The organization, status and powers of the prosecutor's office in France since 1945

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It is a vast subject entrusted to me by the organizers, even limited to the contemporary period, say from 1945 until today. We must begin with fairly simple distinctions relating to the judicial organization in France. As you know, France is characterized by jurisdictional duality, that is to say that there are two types of justice : "judicial justice" and "administrative justice". Where many countries have jurisdictional unity, for example Great-Britain, the United States or Japan, France separates administrative justice which, roughly speaking, deals with disputes involving a public person or a public activity, and judicial justice which focuses on private law and criminal law. The division dates back to the French Revolution, but that is not the subject of my discussion. For more than two centuries, the revolutionary and especially Napoleonic model has been at the heart of the exercise of justice in France, and not only in France : Italy, Germany, Belgium, the Netherlands have been marked by the importation of this French model of jurisdictional duality.

This duality is characterized by differentiated competences (for better or worse) and by a separate jurisdictional organization. Administrative justice includes administrative tribunals, administrative courts of appeal and, at the top, the *Conseil d'État* (not forgetting the specialized administrative courts, for example the *Conseil supérieur de*

la magistrature [CSM] ruling on disciplinary matters)[1]. On the side of judicial justice, in addition to the specialized courts, there is a triple layering : courts of first instance, courts of appeal, Court of Cassation. Judicial justice was for a long time the only one targeted by the 1958 Constitution, which devotes to it a title VIII entitled "On judicial authority". There would be a lot to say about this formula, but I have already given two presentations to the French *École nationale de la magistrature*, and I refer you to their very recent publication in the review *Tribonien*. Until 2008, administrative justice was not mentioned in the Constitution, it is now the case in article 61-1.

Be that as it may, the Constitution of the Fifth Republic is limited, in its four articles 64, 65, 66 and 66-1, with very general principles, subject to what is said of the *Conseil supérieur de la magistrature*, again him, or the prohibition of the death penalty. There is no question of the judicial organization in France or the status of magistrates of the judicial order (and for good reason with regard to this status : article 64, al. 3 of the Constitution refers to a supplementary "organic statute"). At most, we learn in article 65 which deals with the *Conseil supérieur de la magistrature* that the latter are of two types : the judges and the prosecutors. This is the first point on which I would like to insist : the unity of the body of the judiciary in France, it being specified moreover that the members of the administrative jurisdictions acquired this quality only recently (law n° 2012-347 of 12 March 2012 : art. L. 231-1 *Code de la justice administrative*) and not all – the members of the Conseil d'État are not considered as magistrates, because of another so-called functional duality, namely that the Conseil d'État assumes a jurisdictional but also advisory (or administrative) function. In a second step, we will examine, beyond this unit, what are the differences of competence and status between the two types of magistrates, those of the seat and those of the prosecution.

I. A single body of magistrates within the judicial jurisdiction

All magistrates of the judicial order are civil servants of the State, but their status is adjusted to ensure the independence granted to them by article 64, al. 4 of the

[1] The ordinance of December 22, 1958 is silent on this subject and it is the Council of State which came to create a principle from scratch : CE, Ass., July 12, 1969, n ° 72480, *L'Étang*.

Constitution. The flagship text on the subject is the ordinance carrying organic law n° 58-1270 of December 22, 1958, modified on numerous occasions (about thirty times since 1958). The magistrates form an autonomous body of the public service allowing them to escape certain rules of the public service. This is a somewhat technical, but crucial debate : magistrates of the judiciary are not subject to the "general" status of the civil service, they enjoy an "autonomous" status, which is distinguished both a “particular” status (which completes and clarifies the general status) or a “special” status (which departs from the general status). Such an autonomous status exists for three categories of civil servants : in addition to magistrates, the military and the staff of parliamentary assemblies. These are professional magistrates who have embraced the judicial career, and it is they – only them – who will be the subject of this conference (I exclude here magistrates on secondment or local judges for example). They form the “judicial body”, according to the terms of article 1 of the ordinance of December 22, 1958. There are 8,500 magistrates today in France, two-thirds of whom are magistrates of the seat (and two-thirds of them are women).

