

Public prosecutor's independence in Morocco: in a difficult search for a judicial authority

*Independência do Ministério Público no Marrocos:
na difícil busca de uma autoridade judicial*

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ABSTRACT: Over the last decade, the Kingdom of Morocco has opted for the independence of the Public Prosecutor's Office from the executive, severing any link that might have existed between it and the Ministry of Justice. This choice was not straightforward to make. Today, while the change is a step in the right direction and may dispel the suspicions that some people like to harbour about the links between the public prosecutor and executive institution, the new status is nonetheless the subject of several controversies and concerns. In this article, the author highlights the experience of the independence of the Public Prosecutor's Office in Morocco and the efforts to intensify the independence of the judicial institution. By studying the challenges and opportunities raised by the new status of the Public Prosecutor's Office, the author tries to prove that the choice based on the limitation of independence to the absolute separation of the Public Prosecutor's Office from the Ministry of Justice remains a narrow approach to independence and pleads for a general renewal of the status and missions of the Public Prosecutor's Office.

KEYWORDS: independence; impartiality; public prosecutor; judicial authority; judicial police.

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RESUMO: *Durante a última década, o Reino de Marrocos optou pela independência do Ministério Público em relação ao poder executivo, cortando qualquer ligação que pudesse existir entre este e o Ministério da Justiça. Esta opção não foi fácil de adotar. Hoje, embora a mudança seja um passo na direção certa e possa dissipar as suspeitas que algumas pessoas gostam de alimentar sobre as ligações entre a instituição do Ministério Público e o executivo, o novo estatuto é, no entanto, objeto de várias controvérsias e preocupações. No presente artigo, o autor procura destacar a experiência da independência do Ministério Público no Marrocos e os esforços para intensificar a independência da instituição. Ao estudar os desafios e as oportunidades suscitadas pelo novo estatuto do Ministério Público, o autor tenta provar que a escolha baseada na limitação da independência à separação absoluta do Ministério Público do Ministério da Justiça continua a ser uma abordagem estreita da independência e apela a uma renovação geral do estatuto e das missões do Ministério Público.*

PALAVRAS-CHAVE: *independência; imparcialidade; Ministério Público; autoridade judiciária; polícia judiciária.*

SUMMARY: Introduction; 1. Public prosecution: second facet of judicial authority; 2. Public prosecutors: between external independence and internal dependence; 2.1. An authority with absolute external independence; 2.2. An authority with rigid internal dependence; 1. Public prosecutors' independence in Morocco: shortcomings and proposals for change; 1.1. Public prosecutors, an impartial judicial authority?; 1.2. A public prosecutor independent of the executive, what about the parties?; 3.3. Police and public prosecutor relationship: what impact on judicial independence?; Conclusions; References.

INTRODUCTION

At United Nations congresses on the prevention of crime and the treatment of offenders, the status of the public prosecutor has always been the subject of discussions and recommendations, as an institution essential to the balance of any criminal trial. Given this institution's decisive interest and crucial role in the repression of crime, many democratic countries have undertaken structural and recurrent reforms of its functions and role.

In this context, in early 2013, the Kingdom of Morocco launched the first steps of a project promising to bring about a comprehensive reform of the justice system. This project has continued throughout 2018 and has given rise to demands and lively political and doctrinal debates. Historically, under the executive's control, the public prosecutor's status and independence from the Ministry of Justice have received particular attention because of the great importance of an independent and impartial judicial institution in a democratic society.

In light of the historical relationship with the French Judiciary² and the opposition to it,³ the decision to make the Public Prosecutor's Office independent was not easy to adopt. A body dependent on the executive for some and independent of the Judiciary for others, the actors in the debate - politicians, magistrates, and law professors - set out their legal arguments to defend their positions.

At present, the independence of the Public Prosecutor's Office is guaranteed by the state, enshrined in the Constitution and respected by all government institutions. In addition, the Moroccan state ensures all the structural and functional guarantees against political or other interference in the Public Prosecutor's Office. However, while this development is a step in the right direction and may dispel the suspicions that some people like to harbour about the links between the public prosecutor and the executive, the new status is nonetheless the subject of several controversies and concerns.

This article examines the challenges and opportunities raised by the new constitutional status of the Moroccan public prosecutor as an independent judicial authority and argues for a general renewal of its status and missions. To this end, the first part will be devoted to highlighting the status of the public prosecutor as an integral part of the Judiciary under the principle of the unity of the Judiciary. While the

² Since independence, French legislation has always exerted its influence on Moroccan legislators, both in legal and judicial terms.

³ Several organisations militating for reform of the judicial system have shown their strong opposition to any independence of the Public Prosecutor's Office from the executive. Politically, the Justice and Development Party (PJD) - one of the parties forming the government majority in 2017 - initially defended the standing judiciary's dependence on executive authority.

Public Prosecutor’s Office is an independent part of the Judiciary, the second part attempts to clarify that the independence of its members is different from that of judges. An authority with absolute external independence, the Public Prosecutor’s Office is subject to a particular hierarchical organisation, characterised by rigid internal dependence. Certainly, the approach of limiting independence to the separation of the prosecution service from the Ministry of Justice remains a very narrow approach to independence. For this reason, the third part will address the significant concerns raised by the constitutional and functional status of prosecutors. By forming part of the independent Judiciary and combining the powers of a prosecuting party with the exercise of judicial functions, the question of the impartiality of the Public Prosecutor’s Office and its independence from the parties to the proceedings needs to be explored in depth. Moreover, the nature of the relationship between the Judiciary and the judicial police is always a source of debate about its impact not only on the independence of the Public Prosecutor’s Office but also on the independence of the Judiciary as a whole.

1. PUBLIC PROSECUTION: SECOND FACET OF JUDICIAL AUTHORITY

Moroccan judicial institutions are based on the principle of unity.⁴ The Judiciary comprises judges and prosecutors, who form the second level of the body. According to the Moroccan Constitutional Council (MCC), “the Constitution grants the status of “magistrate” to judges and prosecutors, which means that they all belong to the Judiciary - a unified power - and are thus protected by the principle of independence associated with that power.”⁵

Public Prosecutor’s Office members enjoy judicial independence as part of the unified Judiciary. They benefit from the same guarantees as

⁴ Article 1 of Organic Law No. 106-13 on the Status of Magistrates (SM). Available at: <http://www.sgg.gov.ma/Portals/0/lois/Loiorganique_106-13_fr.pdf?ver=2017-02-16-152003-580>. Accessed on: July 27, 2024

⁵ MCC, decision No. 992-16, 15 March 2016, official bulletin No. 6452 of March 31, 2016. Available at: <<https://www.cour-constitutionnelle.ma/Decision?id=992&Page=Decision>>. (In Arabic) Accessed on: July 27, 2024

judges,⁶ which the Supreme Council of the Judiciary is keen to respect.⁷ In addition, they have taken the same oath and share the same judicial quality and legal nature, which has long been exclusive to the judges. In the view of the MCC, the new Constitution of 2011⁸ “differentiates between judges and prosecutors only in certain aspects inherent, like their work,”⁹ which consists of defending the general interests of society while respecting individual freedoms.

As previously established, public prosecutors and judges form the same judicial body.¹⁰ This desire for unity stems from the nature of prosecutors’ functions, which are based on defending the interests of society while respecting individual freedoms.¹¹ However, while both types of magistrate are subject to an independent and unified judiciary, the independence of public prosecutors differs from that established for the rest of the Judiciary.¹²

In fact, unlike judges, public prosecutors are subject to special status. The Constitution provides for establishing a hierarchical authority

⁶ Except for the guarantee of irremovability and internal independence from their hierarchical authority. See VARINARD, André; GUINCHARD, Serge; DEBARD, Thierry. *Institutions juridictionnelles*, Paris: Dalloz, 2019, p. 904.

⁷ The Constitution has granted “all magistrates, without distinction (judges and prosecutors) the same rights and they are subject to the same obligations and the same requirements....”. See Decision No. 992-16 of 15 March 2016 concerning the constitutionality of Article 25 of the Magistrates’ Statute (Official Bulletin No. 6452 of March 31, 2016).

⁸ The Constitution of the Kingdom of Morocco, promulgated by Dahir No. 1-11-91 of 27 Chaabane 1432, July 29, 2011. Available at: <http://www.sgg.gov.ma/Portals/0/constitution/constitution_2011_Fr.pdf>. Accessed on: July 22, 2024.

⁹ MCC, Decision No. 992-16, 15 March 2016, Official Bulletin No. 6452 of 31 March 2016.

