

SUMMARY OF THE INTERVENTION OF M. OLIVIER DE BAYNAST, GENERAL PROSECUTOR

FRANCE IN THE PANEL “IMPARTIALITY AND INDEPENDENCE OF JUDGES AND PROSECUTORS WITH THE FOCUS ON PRE-TRIAL STAGE”

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Prosecutors, in the French legal system, are considered as part of the judicial authorities. As such, they have the authority upon the police and the gendarmerie investigation officers in charge of criminal investigation. They have therefore the mission to control their work.

During the investigation, they also have to supervise the decision to place or not in custody a suspect during a limited time. Then, they check the file and have to decide whether there are sufficient charges to receive penal qualification to be put before a court. At that time, the prosecutor has to decide if the person will remain detained or not: this will be decided by the “juge des libertés” (custody judge, a member of the bench). The prosecutor takes position on this matter but the judge decides.

The question is debated whether or not French prosecutors are able to act independently and impartially during the investigation. They are supposed to do so; they have to lead investigations and prosecutions before courts in an inquisitorial way, not in an accusing one, and may decide, for example, if a suspect is innocent. This is the main difference with the accusing system. Actually, it is often discuss, some people thinking that prosecutors are accusers and not neutral people. This is not our tradition, even if the behavior of some prosecutors could lead to a different appreciation because before court, some of them are seen as accusers rather than neutral part in the process.

Nevertheless, the French procedural code still insists on the neutrality of prosecutors which is theoretically possible as reminds, for example, the recommendation number 2019 of the council of Europe about public ministry, and also the opinion number 12 of the council of European prosecutors: judges and prosecutors, in a democratic society which stresses what they have in common, and especially in term of independence and impartiality.

The problem is the question of the status of prosecutors which, in some countries, is different of the status of judges regarding career, discipline and promotion. The Council of Europe already mentioned instruments stress about the necessity to grant prosecutors a status which ascertain their capacity to act independently and impartially. The court of Strasbourg has considered in different decisions that French prosecutors did not enjoy sufficient guarantees to be perceived as judicial authorities in the sense of article 5 part 3 of the convention of the Human Rights. For example, the decision of November 23rd 2010 in the Moulin against France case or in the Medvedyev and others against France (March 29th 2010) where it was said that French prosecutors did not enjoy sufficient guarantees before the executive to be considered as judicial authorities.

This position was, in the first hand, based on the fact that nomination and career of the prosecutors were submitted to the authority of the Ministry of Justice, and on the other

hand, that the Ministry of Justice could give orders to prosecutors to oblige them to prosecute in specific cases, but also that the independent body, Conseil supérieur de la magistrature, had not the final decision on the nomination of prosecutors, as well as on disciplinary decisions.

In fact, as a prosecutor, I would feel fully independent by never receiving any order in specific cases but however, this is possible until the law of July 25th of this year which prohibits the Ministry to give any instruction in specific cases. Nevertheless, it still remains the matter of the nomination of prosecutors. The government is in favor of changing the status of prosecutors to align it to the status of judges, giving the Conseil supérieur de la Magistrature the power to decide on nomination (the government could not nominate a prosecutor without the agreement of the council). This reform is wanted by all prosecutors and prosecutors on the side of judges independence. It is seen as enhancing the independence of judges, especially because we have the opportunity principle – prosecutors decide to sue or not crimes – and not the legality principle.

But it is not as simple as that because such a reform needs a changing of constitution which can only occur with a qualified majority in Parliament of two third. It seems that the opposition is not ready to vote it just not to support a reform led by the government. Therefore, this reform has been postponed which is, I think, a pity because French prosecutors think this would be the only way to avoid suspicion on their independence.