When we are interested in the French judicial magistracy, we start by highlighting what is common between the magistrates of the seat and the magistrates of the prosecution. Thus, most of them are recruited through the *École nationale de la magistrature* (created in 1970, it succeeds the National Center for Judicial Studies which dates back to 1958) and it is only after of their schooling that each other is assigned to such and such a position according to their rank. During this assignment, all are appointed by decree of the President of the Republic. All take an oath: "I swear to fulfill my functions well and faithfully, to keep the secrecy of the deliberations and to conduct myself in everything like a worthy and loyal magistrate" (article 6 of the ordinance of December 22, 1958)[2]. All are deprived of the right to strike, but enjoy freedom of association (article 10 of the ordinance of December 22, 1958). Most of the obligations and subjections are valid for both types of magistrates, for example the duty of discretion or political and professional incompatibilities. This proximity between the magistrates of the seat and the magistrates of the prosecution is so true that article 1 II of the ordinance of December 22, 1958 clearly states : "All magistrates are entitled to be appointed, during their career, to

[2] See the symposium recently published : J. Boudon (dir.), *Le serment. Perspectives juridiques contemporaines*, Paris, éditions de la SLC, 2023.

functions of the seat and the prosecutor's office". In French, the expression “avoir vocation à” is complex because it means both a freedom and a duty. Currently, it seems that freedom has prevailed over duty (or recommendation), so that President Jean-Paul Jean is a counter-example because magistrates most often make a career either in the bench or in the prosecutor’s office.

This unity of the judiciary has however been contested at European level and it is on this point that I would like to dwell. The traditional position of the French authorities was to consider that judges and prosecutors all belonged to one and the same body of the judiciary. Such was the opinion of the *Conseil constitutionnel* which, in a decision n° 93-326 DC of August 11, 1993, affirmed the following : "The judicial authority which, by virtue of article 66 of the Constitution, ensures respect for the individual liberty, includes both sitting magistrates and prosecutors” (cons. 5)[3]. It was a question of police custody : should this temporary interference with the freedom to come and go be pronounced by a judge, or is a prosecutor competent? The *Conseil constitutionnel* accepted without difficulty the intervention of the prosecutors for 24 hours or 48 hours precisely because they were magistrates, members of the judicial authority. It is precisely on this subject that a thunderclap erupted in 2008 when the European Court of Human Rights in Strasbourg considered that "the public prosecutor is not a 'judicial authority' in the sense that the case law of the Court gives to this notion : as the applicants point out, it lacks in particular the independence with regard to the executive power to be able to be so qualified” (ECHR, 10 July 2008, *Medvedyev v. France*, no. 3394/03, § 61).

Two years later, on March 29, 2010, the Grand Chamber first slips on the subject, while insisting on the necessary independence of the magistrate from the executive power (§ 124), before being much more radical in a judgment of November 23. She was forced to do so this time because the request of the lawyer France Moulin related very specifically to the point of knowing whether the magistrates of the prosecutor's office, who had placed her in police custody, had the status of judicial authority within the meaning of Article 5, § 3 of the European Convention on Human Rights. Even with formality, the judgment is sharp : "In this context, the Court considers that, because of

[3] The formula is taken up in decision no. 2010-14/22 QPC of July 30, 2010, *Daniel W.* (cons. 26).

their status thus recalled, the members of the public prosecutor's office, in France, do not fulfill the requirement of independence respect of the executive, which, according to settled case-law, counts, in the same way as impartiality, among the guarantees inherent in the autonomous concept of "judge" within the meaning of Article 5 § 3" (ECHR, November 23, 2010, *Moulin v. France*, No. 37104/06, § 57). And the criminal chamber of the French Court of Cassation immediately applied European case law in a judgment delivered a few weeks later : "It is wrong that the investigating chamber held that the prosecutor is a judicial authority in the meaning of Article 5 § 3 of the European Convention on Human Rights, when he does not present the guarantees of independence and impartiality required by this text and when he is a prosecuting party" (C. cass, crim., Dec. 15, 2010, no. 10-83674). It is a bit pointless, in our view, to argue about the scope of Article 5 § 3 ECHR[4] : some maintain that it is a question of "judge", whereas the French prosecutor does not judge, he prosecutes . But the Convention specifies : "a judge or other magistrate authorized by law to exercise judicial functions", and it continues with the requirement of a reasonable time for trial, but also with release during the proceedings - or the French prosecutor does have this power during police custody.