¹⁰ According to Article 3 of Organic Law No. 106-13 on the SM “the body of magistrates of the Kingdom, subject to the present statute, is made up of a single body comprising judges and prosecutors...”

¹¹ El HILA, Abd Aziz. *Précis des droits de l’homme : dimension internationale et dynamique marocaine*, Rabat: Al Oumnia, 2008, p. 45.

¹² HOURQUEBIE, Fabrice. *L’indépendance de la justice dans les pays francophones*, Les Cahiers de la Justice, Paris, v.2 n.2, p.41-61, 2012. <https://doi.org/10.3917/cdlj.1202.0041>.

to which public prosecutors are subordinate,¹³ and they must comply with its instructions.¹⁴ The second paragraph of Article 110 of the Constitution states that “the law binds public prosecutors and must comply with written instructions, under the law, issued by the hierarchical authority to which they report.” In addition, Article 116 of the Constitution¹⁵ also makes a distinction between the tasks of the High Council of the Judiciary (HCJ), which relate to the management of the professional careers of public prosecutors, including their appointment, the rules of disciplinary procedure, their promotion and their retirement; and the management of their judicial tasks, which is entrusted to a hierarchical authority outside the Council. In this respect, Article 110 of the same Organic Law states that the King’s Attorney General to the Court of Cassation, in his capacity as head of the Public Prosecution Service, shall submit a report to the HCJ on the implementation of criminal policy and the functioning of the Public Prosecution Service. However, Article 25 of Organic Law No. 106-13 on the SM states that “public prosecutors are placed under the

¹³ Article 66 of Organic Law No. 100-13 on the HCJ determined the hierarchical authority to which the magistrates of the Public Prosecutor’s Office are subject, and entrusted it to the King’s General Prosecutor at the Court of Cassation in his capacity as President of the Public Prosecutor’s Office, stipulating that “(...) in application of the provisions of the last paragraph of Article 116 of the Constitution, the Council shall take into consideration, with regard to public prosecutors, the assessment reports submitted by the King’s Attorney General at the Court of Cassation in his capacity as head of the Public Prosecution Service.” Available at: <http://www.sgg.gov.ma/Portals/0/lois/Loiorganique_100.13%20_fr.pdf?ver=2017-02-16-151709-520>. Accessed on: July 27, 2024

¹⁴ According to the MCC, “given that the principle of subordination of public prosecutors, provided for in the second paragraph of Article 110 of the Constitution, requiring them to comply with written instructions, in accordance with the law, issued by the hierarchical authority, is considered to be an internal dependence established according to the hierarchy of the public prosecutors and the degrees of their responsibilities, and cannot - without prejudice to the principle of the independence of the Judiciary from the legislative and executive powers - constitute a dependence on a body outside the judiciary.” See MCC, Decision No. 992-16, 15 March 2016, Official Bulletin No. 6452 of March 31, 2016.

¹⁵ Article 116 § 2 of the Constitution states that, “In matters concerning public prosecutors, the HCJ shall consider the assessment reports drawn up by the hierarchical authority to which they report.”

authority and control of the King's Prosecutor General at the Court of Cassation and their hierarchical superiors.”

In addition, to promote equality, consistency and efficiency in implementing criminal policy, Public Prosecutor's Office members are subject to a specific hierarchical organisation. In performing their duties, they form a pyramidal organisation, a hierarchical judicial body independent, indivisible, irresponsible and irrecusable. In other words, by remaining bound by the application of the law, Public Prosecutor's Office members are independent in their decisions. At the same time, they must follow the written instructions under the law issued by their hierarchical superiors.¹⁶ While judges are only required to apply the law, Public Prosecutor's Office members are obliged to comply with written instructions by the law from their hierarchical authority.

Moreover, the President of the Public Prosecutor's Office may issue instructions to members of the Public Prosecutor's Office, which must be in writing and comply with the law. These instructions, which may be general or relate to individual cases, are given in the form of notes or periodic circulars sent to all members of the Public Prosecutor's Office or members of the public prosecutor's office responsible for certain types of cases. These instructions may apply to specific cases.¹⁷

In summary, the Constitution has ensured, on the one hand, that the unity of the Public Prosecutor's Office is maintained and that its members belong to a pyramidal hierarchical authority. On the other hand, it has ensured the independence of magistrates, empowering them not to comply with unwritten or unlawful instructions from the President of the Public Prosecutor's Office.¹⁸

¹⁶ Article 110 § 2 of the Constitution stipulates that “the law binds public prosecutors and must comply with written instructions, under the law, issued by the hierarchical authority to which they report.” Similarly, Articles 25 and 43 of Organic Law No. 106-13 on the SM provide that, “public prosecutors are placed under the authority and control of the King's Public Prosecutor at the Court of Cassation and their hierarchical superiors.”

¹⁷ See Presidency of the Public Prosecutor's Office. Report by the Presidency of the Public Prosecutor's Office on the implementation of criminal policy and the operation of the Public Prosecutor's Office for 2018, p. 20. Available at: <<https://bitly.cx/JXNp>>. Accessed on: July 22, 2024. (in Arabic)

¹⁸ See Article 110 § 2 of the 2011 Constitution.

2. PUBLIC PROSECUTORS: BETWEEN EXTERNAL INDEPENDENCE AND INTERNAL DEPENDENCE

2.1. AN AUTHORITY WITH ABSOLUTE EXTERNAL INDEPENDENCE

In the years leading up to 2018, the Public Prosecutor's Office remained under the supervision of the Minister of Justice, who exercised real powers concerning the direction of the prosecutors' judicial functions and the management of their professional status. In fact, at that time, as Vice-Chairman of the former HCJ, the Ministry of Justice had the power to propose, appoint or transfer public prosecutors and could arrest a magistrate and refer him to the disciplinary board or appoint a rapporteur in disciplinary proceedings and impose sanctions at first instance.

This situation has provoked strong criticism at both national and international level because it violates the principle of the independence of the Judiciary stipulated by the Constitution and as a universal principle enshrined in the human rights covenants and conventions ratified by the Moroccan State.¹⁹

With the advent of the 2011 Constitution, Morocco enshrined the independence of the Judiciary, which became a constitutional authority independent of the legislative and executive powers. The HCJ²⁰ is

¹⁹ See Presidency of the Public Prosecutor's Office. Report by the Presidency of the Public Prosecutor's Office on the implementation of criminal policy and the operation of the Public Prosecutor's Office for 2017, p. 16-17. Available at: <<https://bitly.cx/JXNp>>. Accessed on: July 22, 2024. (in Arabic)

²⁰ Under Article 115 of the Constitution, the HCJ is composed of: "the First President of the Court of Cassation as President-Delegate; - the King's General Prosecutor at the Court of Cassation; - the President of the First Chamber of the Court of Cassation; - 4 representatives elected from among their number by the magistrates of the Courts of Appeal; - 6 representatives elected from among their number by the magistrates of the courts of first instance, women magistrates must be represented among the ten elected members, in proportion to their presence in the magistrature; - the Ombudsman; - the President of the National Council for Human Rights; - 5 personalities appointed by the King, recognised for their competence, impartiality and probity, as well as for their distinguished contribution to the independence of justice and the rule of law, one of whom is proposed by the Secretary General of the Supreme Council of Ulemas."

responsible for protecting the independence of judges and prosecutors.²¹

In this respect, the 2011 Constitution incorporated the Public Prosecutor's Office into the independent judiciary.²² However, it also provides for an independent authority, the HCJ, to which the magistrates of the Public Prosecutor's Office are subject. Article 110 states that, "magistrates of the Public Prosecutor's Office must apply the law. They must also comply with the written legal instructions issued by the authority to which they report."²³ Consequently, it is clear that the Public Prosecutor's Office is submitted to an authority other than the HCJ and that the latter is obliged to take into account the assessment reports prepared by this authority concerning the magistrates of the Public Prosecutor's Office when managing their professional status. In assessing the constitutionality of Article 25 of Organic Law 106-13 on the SM, the MCC considered that, "the Constitution has granted the status of "magistrate" to both judges and magistrates of the Public Prosecutor's Office, which places them all

²¹ Article 103 of Organic Law No. 100-13 on the HCJ stipulates that "the Council shall ensure respect for and commitment to judicial values, and promote a culture of integrity and moral standards, so as to strengthen the independence of the judiciary. To this end, it takes all measures it deems appropriate." In addition, it ensures that the guarantees granted to magistrates are respected, in particular as regards the management of their professional situation, the protection of their independence, the drafting of reports on the state of justice and the judicial system at the initiative of the Council, the presentation of appropriate recommendations in this area, and the issuing of detailed opinions on any issue relating to justice, taking into account the principle of the separation of powers (section 4 of the second chapter of Organic Law No. 100-13 (Articles 65 to 113) and Article 113 of the Constitution).

