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Based Proposals for the Elimination of the Quality of a Magistrate held by Romanian Prosecutors

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ABSTRACT: In the Romanian justice system, the prosecutor is still assigned the quality of magistrate. We consider that this is a legal inaccuracy that belongs to a decadent line of justice that affects the legal system, creating real and justified doubts among litigants. The present study aims, through judicious legal references, to convince the parliamentarians of the Legal Commission, to propose for debate the elimination of the quality of magistrate, which the Romanian prosecutors have, they having a double hierarchical subordination: legal (from superiors) and political (from the part of the Minister of Justice, which proposes the leaders of the supreme prosecutor's offices); therefore, the prosecutor has no powers to establish one's guilt or innocence and the title of "magistrate" is this inappropriate for him, as he is a "State attorney", similar to what in the US is called a "District attorney". In arguing this study, we will start from the analysis of the terminology of the name "magistrate", as it was known since antiquity, the Middle Ages and later in the Roman legal system. Until the installation of the communist regime, the Romanian diachronic legal system kept the natural valences of this profession of prosecutor, but, unfortunately, after Romania was liberated from the communist totalitarian system in 1989, this decadent legal position was maintained, relative to maintaining the quality by the "magistrate" of the prosecutor.

KEYWORDS: Magistrate, prosecutor, legal inequity, fair trial, principle of legality, procedural guarantees.

Diachronic references regarding the notion and activity of the magistrate

The notion (term) of *magistrate* derives from the Latin *magistratus* which in antiquity, during the domination of the Roman empire, designated the person of the praetor, namely a high dignitary, and in ancient Greece meant, ruler or dignitary. In the middle Ages, the term magistrate was used to refer to a civil servant who was elected, as was the judge, namely the person who was meant to be a factor of social balance and to be arbitrators in society.

Magistratus ordinarii (ordinary magistrates) and *magistratus extraordinarii* (extraordinary magistrates) were two categories of officials who held political, military and, in some cases, religious power in the Roman Republic. Ordinary magistrates were elected annually (except for the censor) and served for a term of one year. Usually, at least two of the ordinary magistrates were elected to prevent a single person from taking too much power. By contrast, extraordinary magistrates were elected only in special circumstances and did not always have a colleague. They were superior to ordinary magistrates (ro.wikipedia.org).

In Roman times, civil justice was administered by the appointment by a magistrate of a competent court and the election of a judge to lead the trial and dictate the sentence (istorie-edu.ro). Also in the Roman era, criminal justice (*iudicia publica*) was performed by a tribunal composed of a president (praetor or magistrate with this position) and jurors elected by drawing lots from the list of judges (between 3 and 11 members) (istorie-edu.ro).

The organs and the trial procedure of the Romans knew two types of trials: public trials and private trials.

a. Public trials *(iudicia publica)* were those that interested the entire Romanian people and had as object public crimes: betrayal of the country, the murder of a Roman citizen, the desecration of religious things. These were judged directly by the magistrate.

b. Private or private proceedings (*iudicia privata*) are those that interest individuals, certain individuals. Judicial organization is different, unlike judicial organization found in public trials. The peculiarity lies in the actual division of the process into two phases:

- The first phase took place before the magistrate, called *jus* or *in jure*;
- The second phase before the judge, called *judicio* or *in judicium*.

Over time, two procedures followed: the procedure of the actions of the law (from the founding of the city of Rome until the end of the second century) and the formal procedure (introduced after the second century, by the Aebutia Law).

The trials between individuals took place, initially, before the magistrate. At first, the judicial magistrate was one of the two consuls, but after 366-367 there was a need for an additional magistrate. Thus, a new magistracy is created - the *praetura*, the magistrate being appointed *praetor*. Due to their high occupancy rate, a new magistrate appears - the pilgrim praetor.

Magistrates had two powers: *imperium* (command power in civil and military law) and *jurisdictio* (giving a judge to the parties to the trial).

The activity of the magistrate consists in: *do, dico, addico*:

- *do* - listening to the parties;
- *dico* - word used to attribute to a party the possession of the thing in respect of which the dispute exists;
- *addico* - a word used when the plaintiff is assigned the thing on which there is a dispute or when the defendant who did not defend himself properly is passed into the power of the plaintiff.

As can be seen from the above, the magistrate was the person who performed the act of civil or criminal justice. He was considered to be impartial and decided freely after listening to the accuser and the defender. The trial took place in places called basilicas and the magistrate was seated in a high chair with a position that allowed him to look down on the parties to the trial (Jakotă 1993, 101; Molcuț and Oancea 1993, 82-86).

The argumentation of the proposal to eliminate the term of magistrate held by the prosecutor

The legal system in Romania functioned for decades according to rules specific to the totalitarian system and obsolete practices, preserved even in the period after the 1989 Revolution (Danileț 2014).

The first argument on which we base our proposal, originates from the regulation of art. 126 of the Romanian Constitution which legislates that: "Justice is achieved through the High Court of Cassation and Justice and other courts established by law" that the judge does not it brings into question the institution of the prosecutor or the Prosecutor's Offices, but refers **exclusively** to court cases in which only judges carry out their activity.

This discussion was also submitted to the attention of the Constitutional Court in which a petitioner, invoking an exception of unconstitutionality on the provisions of art. 63 para. (2) and art. 65 para. (1) of the Criminal Procedure Code, sees the judges of the Constitutional Court in motivating the exception of unconstitutionality, arguing, in essence, that the criticized laws are unconstitutional, because it regulates the competence of the prosecutor to assess and administer evidence, thus assigning to him both the functions of criminal investigation and investigation, giving him both the quality of representative of the Public Ministry and that of investigating judge. However, the prosecutor does not have the quality of "magistrate" within the meaning of the ~ Convention ~ for the protection of human rights and fundamental freedoms. As a result, the evidence administered by the prosecutor is illegal and cannot be used in criminal proceedings (Decision no 1503/2010, Official Gazette, Part I no 8 of January 5, 2011).