You could ask me the question : what were the consequences of these various judgments? Or rather : why has France not complied with these decisions since the prosecutors are still not independent of the executive power? The reason is twofold. First, the debate is clearly limited to compliance with Article 5 of the ECHR. Then, it is undeniable that France has modified the status or powers of the public prosecutor's office on several occasions : first, police custody was adjusted in 2011 in the direction of greater respect for freedoms, then, the law of 2013 prohibits individual instructions from the Ministry of Justice, finally, three constitutional revision projects in 2013, 2018 and 2019 unsuccessfully attempted to align the appointment and discipline of prosecutors with those of sitting magistrates. This is why the Conseil constitutionnel maintained its opinion in 2017 : not only are prosecutors "magistrates", but, as they belong to the judicial authority, they benefit from the principle of independence recognized in the article 64 of

[4] « Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial ».

the Constitution. It will be agreed that this is going very far : the Conseil constitutionnel considers that prosecutors are free in their action before the courts – in doing so, it seriously undermines the hierarchical principle, the authority of the Ministry of Justice over the prosecution, the general instructions, etc. The Conseil constitutionnel is forced to take this into account of course, but it discerns a balance between independence on the one hand, the hierarchy on the other (decision n° 2017-680 QPC of December 8, 2017, § 6, 9 and 14). However, the Conseil constitutionnel and the French authorities have received the support of the Court of Justice of the European Union which had to rule, within the framework of the European arrest warrant, on the notion of "issuing judicial authority" within the meaning of European Union law. Can French prosecutors be so qualified? The first chamber, presided over by the French judge Jean-Claude Bonichot, will answer in the affirmative : it considers that the issuing judicial authority is not necessarily a judge, that it may be another magistrate, provided that he is independent of the executive power. With regard to France, this independence is proven by the prohibition on the Ministry of Justice from issuing individual instructions to prosecutors (CJEU, 12 December 2019, case C-566/19 PPU, §§ 52-58).

Things remained there, pending a major constitutional revision announced by the President of the Republic, Emmanuel Macron, at the start of his second term, but which has little chance of being adopted in the current political circumstances in France. This revision would have the objective and consequence of bringing together the magistrates of the seat and the magistrates of the prosecution, where the differences are still very marked today.

II. A clear difference between the magistrates of the seat and the magistrates of the prosecution

The magistrates of the seat are called thus because they render justice seated : they are the ones who judge, unlike the magistrates of the prosecution - the prosecutors - who do not render judgments or decisions, but conclusions or requisitions which aim to enlighten the legal debate and which defend the general interest or public order (that is to say the State, but the thing is rarely presented so crudely). Frankly speaking, I have

never understood this claim to defend the general interest (or that of society) as this seems to me elusive, but it does not matter here. We speak of a standing bench because prosecutors speak standing up, either standing on the "floor" of the courtroom or in a special place called "small park"[5]. Basically, as Professor Alvazzi del Frate has pointed out, the current physiognomy of the prosecution goes back to Napoleon and the Empire, that is to say the Code of Criminal Instruction of 1808. We can look for origins under the Ancient Regime and the French Revolution, but most of the look of the prosecution dates back two centuries, with it is true that there have been profound changes, particularly since 1946 and even more so since 1958. Suffice it to point out here that the French Constitution of 1946 contained a Title IX called "The Superior Council of the Judiciary" where the 1958 Constitution has a broader Title VIII entitled "The Judicial Authority" which includes the Superior Council of the Judiciary, but which is not limited to it. In addition, another important landmark, as I have already indicated, the *École nationale de la magistrature* is a fairly recent creation, it dates from 1970, although it was preceded by the National Center for Judicial Studies (CNEJ) born in 1958.

In this communication, I would like to say a few words to you about the organization, powers and statutory guarantees of the prosecutor's office, emphasizing this last point because it is it who has been the subject of debate in recent times.

Let's start with the organization. Within the courts of first instance, there is a prosecutor's office only attached to the judicial court or *tribunal judiciaire*, to the exclusion of the specialized courts, and it is headed by a prosecutor (who may be joined by deputies, vice-prosecutors and substitutes). Within the courts of appeal, the “general” prosecutor’s office is headed by a general prosecutor (assisted by general attorneys and general substitutes). At the *Cour de Cassation*, there is a "General Prosecutor's Office of the *Cour de Cassation*" led by the General Prosecutor, with the first Advocates General, Advocates General and Advocates General “*référendaires*”. It should be specified here that this General Prosecutor's Office of the *Cour de Cassation* does not exercise public action and is not the main party to the disputes : it is similar, it is often said, to the role played by the *rapporteur public* before the administrative courts. The main thing is to emphasize

[5] See E. Jeuland et L. Veyre, *Institutions juridictionnelles*, Paris, Puf, 2021, p. 250.

that the principle of indivisibility reigns within the prosecution, which means that prosecutors are interchangeable : we do not have regard to the individual but to the whole, it is not the prosecutor who counts, but the Office.