²² As illustrated by several chapters in which reference was made to the Public Prosecutor's Office, especially Title Seven of the Constitution, devoted to the judicial authority, in particular Article 110, which incorporated the King's General Prosecutor into the composition of the HCJ, to which he is entrusted with the tasks of managing the professional status of other judges, or by referring to some of the specific features relating to magistrates of the Public Prosecutor's Office (Articles 110, 116 and 128 of the Constitution).

²³ Article 116 also stipulates that "in matters concerning magistrates of the Public Prosecutor's Office, the HCJ shall take into account the assessment reports submitted by the authority to which they are subject."

within the judiciary, which is a unified authority, and they are therefore subject to the independence inherent in that authority.”²⁴

Furthermore, although the Constitution does not explicitly name the authority to which the public prosecutors belong, Organic Law No. 100.13 on the HCJ does and entrusts it to the King’s Procurator General at the Court of Cassation as Head of the Public Prosecution Service.²⁵ Thus, Article 110 provides that the HCJ shall receive reports from the Public Prosecutor at the Court of Cassation as Head of the Public Prosecution Service. Article 25 of Organic Law No. 106.13 on the SM stipulates that “magistrates in the Public Prosecutor’s Office are placed under the authority and control of the public prosecutor at the Court of Cassation and their hierarchical superiors.”²⁶

²⁴ MCC, Decision No. 992-16, March 15, 2016, Official Bulletin No. 6452 of March 31, 2016.

The MCC confirmed this opinion, saying, “independence from the legislative and executive powers being an essential condition for belonging to the judiciary, which excludes the possibility for a person not belonging to the judiciary to exercise judicial functions, or rather, to preside over the public prosecutor’s office.

Whereas the principle of subordination of magistrates of the Public Prosecutor’s Office contained in the second paragraph of Article 110 of the Constitution, which requires them to comply with written legal instructions issued by the authority on which they depend, is an internal subordination which operates according to the hierarchy of magistrates of the Public Prosecutor’s Office and their levels of responsibility, and there cannot be - without prejudice to the principle of independence of the judiciary from the legislative and executive authorities - a subordination to a party outside the judicial authority.” See MCC, Decision No. 992-16, March 15, 2016, Official Bulletin No. 6452 of March 31, 2016.

²⁵ Presidency of the Public Prosecutor’s Office. Report by the Presidency of the Public Prosecutor’s Office on the implementation of criminal policy and the operation of the Public Prosecutor’s Office for 2018, p. 15. Available at: <<https://bitly.cx/JXNp>>. Accessed on: July 22, 2024. (in Arabic)

²⁶ Article 66 states, “In addition, and the application of the provisions of the last paragraph of Article 116 of the Constitution, the Council takes into account, concerning public prosecutors, the assessment reports submitted by the General Prosecutor at the Court of Cassation in his capacity as Head of the Public Prosecutor’s Office.” Similarly, the last paragraph of Article 116 of the Constitution stipulates that, “In matters concerning magistrates of the Public Prosecutor’s Office, the Supreme Council of the Judiciary shall take

As a result of these requirements, Act No. 33-17,²⁷ promulgated on 30 August 2017, on the transfer of powers from the government authority in charge of justice to the King's Prosecutor General at the Court of Cassation in his capacity as Head of the Public Prosecutor's Office was promulgated enacting rules for organising the presidency of the Public Prosecutor's Office, which granted the President of the Public Prosecutor's Office the powers stipulated under the Constitution and the two aforementioned regulatory acts.²⁸

Moreover, the independence of public prosecutors is different from that of other judges. The MCC referred to this situation when it stated that the Constitution "made no distinction between judges and magistrates of the public prosecutor's office other than in respect of certain aspects relating to the nature of their function..."²⁹ However, the Constitution has added an essential characteristic to public prosecutors compatible with their membership in the presidential hierarchy by making them subject to written legal instructions from their presidents, unlike judges, who are subject only to the law.³⁰

It is clear that the legislator has established the total independence of the Public Prosecutor's Office from the legislative and executive authorities. The Constitution, which elevates the Judiciary, of which the Public Prosecutor's Office is an integral part, to the rank of constitutional authority, confers on this authority the function of managing its affairs and powers in complete independence from Parliament and the Government,

into consideration the assessment reports drawn up by the hierarchical authority to which they report."

²⁷ Published in Official Bulletin No. 6632 of December 21, 2017. Available at: <http://www.sgg.gov.ma/BO/bo_fr/2017/BO_6632_Fr.pdf>. Accessed on: July 22, 2024.

²⁸ While the Constitution provides for establishing a hierarchical authority over public prosecutors without specifying it by name, this same authority has been designated under Organic Law No. 100-13 on the HCJ and No. 106-13 on the SM.

²⁹ MCC, Decision No. 992-16, March 15, 2016, Official Bulletin No. 6452 of March 31, 2016.

³⁰ While Article 110 of the Constitution obliges public prosecutors to apply the law, "they must also adhere to the legal written instructions issued by the authority on which they depend."

which cannot interfere in the affairs of the Judiciary, which is not only considered distinct from the two aforementioned authorities but is also independent of them.³¹ On the other hand, if the separation of powers does not prevent overlapping relationships authorised by different constitutions, allowing one authority to dissolve the other or withdraw confidence from it, then independence prevents the existence of such relationships. The constitution, therefore, endeavours to preserve the independence of the judiciary so that it is not influenced by other authorities that primarily implement political agendas.³²

Nevertheless, according to the MCC “the constitutional principle of the correlation between responsibility and accountability cannot be applied to the judicial authority, which is independent of other authorities, in the same way, and with the same tools as in other areas, given the nature of the judicial authority, its independence, its operating mechanisms and the methods established to correct its errors.”³³ In this respect, the independence of the Public Prosecutor’s Office does not mean that it is exempt from control and responsibility; on the contrary, it is subject to the control of the Judiciary regarding the decisions it takes, as well as to the control of the HCJ, to which periodic reports are submitted regarding the implementation of criminal policy and the conduct of the Public Prosecutor’s Office. Similarly, the President of the Public Prosecutor’s Office remains accountable for how he has implemented

³¹ Under MCC Decision No. 991-16, the Constitution does not require the General Prosecutor to present his report before the two committees responsible for legislation in the two chambers of Parliament. In other words, the presentation of the report by the General Prosecutor, or his presence to discuss it before the two parliamentary committees, violates the Constitution, as it undermines independence. The MCC has also emphasised the importance of Parliament’s discussion of the General Prosecutor’s report as a report concerning judicial affairs, with the possibility of taking into account the recommendations contained therein, taking into account the principle of separation of powers and the respect due to the independence of the judiciary.

³² Presidency of the Public Prosecutor’s Office. Report by the Presidency of the Public Prosecutor’s Office on the implementation of criminal policy and the operation of the Public Prosecutor’s Office for 2018, p. 20. Available at: <<https://bitly.cx/JXNp>>. Accessed on: July 22, 2024. (in Arabic)

³³ MCC, Decision No. 991-16, March 15, 2016.

criminal policy, primarily to the authority that appointed him, represented by the President of the HCJ.

In parallel, the Minister of Justice remains responsible for overseeing the management and administrative direction of the courts. In this context, Article 72 of the Organic Law of the Supreme Council of the Judiciary stipulates that the Supreme Council of the Judiciary shall take into account - when appointing judicial officials - the reports drawn up by the Minister of Justice on the level of performance of judicial officials in supervising the management and administrative direction of the courts. In addition, Article 54 of the same Organic Law created a joint body between the Supreme Council of the Judiciary and the Ministry of Justice to ensure coordination in judicial administration.³⁴ In addition, under Article 55 of the same law, the Ministry of Justice is also responsible for taking the necessary measures to implement the decisions of the HCJ relating to the administrative and financial situation of magistrates in cooperation with the relevant departments of the Council.

2.1. AN AUTHORITY WITH RIGID INTERNAL DEPENDENCE

The hierarchical subordination of the Public Prosecutor's Office members is one of its fundamental and historical characteristics of purely Napoleonic origin. Given the problems posed by the Judiciary's independence in France, linked to political traditions that showed no acceptance of Judicial authority, with Napoleon's legalisation, the Public Prosecutor's Office³⁵ took on the role of judge, employee and administrator.³⁶

³⁴ The Ministry of Justice may also attend "board meetings to provide data and information relating to judicial administration or any subject connected with the operation of the judicial establishment, in a manner that does not undermine the independence of the Judiciary, at the request of the board or the minister."

