

Decision No.358 of 30 may 2018

on a request to settle a legal conflict of a constitutional nature between the Minister of Justice, on the one side, and the President of Romania, on the other side¹

- Relevant excerpts -

1. The request to settle a legal conflict of a constitutional nature between the Minister of Justice, on the one side, and the President of Romania, on the other side, in the main, and in subsidiary, a conflict of constitutional nature between the Government of Romania and the President of Romania, generated by the President of Romania's refusal to give effect to the application for the dismissal of the Chief Prosecutor of the National Anticorruption Department, Mrs Laura Codruța Kövesi, submitted by the Prime-Minister of the Government, is registered on the docket of the court.

(...)

THE COURT,

[...] acknowledges the following:

(1) Presentation of the facts

47. Regarding the facts of the matter, the Court acknowledges that on 22 February 2018 the Minister of Justice announced publicly the initiation of the procedure to dismiss Mrs Laura Codruța Kövesi from her position as Chief Prosecutor of the National Anticorruption Department, on the grounds of Art. 54 Para. (4) corroborated with Art. 51 Para. (2) Lett. b) of Law no. 307/2004 on the status of judges and prosecutors. For this purpose, the Minister of Justice prepared and presented a *Report on the management of the National Anticorruption Department*, indicating that the assessment covered the period February 2017 – February 2018 (...) The review included in the *Report* of the Minister of Justice was structured in 20 points, thus:

"1) An unprecedented situation for the relations among public authorities in Romania: three legal conflicts of constitutional nature over the period of one single year, during which the National Anticorruption Directorate, through its management, was summoned in front of the constitutional court following the complaints of other public authorities, invoking breach of their jurisdiction by the DNA and the behaviour of the DNA chief prosecutor, lacking constitutional loyalty; three legal conflicts of constitutional nature where the Constitutional Court firmly circumstanciated the jurisdiction of the National Anticorruption Directorate, while in two of these occasions, the Court sanctioned the behaviour of the DNA chief prosecutor, as opposing the constitutional loyalty;

2) Decision no. 68/2017 of the Constitutional Court - the National Anticorruption Directorate acted *ultra vires*, unduly assuming jurisdiction;

3) Decision no. 611/2017 of the Constitutional Court - through her behaviour, not only that the DNA chief prosecutor precludes herself from any loyal cooperation with the authority exercising sovereignty of the people - the Romanian Parliament, but she also refuses to participate to clarifying some issues related to an event of public interest; the refusal of the DNA chief prosecutor represents a breach of the Romanian Parliament authority, as a representative body of the people, and impedes on its activity, in terms of discharging verification duties through parliamentary committees;

4) Decision no.757/2017 of the Constitutional Court (Annex 4) - the prosecutor's office/DNA do not have jurisdiction to initiate prosecution on the opportunity of issuance of individual administrative acts;

5) Accreditation of DNA jurisdiction to evaluate aspects of opportunity of development of Government Decisions;

6) Failure to assume a breach of the constitutional and legal provisions, and to correct such conduct;

7) Breach of principles governing the exercise of the management position in a public authority". The Performance" of the DNA chief-prosecutor of determining the Constitutional Court to explain in detail that the DNA institution is neither Government, nor Parliament, nor Constitutional Court, nor court of law and,

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in her capacity as manager of this institution, she should observe the jurisdiction of DNA, and uphold a loyal constitutional conduct;

- 8) Excessively authoritarian, discretionary behaviour, contrary to the obligation to moderation and to the deontological obligations imposed to magistrates;
 - 9) Involvement in the investigations conducted by other prosecutors, investigations performed in breach of constitutional jurisdiction;
 - 10) Prioritising the prosecution of cases with media impact. Undignified attitudes. Breach of minimal ethical and professional standards;
 - 11) Challenging the acts and authority of the Constitutional Court;
 - 12) Challenging the authority and acts of the Parliament;
 - 13) Vehement criticism on certain legislative amendment proposals; the legislative solutions in questions were subsequently demonstrated to be constitutional;
 - 14) Abusing the role and place of prosecutors under the rule of law. Accrediting a different status of prosecutors than that established laid down by Constitution;
 - 15) Attempt to obtain convictions at any cost;
 - 16) Increased number of acquittals. Increased expenses. Misreporting;
 - 17) Lack of involvement from the DNA chief prosecutor in identifying and elimination of abusive behaviours from prosecutors;
 - 18) No measures taken in serious cases determined by courts - forgery of transcripts of phone conversations;
 - 19) Procrastination of cases, leading to the expiry of the statute of limitations;
 - 20) Lack of reaction in terms of verifying the professional activity and behaviour of some prosecutors”.
- (...)

