the opening of unjustified criminal investigations, followed by their quashing after the pronouncement by the judge of the decision in the cases already under consideration.

Even though the laws amending the current regulations on the judiciary and the status of magistrates have been returned by the Constitutional Court in the Parliament, the above-mentioned amendments have been considered constitutional, the return to Parliament referring only to a clearer drafting of other amending texts.

As these laws predict, they will not lead to the subordination of the Public Ministry to the executive power, the prosecutors keeping their quality of magistrates with special status within the judicial authority, distinct from the judges. The above-mentioned amendments cannot affect the fight against corruption, and do not limit the competencies of the National Anticorruption Directorate.