³⁵ The idea of a substitute or public prosecutor makes no sense in Islamic and customary law, but it is a purely French heritage.

³⁶ Moroccan judicial organisation is still based on the Napoleonic concept of a hierarchically organised judiciary.

In fact, to impose the control of political power over the courts, it used two mechanisms: firstly, a public prosecutor was set up within each court, a public prosecutor before each court of first instance and a general public prosecutor before each court of second instance. They and their representatives are organised hierarchically and are subject to a central executive power. On the other hand, they are submitted to the Judiciary by the principle of the unity while retaining certain guarantees for sitting magistrates, such as security of tenure.

However, the hierarchy that characterises the relationship within the Public Prosecutor's Office can negatively influence the assessment of promotions and the direction of magistrates' career paths.³⁷ The Moroccan constitutional legislator explicitly approved this observation when it obliged the HCJ to take into account the assessment reports submitted by the authority to which the magistrates of the Public Prosecutor's Office are subject, in all matters relating to their career path, in particular the promotions they may receive.³⁸

Clearly, the Moroccan legislator's choice to establish a hierarchical system based on which public prosecutors are organised, and to link their submission to orders and instructions issued by their hierarchical superiors to the need to give them according to the law and in writing, has strengths and weaknesses. Indeed, while the last two conditions may appear at first sight to be a guarantee against any hegemony emanating from the hierarchical superior and a protection of the accused against arbitrariness, this guarantee loses all sense of its existence and collapses in the face of a criminal procedure many of whose requirements, even the most serious, are too general and broad. However, the legislature has given the public prosecutor a wide discretionary power that is difficult to control, surrounded by vague and ambiguous concepts.

In approving the hierarchical system and the legal and written instructions addressed to the magistrate of the Public Prosecutor's Office

³⁷ HATIM, Anouar. Remote Hearing in Morocco: Limits of Technology and Their Impact on the Fairness of Trials, *African Journal of Legal Studies*, v.16, n.2, p. 106-136, 2024. <https://doi.org/10.1163/17087384-12340104>

³⁸ Article 116 of Morocco's 2011 Constitution. Available at: <http://www.sgg.gov.ma/Portals/0/constitution/constitution_2011_Fr.pdf>. Accessed on: July 22, 2024.

by his superior, the Moroccan legislator should have distinguished between general instructions and orders concerning the guidelines of criminal policy and those that take the form of written instructions relating to individual matters likely to affect the private interests of individuals.

while the first type of instruction remains acceptable and even desirable because it ensures the unified application of criminal policy and the embodiment of an indispensable unity in its application throughout the national territory, its generality prevents it from undermining the independence of the Public Prosecutor's Office members.³⁹ Furthermore, it does not prevent magistrates from exercising their discretionary powers and thus establishes equality in applying criminal policy.

On the other hand, the second type of instructions, which are of a private and individual nature, or the possibility of substituting themselves for the public prosecutor, involve an explicit threat to his independence and constitute a source of arbitrariness for the rights of individuals, and a direct violation of the principle of equality of those subject to trial, as it abolishes the discretionary power of the magistrate of the Public Prosecutor's Office, as long as he is the most and best informed about the merits of the case.

In addition, given the impossibility of opposing the instructions of their superiors, with all that this may entail, whether, in terms of their professional career or the progress of the case as a whole, the magistrates of the Public Prosecutor's Office are obliged to carry out at least the written orders, on pain of exposing themselves to disciplinary liability in the event of any breach, which makes them magistrates of instructions.

However, when regulating judicial instructions to prosecutors, the Moroccan legislator insisted on issuing them in written form, ruling out any possibility of responding to oral instructions. Conversely, it has not determined the fate of these written instructions, nor has it required their written text to be attached to the case file so that their legal legitimacy and the extent of their impact on the rights of the parties and the conduct of the trial can be monitored at a later date.

³⁹ Two ways the Public Prosecutor's Office can ensure the effectiveness of criminal policy are the management of the judicial police and the principle of hierarchical subordination.

In the same context, the removability to which prosecutors are subject is a sign of strong dependence. Although the Moroccan Constitution has adopted the principle of the unity of the judiciary⁴⁰ and made the Public Prosecutor's Office an integral part of the judicial authority, it has not granted prosecutors the same guarantees as those provided for judges, in particular, the guarantee against irremovability, which limits the effectiveness of the guarantee of independence granted to them and reinforces their submission to the pyramid hierarchy. Thus, prosecutors can be transferred automatically without their approval and disciplinary procedure.

It is clear that the relationship based on hierarchy and mandatory instructions remains very special. It weakens the Public Prosecutor's Office more than it strengthens it, especially as it leaves discretion and special authority to the heads of the Public Prosecutor's Office. Similarly, this relationship remains very sensitive regarding its impact on appearances and even on the requirement for independence. In addition, the hierarchy also contributes to intensifying the fear and anxiety surrounding the public prosecutor. It fuels legitimate doubts, particularly in the event of the application of its judicial powers.

Furthermore, the distinction between the prosecutor's submissions during the hearing, in which he enjoys a certain freedom of speech, and the binding orders he receives in writing, or the adage 'the pen is served, but speech is free,' allows him only limited independence and is often symbolic, even illusory. Similarly, this freedom is threatened by the principle of the indivisibility of the Public Prosecutor's Office members, as long as a subordinate who is not convinced by the written submissions can always be replaced by another during the hearing.

In summary, any criminal policy must be limited to general guidelines, excluding instructions relating to individual cases. The relationship between all the Public Prosecutor's pyramidal hierarchy components must be clear, transparent and balanced. In other words, all instructions of a general nature must be in written form and justified before being attached to the file to establish a reconciliation between hierarchical

⁴⁰ Article 3 of Organic Law No. 106-13 on the SM.

subordination and independence. Similarly, a subordinate claiming the illegality of his instructions must be guaranteed a right of appeal.

3. PUBLIC PROSECUTORS' INDEPENDENCE IN MOROCCO: SHORTCOMINGS AND PROPOSALS FOR CHANGE

3.1. PUBLIC PROSECUTORS, AN IMPARTIAL JUDICIAL AUTHORITY?

Impartiality is the cornerstone of the right to a fair trial.⁴¹ It lies at the heart of judicial functions,⁴² establishes the legitimacy and credibility of the judge as an impartial,⁴³ disinterested third party and, consequently, increases the parties' confidence in the decisions handed down.⁴⁴ Impartiality, which is enshrined in several international instruments for the protection of human rights⁴⁵ and reflected in national constitutions⁴⁶ and laws,⁴⁷ is a quality that merges with the idea of

⁴¹ HOOLEY, Tristram. Impartiality: A critical review, *Journal of the National Institute for Career Education and Counselling*, v.50, n.1, p. 41-53, 2023. <https://doi.org/10.20856/jnicec.5005>

⁴² RENAULT-BRAHINSKY, Corinne. *Procédure pénale*, Paris: Gualino, 2019, p. 34.

⁴³ BERTRAND, Mathieu. tiers impartial, l'engagement politique est-il compatible avec la fonction de magistrat?, *J.C.P édition. général*, Paris, No. 39, p. 1005, 2005; FATHI SOROUR, Ahmed. *Traité de procédure pénale*, Caire: Dar Nahda Arabia, 2016, p. 200. (In Arabic)

⁴⁴ MCINTYRE, Joe. Principles of Judicial Impartiality: Threats to the Independence and Impartiality of Judges, In: *The Judicial Function*, Springer, Singapore, 2019, p. 159-180. https://doi.org/10.1007/978-981-32-9115-7_10

⁴⁵ Article 11 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights; Article 7 of the African Charter on Human and Peoples' Rights; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴⁶ Under paragraphs 3 and 4 of Article 109 of the Moroccan Constitution, "any breach by a judge of his duties of independence and impartiality constitutes serious professional misconduct, without prejudice to any legal proceedings that may be brought. The law punishes any person who attempts to influence the judge in an unlawful manner." Similarly, according to the first paragraph of Article 110, "judicial decisions shall be rendered solely based on the impartial application of the law."