(2) Admissibility of the Petition submitted by the Prime Minister:

(...)

62. (...) the Court finds that the Minister of Justice may be party in a legal conflict of a constitutional nature both as representative of the Ministry that he leads, in issues related to the overall competence of the Government, and individually, to the extent to which a special and explicit constitutional responsibility/competence is incumbent on him that is not related to the overall competence of the Government, as in the case at hand.

(...)

64. Considering the case at hand, the Court finds that the petition submitted by the Prime Minister concerns a litigious situation, since it involves a dispute between the Minister of Justice and the President of Romania, and the litigation has a legal character, since the refusal of the President of Romania to give effect to the request to dismiss the Chief Prosecutor of the National Anticorruption Department, Mrs Laura Codruța Kövesi, is related to the scope and exercise of the competences of the above-mentioned authorities. Thus, the obvious conclusion is that the two public authorities carried out actions with legal significance, which means that a legal relationship was established between them, which is in itself capable of generating a conflict of legal nature. [...]

65. Thereafter, the Court will determine if this legal litigious situation is of a constitutional nature. Regarding this aspect, the Court finds that, in the essence, the question of law is to determine the scope and contents of the words “under the authority of the minister of justice” in Art. 132 Para. (1) of the Constitution, in correlation to Art. 94 Lett. c) of the Constitution. [...]

66. The Court finds that the two above-mentioned constitutional texts cover, in essence, the organisation of the political power. [...]

67. Consequently, in the case at hand, the Constitutional Court is called upon, from the perspective of the attributive dimension of the Constitution, to determine both the scope and the limits of the constitutional responsibilities and competences of the two public authorities in *lato sensu* relation with the work of the Public Ministry. [...]. Therefore, the relationship established between the Minister of Justice and the President of Romania concerning the exercise of public power and the responsibilities and competences

bestowed on them by Art. 94 Lett. c) and Art. 132 Para. (1) of the Constitution, are evidently, relations of pure constitutional law.

(...)

(3) Analysis on the merits of the Petition submitted by the Prime Minister

100. Also, as pointed out above, the constitutional text of Article 132 paragraph (1) is of a special nature, establishing the competence of the Minister of Justice with regard to the activity of prosecutors, so that, if the organic legislator has decided that the act of appointment is issued by the President, under the provisions of Article 94 (c) of the Constitution, **the latter cannot be recognized as having a discretionary power, but a power to verify the regularity of the procedure.**[...] Therefore, the attribution of the President of Romania in the case of revocation/removal from office disposed according to art. 94, letter c) of the Constitution, is subsumed only by regularity conditions established strictly by the law, and not by a discretionary power.

101. Therefore, as regards the proposal for appointment to the management positions provided for in Article 54 (1) of [...]. Under these circumstances, as a counterweight, the President of Romania may oppose a **limited veto** on the idea of a permanent co-operation and consultation within the bicephalous executive, **based on the provisions of art. 1 para (5) and of art. 80 para (2) of Chapter 2 of the Constitution**, according to which (2) *The President of Romania shall guard the observance of the Constitution and the proper functioning of public authorities. To this effect, he shall act as a mediator between the Powers in the State, as well as between the State and society*", but cannot block the appointment procedure. This reflects the existence of a minimal discretionary power of the President of Romania in this procedure, precisely in order to make sure that the prominent role of the Minister of Justice in the activity of prosecutors is observed. On the other hand, if the President of Romania refuses to appoint a person based on legality grounds, according to the provisions of Art. 94, letter c) of the Constitution, the appointment procedure stops and it must be resumed from the beginning.