Also, the aforementioned Decision states that: *"According to the Constitution, the Public Ministry is a component part of the judiciary, and not the executive or public administration"* which is correct and corresponds to the organization of the judiciary in Romania.

In Decision 983 of 2010, of the Romanian Constitutional Court, it is specified that: *"In the criminal process in Romania, the prosecutor acts as a defender of the general interests of society, but also of the party in the process, in the spirit of legality"* (Decision no 983/2010, Official Gazette, Part I no 551 of August 5, 2010). Or, the magistrate judge does not defend the interests of a part of a trial

but, through an impartial attitude, he is the guarantor of finding out the truth, the person entitled to do justice. Moreover, the judges are appointed by the President of Romania, enjoying immovability, a privilege not granted to the prosecutor, who acts instead "under the authority of the Minister of Justice". It is ineluctable that, according to the Constitution, the judge has a higher role than the prosecutor, and the quality of magistrate must be granted only to the judge and not to the prosecutor.

Another argument we base on is that the judge is not hierarchically subordinate but independent, instead the prosecutor defends the normative order, and thus does not unbalance the process in favor of one or another of the right holders prosecuted *The prosecutor is not a party (...), He is an organ of the law* (Decision no 68/2005, Official Gazette, no 145 of February 17, 2005).

According to the law, the prosecutor is nothing more than a defender of civil rights and freedoms or accuser of persons (natural or legal), having a double hierarchical subordination: legal (from superiors) and political (from the Minister of Justice, who proposes the leaders of prosecutor's offices supreme); therefore, the prosecutor has no power to establish one's guilt or innocence, and the title of "magistrate" is thus inappropriate for him to be a "state attorney", similar to what in the United States is called a "district attorney" (Danileț 2014).

In Decisions no 345/2006 and no 385/2010 of the Romanian Constitutional Court, its judges ruled that by applying the principle of hierarchical control, it ensures the fulfillment by all prosecutors in the Public Ministry system of their function of representing the interests of the whole society, in other words, the exercise of the attributions of public authority by him, without discrimination and without bias. By virtue of this principle, the Public Ministry is conceived as a pyramid system, in which the law enforcement measures adopted by the hierarchically superior prosecutor are mandatory for subordinate prosecutors, which gives substantiality to the principle of hierarchical exercise of control within this public authority (Decision no 345/2006, Official Gazette, Part I no 415 of May 15, 2006 and Decision no 385/2010, Official Gazette, Part I no 317 of May 14, 2010).

According to art.131 paragraph (1) of the Constitution, prosecutors are subject to the principle of legality, but from the provisions of art.315 and 316 of the Criminal Procedure Code we can conclude that they allow the prosecutor, who participates in judicial debates, to be biased because the sitting prosecutor drew up the indictment in question or carried out or supervised the criminal investigation, and the constitutional obligation of impartiality does not subsist for the prosecutor in these cases.

We consider that the principle of hierarchical subordination, specific to the Public Ministry, contradicts the constitutional principle of impartiality and is likely to prevent the prosecutor participating in the trial of complaints made under Article 278 of the Criminal Procedure Code, to be impartial when complaints are directed against resolutions or orders given by his hierarchical superior, even if it is assumed that the prosecutor is free to present to the court the conclusions he considers justified according to the law and taking into account the evidence administered in the case. As long as there is hierarchical subordination, there can be no independence and impartiality in a judicial system.

Although the prosecutor is subject to hierarchical control only against the head of the prosecutor's office, and he can exercise only within the legal framework, the prosecutor having the right to complain to the Superior Council of Magistracy of interference, the current status of the prosecutor does not correspond to the claim of impartiality. The pseudo-independence of the prosecutor magistrate cannot be presumed either due to the connections with the executive power, regarding the appointment of prosecutors in the positions at the top of the Public Ministry.

It can be seen, from the multitude of legal regulations, judges and prosecutors, although both enjoy the quality of magistrate, their functions and roles in the judiciary are, to a very large extent, different, and in conclusion, the quality of magistrate should be attributed only to the judge.

Proposal for the establishment of the Institute of the Public Ministry

With the loss of the quality of magistrate by prosecutors, the legitimate question arises, what will be the way in which law graduates, who want to become prosecutors, will be able to elucidate this position, given that this position can no longer be acquired within the National Institute of Magistracy because prosecutors will no longer be magistrates. In this sense, we propose the establishment of an institute, like the National Institute of Magistracy, to operate under the authority of the Public Ministry in which potential prosecutors will take the entrance exam and those declared admitted will follow a 2-year training course.

Also, with the elimination of the quality of magistrate for prosecutors, they will no longer be part of the Superior Council of Magistracy and a structure called the National Order of Prosecutors will be established which will have its own state of organization and functioning.

Regarding the physical position of prosecutors in courtrooms, they will no longer sit next to judges but next to lawyers, and the court panel will be the only one that will have a higher position than the entire courtroom. Thus, the magistrate judge, from the height of his professional and moral valences, will look at the two parties (the accusatory one, represented by the prosecutor and the defense one, represented by the lawyer) symmetrically and equally, thus respecting presumption of equal legal treatment.

Conclusions

The proposals made in this approach are innovative in nature for the Romanian judicial system, but which imply a radical change of vision of the organization and functioning of the Romanian justice system, which, if implemented, will provoke pros and cons (necessary and of course in a democratic society) but we are sure that they will be the necessary element for a trustworthy justice of citizens and similar international judicial bodies.

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