⁴⁷ Article 40 of Organic Law No. 106-13 on the SM.

justice,⁴⁸ maintaining a close link with the principle of equality of arms.⁴⁹ In this respect, impartiality can be defined as being impartial and fair, showing no prejudice or bias, and carrying out one's duties by "excluding all considerations extraneous to the case."⁵⁰ It is a human quality, "a state of mind in which the subject is in perfect balance between the parties."⁵¹

Classically, impartiality is assessed both subjectively and objectively.⁵² Subjective or personal impartiality refers to personal conviction⁵³ and requires that "the judge approach each case brought before him without prejudice."⁵⁴ In this case, the magistrate remains presumed impartial as long as the defendant has not provided proof of serious elements, prejudice or bias on his part. Hence, the magistrate's presumption of personal impartiality may be denounced.⁵⁵ Furthermore, objective or functional impartiality involves assessing whether the member

⁴⁸ FATHI SOROUR, Ahmed. op. cit., p. 200.

⁴⁹ DINTILHAC, Jean- Pierre. *l'égalité des armes dans les enceintes judiciaires*, In : *Rapport de la Cour de cassation 2003*, Paris: 2003, p. 143; DALLAT, Patrick. *Droit Européen et droit de l'union Européenne*, Paris: Sirey, 2010, p. 466; TERCIER, Pierre. *l'éthique des arbitres*, In : KEUTGEN, Guy (dir.). *l'éthique dans l'arbitrage*, Bruxelles: Bruylant, 2012, p. 29.

⁵⁰ LACABARATS, Alain. *Indépendance et impartialité, responsabilité du magistrat*, In: DESCAMPS, Olivier. *Le statut du magistrat*, Paris: Éditions Panthéon-Assas, 2020, p. 117-122; COLLET, Philippe. *La conception de l'impartialité du juge par la chambre criminelle de la Cour de cassation*, *Revue de science criminelle et de droit pénal comparé*, Paris, v.3, n.3, p.485-504, 2016. <https://doi.org/10.3917/rsc.1603.0485>.

⁵¹ CANIVET, Guy; JOLY-HURARD, Julie. *la déontologie du magistrat*, Paris: Dalloz, 2009, p. 100; TRECHSEL, Stefan. *Human rights in Criminal Proceedings*, NewYork: Oxford University Press, 2005, p. 61.

⁵² MADONDO, Isaac. *Accessibility, Independence and Impartiality of the Traditional Court System*, *Journal of Law, Society & Development*, v.10, p. 1-34, 2023. <https://doi.org/10.25159/2520-9515/12134>

⁵³ FRANCHIMONT, Michel; JACOBS, Ann; MASSET, Adrien. *Manuel de Procédure pénale*, Bruxelles: Larcier, 2012, p. 1279.

⁵⁴ PAPAYANNIS M. Diego. *Independence, impartiality and neutrality in legal adjudication*, *Revus*, v.28, p. 33-52, 2016. <https://doi.org/10.4000/revus.3546>

⁵⁵ KUTY, Franklin. *l'impartialité du juge en procédure pénale, de la confiance décrétee à la confiance justifiée*, Bruxelles: Larcier, 2005, p. 47- 48.

of the judiciary offers sufficient guarantees to exclude any objective factors that might give rise to legitimate doubts of partiality.⁵⁶ Thus, the assessment of objective impartiality is essentially based on hierarchical relationships, the internal organisation of the courts, how judicial functions were performed during the proceedings or other relationships between members of the Judiciary and other parties involved in the proceedings. Functional partiality can only be ruled out by establishing a right of recusal.⁵⁷

Moreover, the Moroccan legislature inherited the provisions laid down by the French legislature concerning the irrecusability of the Public Prosecutor's Office⁵⁸ when the new Code of Criminal Procedure was adopted. Thus, Article 274 of the new code expressly states that public prosecutors are irrecusable. Impartiality is a quality inherent in the very status of a judge.⁵⁹ The public prosecutor is excluded from this requirement; he is always represented as an accusing party in the trial who does not decide based on a charge. It is not a judge, even if the law confers several judicial powers.⁶⁰ His role is limited to requesting summonses, and the court that decides cases by issuing judgements.⁶¹ For the Criminal Chamber of the French Court of Cassation, "because the

⁵⁶ SUDRE, Frédéric. *Convention européenne des droits de l'homme : droits garantis, droit à un procès équitable*, Paris: Presses Universitaires de France, 2018.

⁵⁷ YVES, Mayaud. *l'affaire AZF entre impartialité et légalité*, *AJ pénal*, Paris, p. 191, 2015.

⁵⁸ Article 668 of the French Code of Criminal Procedure. Available at: <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/>. Accessed on: July 22, 2024.

⁵⁹ The same provision is set out in Article 669 of the French Code of Criminal Procedure and the second paragraph of Article 248 of the Egyptian Code of Criminal Procedure. Available at: <https://menarights.org/sites/default/files/201611/EGY_code%20of%20criminal%20procedure_1950_AR.pdf>. Accessed on: July 22, 2024. (In Arabic)

⁶⁰ This justification is established by the Egyptian Court of Cassation in order to dismiss the application to challenge the magistrate of the Public Prosecutor's Office. See Cassation du 2 février 2005, pourvoi No. 60195, année judiciaire No. 73. Available at: <<https://www.cc.gov.eg/>>. Accessed on: July 22, 2024. (In Arabic)

⁶¹ KHAMLICH, Ahmed. *Treatise on Criminal Procedure*, Rabat: Al Maarif Printing House, 2002, p. 48-49. (In Arabic)

Public Prosecutor’s Office does not decide on the merits of the charge in criminal cases, a magistrate of the Public Prosecutor’s Office cannot be criticised for his impartiality during the conduct of the prosecution.”⁶² The same chamber, in ruling out the guarantee of impartiality, considered that “the public prosecutor, whose role is to support the prosecution, takes no part in the trial of the accused; it follows that this magistrate does not fall within the scope of Article 6⁶³ of the European Convention for the Protection of Human Rights and Fundamental Freedoms,”⁶⁴ which “applies only to judges and not to the representative of the prosecution or the representative of the defence,”⁶⁵ even though the representative of the prosecution is bound by a duty of loyalty that consists in not distorting the reality of the case before the criminal court.⁶⁶

Nevertheless, the Moroccan criminal legislator has allowed judges to recuse themselves without offering the same possibility to those of the public prosecutor.⁶⁷ In Article 275 of the Code of Criminal Procedure, the same legislator obliges any judge - the Article uses the term ‘judicial quality’ without specifying the judicial body concerned - between himself

⁶² See *Crim. 9 mars 2016*, No. 14-86.795. Available at: <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000032194111>>. Accessed on: July 22, 2024.

⁶³ Under this Article, “everyone is entitled to a fair and public hearing by an independent and impartial tribunal.”

⁶⁴ See *Crim. 21 mai 2003*, No. 02-87.150, Bull. Crim. No. 103. Available at: <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000007069071>>. Accessed on: July 22, 2024.

⁶⁵ See *Crim. 6 mai 1996*, No. 95-81.766, Bull. crim. no.187. Available at: <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000007066167>>. Accessed on: July 22, 2024.

See also MARIN, Jean-Claude. *Réflexions sur le statut du magistrat du parquet*, In: DESCAMPS, Olivier. *Le statut du magistrat*, Paris: Éditions Panthéon-Assas, 2020, p. 187-193.

⁶⁶ The same French chamber rejected any suspicion of bias on the part of the court when an attorney general is the godfather of the defendant against whom he is prosecuting. See *Crim. 6 janvier 1998*, No. pourvoi: 97-81.466. Available at: <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000007069906/>>. Accessed on: July 22, 2024.

⁶⁷ Article 273 of the Moroccan Code of Criminal Procedure (MCCP). Available at: <<https://shorturl.at/SRdik>>. Accessed on: July 12, 2024. (In Arabic)

and the accused a ground for recusal to declare it to the first president of the Court of Cassation or the Court of Appeal, as appropriate.

On the other hand, legal logic requires the public prosecutor to be recused for sharing the same judicial status as the judges responsible for handing down sentences.⁶⁸ In theory, Moroccan Public Prosecutor's Office members should enjoy the same guarantees as judges. Thus, they are constitutionally part of the Judiciary. Their statutory independence from the executive is a guarantee of their impartiality, which justifies requests to subject them to the recusal procedure.