102. The same constitutional paradigm applies also to the revocation procedure, in the sense that the Minister of Justice also has a central role in this procedure. If in the case of appointment the Minister of Justice has a wide margin of appreciation, while the President of Romania has a limited margin, **in the case of revocation the Minister of Justice has a minimum margin of appreciation, since the limitations imposed by the law are extremely strict, and, under these circumstances, the President of Romania can only oppose his/her right to verify the lawfulness of the proposal, and may refuse it only if the proposal does not comply with the law, in which case the procedure will cease.** Of course, no constitutional text opposes the existence of consultations between the two public authorities under Article 1 (5) and Article 80 (2) of the second Chapter of the Constitution, **but given that the whole procedure is carried out while the discretionary discretion /discretion of the Minister of Justice - the Minister playing a central role in the procedure - is minimal, the discretionary power / discretion of the President cannot be recognized in any way.** Therefore, the President of Romania has only one competence related to this procedure, limited to verifying the conditions for the legality of the procedure.

(...)

106. All these **legal aspects** cannot distort the **constitutional authority** of the Minister of Justice. As a result, the President of Romania cannot exercise his legal powers in a sense that would affect the constitutional text. That is why his competence is to control the legality of the measure, namely the revocation proposal, as he cannot invoke aspects related to the opportunity of the proposal or carry out an assessment of the Chief/General Prosecutor's work, as in the case. Therefore, **the decision-making power of the President of Romania is limited to the conditions of legality of the submitted revocation proposal.**

(...)

110. In relation to the present case, the Court notes that, in his response, the President considered that the arguments of the Minister of Justice "are not thoroughly grounded in terms of the opportunity of the proposed measure", which means that he has carried out an analysis of the arguments of the Minister of Justice and, by its own decision, determined the solution he considered most appropriate.

Or, a competence to verify the validity of the revocation proposal is not similar to and does not have the purpose of analysing the assessment made by the Minister of Justice in respect of the provisions of Article 51 (2) (b) of Law no. 303 / 2004.

111. The Minister of Justice carries out this assessment in accordance with Article 51, paragraphs (3) - (6) of Law no.303 / 2004, according to which „(3) When verifying the effective organisation, the following main criteria are to be taken into account: appropriate use of human and material resources, evaluation of needs, crisis management, relation between invested resources and obtained results, management of information, organisation of professional training and improvement and assignment of tasks within the courts or prosecutor's offices.

(4) When verifying the behaviour and communication skills, the following main aspects are to be taken into account: behaviour and communication with judges, prosecutors, auxiliary personnel, the users of justice, the persons involved in the act of justice, other institutions, the media, ensuring access to information of public interest in that court or prosecutor's office and transparency in leadership.

(5) When verifying the assuming of responsibility, the following main aspects are to be taken into account: the fulfilment of duties provided in laws and regulations, the implementation of national and sequential strategies in the field of the Judiciary and the observance of the principle of random case distribution or, the case being, of cases distribution based on objective criteria.

(6) When verifying the management skills, the following main aspects are to be taken into account: the capacity for organisation, the capacity for quick decision-making, resistance to stress, self-improvement, capacity for analysis, synthesis, foresight, strategy and planning in the short, medium and long term, initiative and capacity to adapt quickly”.

112. The above mentioned legal text sets out a certain assessment methodology. The compliance with and the observance of this methodology is the sole responsibility of the initiator of the measure. The President is not entitled to decide on the way in which the proposal is grounded. In turn, he can start a dialogue with the Minister of Justice on these issues.

113. There is neither the role of the President of Romania nor of the Constitutional Court to control this assessment because, in such a case, they would distort the role of the Minister of Justice and turn into authorities that control the way in which the Minister of Justice understands to exercise his minimal discretionary constitutional competence reflected in the evaluation. Or, the Court notes that in this case the President of Romania has carried out an "assessment of the assessment" made by the Minister of Justice, in other words, an assessment of the grounds of the revocation proposal, placing himself above the authority of the Minister of Justice, thus violating the provisions of Article 132 paragraph 2) of the Constitution [...] Therefore, the arguments contained in the proposal for dismissal of the prosecutor from the management position, provided by art. 54 paragraph (1) of Law no.303 / 2004, as well as their grounds, come under the discretionary competence of the Minister of Justice and not of the President of Romania, thus generating a political responsibility, first of all, of the Minister of Justice and, secondly, of the Government before the Parliament, as there is the possibility to fall into the provisions of Article 113 and Article 114 of the Constitution concerning the voting of a simple motion or a motion of no confidence, as the case may be.