If we then look at the powers of the prosecution, we tend to reduce them to the application of criminal law and therefore to the repressive domain. This would be a big mistake as the powers of prosecutors are diverse and include both civil and criminal cases. In civil matters, the prosecution intervenes judicially (nullity of a marriage, for example) or not (rectification of civil status documents, for example). But it is in criminal matters that his role is best known. This is understandable because here his presence is always required, while in civil cases it is only optional. Article 32 of the Code of Criminal Procedure provides : "He [the prosecutor's office] is represented before each criminal court". In this context, the prosecutor is the master of the initiation of public action and responsible for requesting the investigating magistrate. It also has a role in the prevention of delinquency and it freely assesses the opportunity for prosecutions (contrary to its Italian counterpart since the Italian Constitution of 1947 establishes the legality of prosecutions in article 112), it ensures the enforcement of court decisions. Recently, he becomes more and more judge because of the procedure of appearance on preliminary recognition of culpability (law n° 2004-204 of March 9, 2004) : subject to this recognition and an approval by a judge of the seat, it is the prosecutor who determines the sentence, yet today this represents half of the criminal cases. In other words, the prosecutor is the handyman of judicial justice in France : the list of his tasks is breathtaking and it is not surprising that weariness and fatigue at work threaten.

But it is the statutory guarantees that have been the most discussed in the last twenty years because they directly call into question the membership of prosecutors in the judiciary. The difference between sitting magistrates and prosecutors is solemnly underlined by the Constitution that they cannot be transferred without their consent (I leave aside the question which you know better than I of the extent of this principle in article 107 of the Italian Constitution of 1947 and of the *autogoverno* : the magistrates are they also those of the prosecution ?). Article 4 of the ordinance of December 22, 1958 specifies : “The magistrates of the seat are irremovable. Consequently, the magistrate of the seat cannot receive, without his consent, a new assignment, even in advancement”.

This is not the case with prosecutors, who are on the contrary subject to the principle of hierarchical subordination. Article 5 of the ordinance of December 22, 1958 provides : "The magistrates of the prosecution are placed under the direction and control of their hierarchical superiors and under the authority of the Keeper of the Seals, Minister of Justice".

Hierarchical subordination receives three main translations.

1) The first concerns the appointment and career of public prosecutors. The Constitution of 1946 like the Constitution of 1958 established and continue to establish an obvious break between the magistrates of the seat and the prosecutors. From 1958 to 1993, the CSM, referred to in Article 65 of the Constitution, was not at all concerned with the appointment of prosecutors, which was left to the Ministry of Justice and the executive power in general. During this time, the CSM made proposals for the judges of the *Cour de Cassation* and the first presidents of the courts of Appeal, while it gave a simple opinion (*avis simple*) for the other judges. From 1993, the CSM gave simple opinions (*avis simples*) on the appointment of prosecutors, except for posts filled in the Council of Ministers (while it made proposals for the presidents of the courts of first instance[6] and gave conform opinions [*avis conformes*] for the other sitting magistrates). The constitutional revision of July 23, 2008 mainly changed the composition of the CSM and not much of its powers, except on one point : from now on, the CSM issues simple opinions (*avis simples*) on the appointment of all prosecutors. In French administrative law, a conform opinion means that the decision-making authority cannot appoint a candidate other than the one who has been accepted : it has only one option left, that of not appointing.

Three constitutional bills in 2013, 2018 and 2019 wanted to go further and bring the appointment of prosecutors closer to that of sitting magistrates : the prosecutors would have been appointed on the conform opinion of the CSM (this was already the case in a 1998 project). But none of these projects came to fruition, so that the difference

[6] In total, the CSM issues proposals for approximately 400 positions (80 per year). It should be noted that his proposals relating to the presidency of the judicial courts should be considered unconstitutional since article 65 refers to the courts of first instance which were replaced by the judicial courts in 2010. Concerning the conform opinions to sitting magistrates, the CSM issues approximately 1,500 a year, compared to 600 for simple opinions relating to prosecutors.

remains clear between one and the other : no sitting magistrate can be appointed without the agreement of the CSM (whether he proposes directly or renders a conform opinion), whereas a simple opinion is required on its part for the magistrates of the prosecutor's office, which possibly allows the government to free itself from the opinion and to appoint the person of its choice, even if it means paying the political price. It is true that the Ministry of Justice has become accustomed to following the opinions of the CSM (the counter-examples are now quite remote, for example Philippe Courroye appointed in 2009 prosecutor at the Nanterre *tribunal de grande instance* despite the negative opinion given by the CSM) and that moreover negative opinions are rare, around two to five per year.