Furthermore, Public Prosecutors are subject to the principle of impartiality⁶⁹ in executing their duties.⁷⁰ Under Article 40 of Organic Law No. 106-13 on the SM, all magistrates, whether prosecutors or judges, must take an oath when they are first appointed to the Judiciary and before taking up their duties, in the following terms "I swear before Almighty God to perform my duties impartially (...) and to commit myself to the impartial application of the law."⁷¹ The Moroccan legislator has deemed any breach of the undertakings contained in the oath to be a breach of professional duty.⁷²

Furthermore, in his practical treatise on the functions of the King's Prosecutor, De Molène referred to the versatility of the powers of the public prosecutor "the powers of the public prosecutor, properly understood, are the finest in existence."⁷³ In this respect, the Moroccan public prosecutor is not simply a prosecuting authority. It has two distinct roles: a party to criminal proceedings and a magistrate empowered by

⁶⁸ The 1996 Moroccan Constitution does not designate the Public Prosecutor's Office as a judicial authority, unlike the 2011 Constitution, which explicitly granted members of the Public Prosecutor's Office the status of the judiciary.

⁶⁹ The principle of the impartiality of public prosecutors in Morocco has always been seen as an ethical obligation.

⁷⁰ Paragraph 13/a of the guiding principles applicable to the role of public prosecutors; Article 24 of Recommendation Rec (2000)19 on the role of public prosecutors in the criminal justice system.

⁷¹ Referring back to Article 18 of the former Moroccan Magistrates' Statute, impartiality is not contained in the oath taken by magistrates.

⁷² Article 40 of Organic law No. 106-13 on the SM.

⁷³ DE MOLENES, Alexandre. *Traité pratique des fonctions de procureur du roi*, Tome 1, Paris: Hachette Bnf, 2021.

law to exercise judicial functions. In this regard, the public prosecutor is a prosecuting party. It initiates public proceedings on a vague principle of discretionary prosecution, with no definition of the general guidelines serving as a reference for decisions in individual cases, which increases the chances of partiality on the part of the public prosecutor, who may resort to motivations guided by private interest, given the hierarchical instructions to which he is bound. In other words, the risk of partiality on the part of the public prosecutor may be intensified if he uses his power to prosecute or not to prosecute, which is dominated by the principle of opportunity.⁷⁴ Thus, the prosecutor's family and personal considerations may influence his decision to initiate a prosecution, which may affect his personal impartiality.

In addition to the powers of the prosecution, the public prosecutor performs judicial functions.⁷⁵ While impartiality is a requirement that is consubstantial with the judicial function, the purpose is to decide between adversaries fairly and equitably.⁷⁶ For this reason, the magistrates of the Public Prosecutor's Office only have legitimacy in the exercise of judicial functions, especially about the qualification of prosecutions and infringements of liberty, when appearances do not show a prejudice, just as the accumulation of functions does not appear to be a commitment on the part of this magistrate in favour of one of the parties to the criminal proceedings.

In contrast, functional impartiality presupposes that the Public Prosecutor's Office does not perform both prosecution functions and functions relating to detention and release.⁷⁷ Consequently, if the public

⁷⁴ SUNNQVIST, Martin. Impartiality and Independence of Judges: The Development in European Case Law, *Nordic Journal of European Law*, v.5, n.1, p. 67-95, 2022. <https://doi.org/10.36969/njel.v5i1.24499>

⁷⁵ The functions of the Public Prosecutor's Office are not limited to the criminal field; it also plays an important role in civil cases, which involve disputes between two private individuals. While their presence in civil hearings is optional, they must be represented in cases where they are the main party or in cases determined by law and during all Supreme Court hearings.

⁷⁶ CORNU, Gérard. *vocabulaire juridique*, Paris: P.U.F., 2024, p. 1122.

⁷⁷ The European Court of Human Rights has ruled on several occasions that the combination of the decision on liberty and the prosecution is sufficient to establish the partiality of the public prosecutor. See Cour eur. dr. h., arrêt

prosecutor combines prosecution and judicial functions, whether in the same case or several cases, this can only be a legitimate reason to fear for the impartiality of the public prosecutor.⁷⁸ In other words, while appearances are undeniably important in criminal trials, there can be no denying any doubt of bias on the part of the standing magistrate when he makes a decision on a person's liberty before later becoming a prosecuting party in the same case.

Certainly, the magistrate of the Public Prosecutor's Office cannot be recused if he were only a principal and necessary party to the criminal trial, an adversary of the accused who exercises the public prosecution, conducts the investigations and uses the remedies. In this case, irrecusability may be justified, as the adversary cannot recuse his adversary. Whereas the latter holds judicial functions that belong to a judge bound by guarantees of independence and impartiality, which makes any partiality or prejudice potentially detrimental to the interests of the accused.⁷⁹

In addition, despite the significant weight of the competence to qualify the facts conferred on the public prosecutor and its impact on the trial's outcome, the law did not authorise the accused to recuse the magistrate who took this decision, even if there were grounds for doing so. Also, the chances of the existence of reasons contrary to the presumed impartiality increase in the case of the public prosecutor, given the broad judicial powers granted to him, which are based on discretion, which intensifies the risk of miscarriages of justice.

In summary, the enshrinement of the public prosecutor's right of recusal and the obligation to give reasons will lead to greater transparency in initiating prosecutions and, consequently, greater impartiality.

Moroccan legal writers supported the idea that all magistrates should be recused during the drafting and discussion of Moroccan criminal

De Jong, Baljet et Van Den Brink c. Pays-Bas, 22 mai 1984, 8805/79 et autres, § 49; Cour eur. dr. h., arrêt Medvedyev et autres c. France, 29 mars 2010, 3394/03, § 124.

⁷⁸ MACAYA, Ariana. Le parquet dans la jurisprudence constitutionnelle et conventionnelle, In : BERTRAND, Mathieu; VERPEAUX, Michel. (dir.). *le statut constitutionnel du parquet*, Paris: Dalloz, 2012, p. 96.

⁷⁹ KHAMLICH, Ahmed. op. cit., p. 49; FATHI SOROUR, Ahmed. op. cit., p. 277.

procedure legislation.⁸⁰ Nevertheless, the legislator has departed from this approach by limiting the scope of the recusal procedure to trial and investigating judges without including public prosecutors.

However, the recusal procedure introduced by the Code of Criminal Procedure is not a judicial.⁸¹ On the contrary, it is an administrative procedure with special rules. The magistrate recused is not a party to the proceedings but a passive subject. The procedure is neither public nor adversarial. In addition, the decision is not subject to the obligation to state the reasons it is based, and there is no right of appeal. Similarly, no legal provision requiring the first president to rule on a recusal request. Therefore, the first president's failure to respond to a request appears to be an interesting alternative. The legislator has not set any deadline for responding to a request for recusal.⁸²

This obscurity that characterises the recusal procedure impact the civil penalty decision handed down if the plaintiff's application is rejected, as the plaintiff will have no right to defend himself or lodge an appeal. The prerogative of recusal entrusted to the parties to the trial whose unfavourable outcome would always result in a pecuniary penalty.⁸³ All unfounded claims result in a fine, which remains open to criticism regarding the rights of the defence. This situation can leave the claimant in a state of uncertainty and lack of confidence in the judicial institution.

Nevertheless, a recusal procedure to guarantee impartiality must be judicial and subject to the procedural requirement of the right to a fair trial. It must comply with the adversarial principle through the communication of the submissions and documents of the recused magistrate to the applicant, in addition to the opening of a judicial debate. Moreover, the order ruling on the recusal must state the reasons on which it is based, be handed down within a specific time limit and be subject

⁸⁰ ALAMI, ABD-OUAHED. *Treatise on the new code of criminal procedure*, Casa-blanca: Dar Assalam, 2011, p. 94. (In Arabic)

⁸¹ MERLE, Roger; VITU, André. *Traité de droit criminel : Problèmes généraux de la science criminelle, droit pénal général*, Paris: Cujas, 2000, p. 974.

⁸² DE BAETS, Frédéric. Récusation : crime de lèse magistrat ?, *AJ pénal*, Paris, p. 291, 2011.

⁸³ DEFFERRERD, FABRICE. Récusation, *JurisClasseur, procédure pénale*, Paris, p. 222, 2019.

to appeal. However, if the public prosecutor is not impartial, what about independence from the parties?

3.1. A PUBLIC PROSECUTOR INDEPENDENT OF THE EXECUTIVE, WHAT ABOUT THE PARTIES?

Independence is one of the foundations of the concept of the rule of law, a guarantee of the fairness of criminal proceedings⁸⁴ and a corollary of the principle of equality before the law.⁸⁵ It guarantees fair justice and is a prerequisite for any legal system.⁸⁶ It strengthens the role of the public prosecutor in the rule of law, therefore, enhances the effectiveness of the judicial system.