115. The Court also notes that the Decision of the Superior Council of Magistracy - Prosecutors' Section, which has consultative value, may contain considerations both regarding the merits and the legality of the proposal. As long as the competence of the President of the Republic refers only to the control of the lawfulness of the revocation procedure, he cannot invoke as a ground for refusal of the Minister of Justice's proposal the fact that the Superior Council of Magistrates - the Prosecutor's Section found that "the issues raised by the Minister of Justice do not reveal deficiencies in the exercise of managerial duties by the Chief Prosecutor of the National Anticorruption Directorate" or that "in the Minister of Justice's report, the managerial components are generically listed, without a concrete individualization of the unlawful resources used, the behavioural deficiencies, the unfulfilled legal attributions or the absence of managerial skills". As pointed out above, the Decision of the Superior Council of Magistracy - Prosecutors' Section is a

consultative reference for the Minister of Justice both in terms of the legality and the soundness of the proposal, while **the President of Romania, given his competence, can use it, also as a consultative reference, only on aspects concerning the legality of the procedure.**

Practically, the document issued by the President must confirm the regularity or lack of regularity of the procedure, not the opportunity or lack of opportunity thereof.

(...)

118. Therefore, by examining the constitutional and legal texts, the Court finds that, given that the President of Romania had no objection on its regularity, the revocation procedure initiated by the Minister of Justice meets the legality criteria, which means that the President of Romania should have issued the decree of dismissal for the chief prosecutor of the National Anticorruption Directorate. [...] Thus, the Court finds that Minister of Justice was prevented from fulfilling his constitutional role regarding the revocation of the chief prosecutor of the National Anticorruption Directorate.

119. Consequently, after analysing the President of Romania's letter, by which he refused to put into practice the revocation proposal of the chief prosecutor of the National Anticorruption Directorate, Mrs. Laura Codruta Kövesi, the Court notes that the President of Romania **stated the regularity and legality of the revocation procedure**, the only objections being raised on the opportunity of the measure. In this context, the Court finds the existence of a legal dispute of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to put into practice the proposal to dismiss the Chief Prosecutor of the National Anticorruption Directorate, Mrs. Laura Codruta Kövesi.

120. Once a legal constitutional dispute has been established, the Constitutional Court, by virtue of the provisions of Article 142 paragraph (1) of the Constitution, according to which "it is the guarantor for the supremacy of the Constitution", has the obligation to settle the dispute by indicating the correct conduct in accordance with the constitutional provisions which public authorities must comply with. [...] Consequently, in the exercise of its function, the Court applies a two-step procedure, namely the analysis of the existence of a legal dispute of a constitutional nature and in case of an affirmative answer, the indication of the conduct to be followed by public authorities involved in the dispute.

121. Thus, irrespective of the authority that generated the legal dispute of a constitutional nature, it has the obligation, according to the rule of law, to respect and comply with those established by the decision of the Constitutional Court. In relation to the present case, the Court finds that, the letter of the President of Romania who refuse to accept the revocation proposal of Mrs. Laura Codruța Kövesi from the position of Chief Prosecutor of the National Anticorruption Directorate, undoubtedly shows that the procedure meets the regularity and legality requirements, which is also the position of the Constitutional Court. Therefore, the President of Romania must issue the decree to dismiss Ms. Laura Codruta Kövesi from the chief prosecutor position at the National Anticorruption Directorate.

(...)

THE CONSTITUTIONAL COURT

In the name of the law

RULES:

1. Takes note of the existence of a legal conflict of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to put into practice the proposal to dismiss Mrs. Laura Codruta Kövesi from the position of Chief Prosecutor of the National Anticorruption Directorate.

2. The President of Romania is due to issue the decree on the dismissal of Laura Codruta Kövesi from the position of chief prosecutor of the National Anticorruption Directorate [...].

Delivered in the meeting on 30 May 2018.