A magistrate is never appointed once and for all : he pursues a career, so that he is led to change position and functions. Here again, the fate of magistrates is not uniform. If the magistrates of the seat are irremovable, the prosecutors are "removable", they can be transferred at any time by decree of the President of the Republic. The *Conseil d'État* had the opportunity to recall this in a famous case involving the prosecutor Philippe Courroye : "No provision or general principle of law prohibits the President of the Republic, charged by article 28 of the ordinance of December 22, 1958 (...) to issue decrees appointing to the functions exercised by magistrates, to automatically transfer in the interest of the service magistrates who do not benefit from security of tenure" (CE, June 12, 2013, No. 261698, *Courroye*). Philippe Courroye, Prosecutor at the Nanterre *tribunal de grande instance*, entangled in political and economic affairs involving the President of the Republic Nicolas Sarkozy, had been appointed Advocate General at the Paris Court of Appeal, by a decree of the August 2, 2012 "in the interest of the service". It is still necessary that the CSM has truly delivered its opinion, even simple : it is for lack of opinion that the Council of State canceled in 2010 the appointment of Marc Robert, general prosecutor at the Court of Appeal of Riom , as Advocate General at the *Cour de Cassation* (CE, December 30, 2010, No. 329513).

2) The second concerns the discipline of prosecutors. Constitutes a disciplinary fault "any breach by a magistrate of the duties of his state, honor, delicacy or dignity" (article 43, al. 1 of the ordinance of December 22, 1958). The CSM is solely competent for the sitting magistrates : it acts here as a specialized administrative court placed in cassation under

the control of the *Conseil d'État*. On the other hand, the CSM is content to give an opinion concerning the discipline of the magistrates of the prosecution, the Ministry of Justice being the sole decision-maker to apply the sanction recommended by the CSM, or even to modify it (he practically never does this). Many constitutional bills wanted to make the CSM a disciplinary council for all magistrates, including those of the prosecution : in 1998, in 2013, in 2018 and in 2019. None went all the way.

3) The third concerns the instructions given to the members of the prosecutor's office by the executive power and we have seen that this was a central element for national and European courts. Prosecutors can receive instructions from the Ministry of Justice with two caveats. The first is that these instructions are general and can no longer be individual since a law of 2013 (law n° 2013-669 of July 25, 2013 : art. 30, al. 3 *Code de procédure pénale*) : prosecutors are responsible for applying the general policy of the government and the Ministry of Justice. The second is a great principle that prosecutors are always free to express their feelings in court. Article 5 of the ordinance of December 22, 1958 provides in a second sentence : "At the hearing, their speech is free". This principle is specified by article 33 of the *Code de procédure pénale* : "He is required to take written requisitions in accordance with the instructions given to him under the conditions provided for in articles 36, 37 and 44. He freely develops the oral observations he believes suitable for the good of justice". All French law students know this formula : "The pen is serf, but the word is free". (Symmetrically, the tenure of judges must be qualified : it does not mean immobility and on the contrary judges are also subject to mobility, in other words there is no acquired right to remain in one's position.)

A few words of conclusion to tell you that the balance has not been found in France concerning the status of the prosecutors and, consequently, the attributions of the *Conseil supérieur de la magistrature*. It is striking to note that, for the past twenty years, the political class seems to have largely agreed to align the status of prosecutors with that of sitting magistrates, particularly as regards appointments and discipline, which would have the advantage of calming relations with the European Court of Human Rights[7].

[7] Proof of this is the very recent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, adopted on 9 and 10 June 2023 : https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)015-e

However, all constitutional revision projects have failed, including, for the recent period, the constitutional bills of 2013, 2018 and 2019. Why? Beyond political calculations, I believe that these failures show a typically French resistance of mistrust towards the figure of the Judge : we do not want to grant more freedom to the magistrates of the prosecution, we want the prosecutors to remain subject to the Ministry of Justice and to the government, because it is feared that the “judicial authority” will be transformed into a “judicial power” which would come to compete with the only “real” powers, the legislative and executive powers.