Similarly, the guarantee of independence is always associated with impartiality, but the two requirements are conceptually distinct.⁸⁷ Independence is a precondition for impartiality; you cannot be impartial if you are not independent, but an independent judge can be partial in a particular case.⁸⁸

Therefore, independence means that no member of the judiciary is subject to undue influence from outside or inside the Judiciary. Thus, it means independence not only from the executive and legislative powers⁸⁹

⁸⁴ HATIMI, Abd-Latif. Independence of the Judiciary and impartiality of the court and judges: how can we distinguish between these principles?, *Ouidadia Al Hassania magazine for magistrates*, Rabat, v. 1, p. 129, 2009. (In Arabic)

⁸⁵ ANJAR, Tayeb. The role of the criminal judge in the protection of human rights and the censorship of the court of cassation on the legitimacy of the sentence, In: *the role of the Judiciary in the protection of human rights*, Rabat, 2005, p. 91. (In Arabic)

⁸⁶ ALLARD, Julie. L'impartialité au cœur de l'autorité du juge. Approches philosophiques, *Les Cahiers de la Justice*, Paris, v.4, n.4, p.661-672, 2020. <https://doi.org/10.3917/cdlj.2004.0661>.

⁸⁷ "If one can be independent of any power and partial towards the parties, having prejudices on a case, it seems difficult to be impartial if one depends on a power or on others." See GUINCHARD, Serge; CHAINAIS, Cécile; FER-RAND, Frédérique; MAYER, Lucie. *Procédure Civile : Droit interne et européen du procès civil*, Paris: Dalloz, 2022, p. 767.

⁸⁸ VARINARD, André; GUINCHARD, Serge; DEBARD, Thierry. op. cit., p. 233.

⁸⁹ In particular, it concerns the method of appointment and term of office of members of the Public Prosecutor's Office, the existence of protection

but also from the parties to the proceedings.⁹⁰ In other words, the Public Prosecutor's Office members must offer the requisite guarantees of independence from the executive and from the parties, which means that he cannot subsequently act against the applicant in the criminal proceedings.

Independence from the parties is the same as the requirement for impartiality, which involves verifying the magistrate's independence from the parties to the proceedings.

Constitutionally part of the Judiciary, the Moroccan public prosecutor shares the same judicial status as the judges and exercises several judicial functions but is primarily a party to the criminal proceedings, an accusing party whose role is to support the prosecution. Whereas in civil proceedings, the public prosecutor is usually a party in interest, in criminal proceedings, he is always the primary and necessary party, acting on behalf of and in the interests of society.⁹¹ No criminal court can validly rule on a criminal case without the presence of a representative of the public prosecutor.

In this respect, the public prosecutor is a prosecuting party. He assumes the powers of a prosecuting authority, which initiates the trial by initiating and exercising the public prosecution in applying the principle of discretionary prosecution. It also conducts investigations, requests summonses and uses legal remedies. The prosecutor is the defendant's adversary. As the plaintiff at the hearing, the public prosecutor presents his conclusions in an oral indictment and all the evidence supporting his claims before requesting the conviction of the accused.

In summary, while the Public Prosecutor's Office was statutorily independent of the executive, it depended on the parties to the proceedings since they initiated the prosecution and directed the investigations. Consequently, it did not satisfy the independence requirement concerning the parties, ruling out the possibility of their subsequently acting against the applicant in the criminal proceedings. In these circumstances, and taking into account the principle of the indivisibility of the Public Prosecutor's

against external pressure and whether or not there is an appearance of independence.

⁹⁰ VARINARD, André; GUINCHARD, Serge; DEBARD, Thierry. *op. cit.*, p. 233.

⁹¹ Articles 6, 7 and 8 of the M CCP.

Office and its monopoly on the exercise of public prosecution, it is considered that the King's Public Prosecutors in Morocco did not meet the guarantees of independence to qualify, within the meaning of the international covenants signed by the Kingdom, as magistrates authorised by law to exercise judicial functions.

3.3. POLICE AND PUBLIC PROSECUTOR RELATIONSHIP: WHAT IMPACT ON JUDICIAL INDEPENDENCE?

The relationship between the Judiciary and the police⁹² has always been the subject of debate in Moroccan legal doctrine. It remains highly complex and particularly sensitive, notably due to the sensitivity of the judicial police's missions and the duality of its subordination. Given the great diversity of its functions, the judicial police is of great importance. It intervenes before, during and at the end of criminal proceedings. It is directed and controlled by the Public Prosecutor's Office.

In this respect, while the Constitution makes the relationship between the public prosecutor and the judicial police an authoritative one,⁹³ criminal procedure distinguishes between the public prosecutor and the general public prosecutor. Even though the latter two share the status of a superior judicial police officer and are affiliated to the same judicial system, the legislator has made the relationship between the public prosecutor and the judicial police officer a management relationship. In contrast, the relationship between the latter and the general public prosecutor is one of authority.

Certainly, this latter relationship is broader than the management relationship, representing only a marginal part of the former. This implies restricting the influence of the Public Prosecutor's Office in favour of the

⁹² On the history of the police, see CHEVALLIER, Jacques. *la police est-elle encore une activité régaliennne*, *archives de politique Criminelle*, Paris, v.33, n.1, pp, 13-27, 2011. <https://doi.org/10.3917/apc.033.0013>.

⁹³ According to Article 128 of the Moroccan Constitution, "The judicial police acts under the authority of the public prosecutor and investigating judges in all matters relating to the enquiries and investigations necessary for the detection of offences, the arrest of offenders and the establishment of the truth."

original authority: the Ministry of the Interior. It often makes the control of the judicial authority over the judicial police more theoretical than real.⁹⁴ For Dintilhac, “the notion of direction does not necessarily imply depriving those who are directed of their own powers: it is both by a posteriori control and by the possibility he has of initiating investigations or intervening in investigations in progress that the public prosecutor exercises his power of direction.”⁹⁵

Furthermore, the control relationship has to contend with the complexity of the judicial police’s dual-functional organisation, which makes it very difficult.⁹⁶ In addition, judicial police officers are not only under the command of the public prosecutor but also under the authority of their superiors.⁹⁷ However, absolute authority still rests with administrative superiors as straightforward and binding authority of origin. Their instructions and orders take precedence over the instructions of the public prosecutor.

In addition, the judicial police’s affiliation with an independent, non-judicial authority gives them greater freedom of manoeuvre, which limits the effect of judicial control on their actions. Their hierarchical subordinates pursue their pure objectives and priorities, which the Ministry of the Interior generally determines.⁹⁸

Consequently, implementing the public prosecutor’s instructions is often subject to the goodwill of judicial police officers, who are not placed under his direct authority. They may resort to procrastination or

⁹⁴ FROMENT, Blandine. les contrôles de la police, *Revue Pouvoir*. Paris, v.102, n.3, p, 52, 2002. <https://doi.org/10.3917/pouv.102.0043>.

⁹⁵ DINTILHAC, Jean-Pierre. Le contrôle du parquet sur la police judiciaire, *Archives de politique criminelle*, Paris, v.33, n.1, p. 31, 2011. <https://doi.org/10.3917/apc.033.0029>.

⁹⁶ Some judicial police forces are affiliated to the Ministry of the Interior and others to the Ministry of Defence. See DANET, Jean. *Défendre, pour une défense pénale critique*, Paris: Dalloz, 2004, p. 25.

⁹⁷ EI HILA, Abd Aziz. L’enquête policière entre les impératifs de l’ordre public et de la sécurité et les exigences des droits de l’homme, In: *Réflexions sur le procès équitable*, Casablanca: coll. Réforme du droit et développement socio-économique, 2009, p.67.

⁹⁸ KHAMLICHI, Ahmed. op. cit., p. 193.

not attach much importance to the case.⁹⁹ According to Cedras, “judicial police officers are answerable to an administrative hierarchy to which they send reports and from which they may seek or receive instructions in the course of their investigations. As these are sensitive cases, the possibilities open to the executive to influence the course of these judicial investigations are therefore not small. Remember that a police truth often becomes a judicial truth.”¹⁰⁰

In the same context, the judicial police officer always works under the authority of his administrative superiors, who control the management of resources that are subject to numerous restrictions and who are also often responsible for operational management and determining the most appropriate material and human resources to achieve efficiency in carrying out the instructions of the judicial authority.¹⁰¹ As a result, the relationship between the administrative head and the public prosecutor impacts the effectiveness of the judicial police’s interventions.¹⁰²

However, as long as magistrates are absent from the field, they need the judicial police. In addition, they deal with dozens of cases simultaneously, leaving them little time to work closely together on each case. Mohanna adds that “not only are magistrates never in the field, which limits their ability to control the work of the police or gendarmes effectively, but they are also subject to a more direct and binding authority than that of the public prosecutor or the investigating judge: their hierarchy, which pursues its own objectives and priorities, generally set by the Ministry of the Interior.”¹⁰³

⁹⁹ AJOUID, Ahmed. A contemplative pause before the texts of criminal procedure, *Moroccan review of local administration and development*, Rabat, v.39, p. 46-47, 2003. (In Arabic)

¹⁰⁰ CEDRAS, Jean. la spécificité des juges d’instruction français au sein des procédures pénales européennes, *Revue Internationale de Droit Pénal*, Paris, v.81 n.1, p. 243, 2010. <https://doi.org/10.3917/ridp.811.0233>.

¹⁰¹ MOUHANNA, Christian. Les relations Police-Justice : de la confiance à la gestion de flux, *revue après-demain*, Paris, v.30, n.2, p, 388, 2014. <https://doi.org/10.3917/apdem.030.0019>.

¹⁰² Police judiciaire - Justice : la complémentarité n’exige pas l’intégration, (SC PN, Syndicat des commissaires de la police nationale), *AJ Pénal*, Paris, p. 381, 2013.

¹⁰³ MOUHANNA, Christian. op. cit., p, 388.

Morocco has a significant shortfall in public prosecutors, with no more than three per 100,000 inhabitants, compared with a European average of 12. This makes it challenging to exercise any control over judicial police officers or even to ensure the independence of the Public Prosecutor's Office.¹⁰⁴ Therefore, a considerable discrepancy exists between the formal powers that the Code of Criminal Procedure confers on public prosecutors and their resources to assert themselves against the police and their administrative and hierarchical apparatus.¹⁰⁵ As a result, the management of judicial affairs remains in the hands of the police and their goodwill.¹⁰⁶

Furthermore, the role of the judicial police is decisively enhanced by the probative value of the minutes. Thus, investigations carried out by the judicial police are recorded in minutes and compiled in an official file kept by the Public Prosecutor's Office, which forms the backbone of the trial.¹⁰⁷ As a result, all procedural acts are recorded in minutes to which criminal procedure accords probative value.¹⁰⁸ This file, containing all the facts of the investigation, is given to the judge, who bases his decisions mainly on the written evidence gathered by the judicial authorities.

¹⁰⁴ Bologna gave up on adopting an independent Public Prosecutor's Office after an experiment that lasted more than 40 years, even though it has more than 15 public prosecutors for every 100,000 inhabitants. See WALTOS, Stanislaw. le rôle du parquet en Pologne, *Revue Internationale de Droit Pénal*, Paris, v.63, pp, 1231-1232, 1999.

¹⁰⁵ HATIM, Anouar; MILOUDI, Mohammed; EL ARAJ, Najib. Promoting the Defence's Role in the Preliminary Investigation, a Challenge in Maghrebian Criminal Proceedings, *The Age of Human Rights Journal*, n.19, p. 47-69, 2022. <https://doi.org/10.17561/tahrj.v19.7123>

¹⁰⁶ MOUHANNA, Christian. Les limites effectives du pouvoir du parquet sur la police, *AJ Pénal*, Paris, p, 388, 2013.

¹⁰⁷ JAOUHAR, Mohamed. présomption d'innocence et procès-verbaux de la police judiciaire, In : *Mélanges Jalal Essaid*, Rabat: Publication du Centre marocain d'études juridiques, 2005, p.225; MOHIEDDINE, Amzazi. *Essai sur le système pénal marocain*, Rabat: Centre Jacques-Berque, 2013. <https://doi.org/10.4000/books.cjb.384>

¹⁰⁸ In Morocco, minutes of criminal offences are only valid for information purposes (Article 291 of the MCCP). For misdemeanours and infractions, which account for almost all offences committed in Morocco (around 95%) and which carry a penalty of up to 5 years' imprisonment, minutes are authentic until proven otherwise by any means (Article 291 of the MCCP).

In other words, the evidence gathered during the police investigation generally determines the framework within which the crime will be examined. This leads to the principles of orality and adversarial, governing the criminal hearing, being emptied of their substance.¹⁰⁹

For the Moroccan National Council for Human Rights, “this probative value is not compatible with the presumption of innocence and limits the judge’s authority to control and assess the means of proof.”¹¹⁰ In addition, it reverses the burden of proof, forcing the accused to prove his innocence, which encourages torture and ill-treatment of suspects.¹¹¹ Paradoxically, the various changes made to criminal procedure only reinforce the strength of the case file, consisting mainly of minutes prepared during the police investigation.

In summary, the general environment, the organisation of the Public Prosecutor’s Office and local police and gendarmerie services, and the nature of the case in question are all criteria that shape any professional relationship between a public prosecutor and a judicial police officer.¹¹² For this reason, any approach to the independence of the Public Prosecutor’s Office remains very difficult, given the presence of the judicial police on the ground, while retaining an administrative affiliation with elements of strength that limit the supervisory role of the judicial authority. Most requests sent to the police by the latter leave them a great deal of room for manoeuvre.¹¹³

¹⁰⁹ ESSAID, Mohamed Jalal. De la présomption d’innocence au procès équitable, In: *Réflexions sur le procès équitable*, Casablanca: coll. Réforme du droit et développement socio-économique, 2009, p. 21.

¹¹⁰ Conseil Consultatif des Droits de l’Homme (CNDH). Rapport sur la situation des droits de l’Homme au Maroc 2003, Avril 2004, p. 61. Available at: < <https://www.cndh.ma/fr/rapport-annuel-sur-la-situation-des-droits-de-lhomme-2003>>. Accessed on: July 22, 2024.

¹¹¹ Conseil des Droits de l’Homme. Rapport du groupe de travail sur la détention arbitraire (Mission au Maroc), A/HRC/27/48/Add.5, 4 août 2014, para. 33. Available at: < <https://documents.un.org/doc/undoc/gen/g14/100/01/pdf/g1410001.pdf>>. Accessed on: July 22, 2024.

¹¹² DELMAS-MARTY Mireille. *Libertés et sûreté dans un monde dangereux*, Paris: Seuil, 2010, p. 56.

¹¹³ ARMIL, Bouchaieb. The judicial police and its relationship with justice: the challenges of the future, *publications of the association for the publication of legal and judicial information*, Rabat, v.4, p. 410, 2005. (In Arabic)

Moreover, the Public Prosecutor's Office's material and human organisation will further weaken it. In the same way, the freedom of intervention of the judicial police, the absence of a legal deadline for the presentation of their reports to the judicial authority and the failure to set a deadline for the intervention of the Public Prosecutor's Office in investigations are all causes that weaken the effectiveness of control by the judicial authority. Under such conditions, it would be illusory to claim to be directing police action from the Public Prosecutor's Office, given that the deputies assigned to real-time processing give the impression of being more subject than initiators of anything.¹¹⁴ Practice shows they have no real authority over the judicial police officers because they were not placed directly under their authority.¹¹⁵

CONCLUSIONS

The independence of the Public Prosecutor's Office in Morocco has always been at the forefront. Since 2018, the Moroccan legislature has chosen to proclaim the complete independence of the Judiciary from the executive. While the move may seem innovative and promising, it is the subject of several concerns.

The Public Prosecutor's Office in Morocco has a hybrid status. Submitted to a rigid hierarchical subordination, it is simultaneously totally independent of the executive and remains dependent on the parties to the proceedings. As a magistrate and guardian of individual freedom, the public prosecutor directs the judicial police, supervises investigations and ensures that infringements of freedom are legitimate. Moreover, the independence of the Public Prosecutor's Office remains very fragile. The human and financial resources it needs to enshrine this independence and function effectively are not guaranteed.

The real problem at the heart of the status of a public prosecutor is not its lack of independence or impartiality but its ambiguous status. Thus, it combines the functions of an investigating magistrate,

¹¹⁴ MOUHANNA, Christian. *op. cit.*, p. 388.

¹¹⁵ AJOUID, Ahmed. *op. cit.*, p. 47.

a prosecuting authority, a liberty and detention magistrate, a party to the trial, and a quasi-judge.

Establishing independence remains a pressing need and a necessary response to several concerns. However, such independence can only be achieved as part of a comprehensive and far-reaching reform of the procedural system to establish compatibility with the primary principles governing any right to a fair trial.

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