

Decision No 26 of 16 January 2019
on the request for settlement of the legal dispute of a constitutional nature between the
Public Ministry — the Public Prosecutor’s Office attached to the High Court of Cassation
and Justice, the Parliament of Romania,
the High Court of Cassation and Justice and the other courts
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Summary

I. As grounds for the request for settlement of the dispute, the President of the Chamber of Deputies has argued that, by signing two protocols, in 2009 and 2016, with the Romanian Intelligence Service, the Public Ministry - the Prosecutor’s Office attached to the High Court of Cassation and Justice has breached its own constitutional powers and, by misusing the powers of the Parliament, vested the Romanian Intelligence Service with the task of carrying out activities specific to the criminal investigation bodies, which is expressly prohibited by the legislator in Law No 14/1992 on the organisation and functioning of the Romanian Intelligence Service.

The two protocols are secret, so that they have not been communicated to the courts, have not been made public and have not been published in the Official Gazette, which has led to the prosecution and gathering of evidence by the officials of the Romanian Intelligence Service and Prosecutor’s Office on the basis of secret rules which are legally non-existent. Since judges were not aware of the content of the protocols, they could not rule on the lawfulness of the evidence thus obtained, which infringes a person’s rights of defence, right to a fair trial and effective access to justice.

The Public Ministry also led judges to abide by not only law but also secret cooperation protocols with the Romanian Intelligence Service. By that conduct, the Public Ministry has breached the principle of sincere cooperation between the State’s powers and, through covert, secret acts, it determined a legal dispute of a constitutional nature not only in relation to Parliament, as legislative power, but also to the High Court of Cassation and Justice and the courts, as judicial power.

On the basis of those protocols, the prosecutors together with the officials of the Romanian Intelligence Service have themselves made a pre-selection of evidence, physically removing from the criminal file evidence to their free discretion, which they considered to be ‘irrelevant’, evidence which can no longer be assessed by an independent judge. By so doing, they replaced the judge. There cannot be a free trial as long as the public prosecutors and officers of the Romanian Intelligence Service present only a part of the truth, based on the evidence selected by themselves, practically manipulating the evidence and by default the course of the trial. For this reason, the courts have not been able to judge independently and impartially, as provided for in the Constitution.

No secret legislation can create obligations on citizens and can deprive them of rights recognised by law. No procedural act and no court-related activity can be carried out outside the law, on the basis of secret rules, without infringing the constitutional foundation of administration of justice, rule of law and separation of powers.

II. Having examined the dispute resolution request, the Court noted that the author of the request referred to a generalised practice. Therefore, the Court considered as party of the alleged constitutional dispute all courts, under the phrase “High Court of Cassation and other courts”. At the same time, the Court found that there was nothing to prevent two constituent elements of the same authority being in conflict — the Public Ministry and the courts.

Although the Public Ministry has a leading role in prosecution, it is alleged to have agreed to divest part of its constitutional and legal powers to a secret service and to use the evidence thus obtained during the criminal proceedings. Therefore, the secret service played a secondary role in the alleged dispute and cannot be considered as part of it.

The Court has held that the main issue brought before it is concerned with the fact that the Public Ministry has assumed the role of the legislator, adding to the law, through “collaboration protocols”, with negative consequences for citizens’ rights and freedoms. Thus, the litigant has to fight against legal practices and rules that are unconstitutional but institutionalised for more than 9 years.

The principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution prohibits courts from establishing, amending, supplementing or repealing primary regulatory rules. The principle of legality presupposes, in essence, that the judicial bodies act on the basis of the power which the legislator has conferred on them and, subsequently, that they must comply with both substantive and procedural law provisions, including the rules of jurisdiction.

The Court has found that rules of criminal procedure, established by law, do not provide for the task of public prosecutors, whatever the level or function, to enter into “collaboration protocols” in relation to the individual cases they handle. As the protocols did not concern a specific case, but a broad framework of “institutional cooperation”, they are not procedural acts that prosecutors could order. The Court has held that the collaboration protocols cannot be administrative acts of management, but only administrative acts of authority, which are of an extrajudicial nature and are subject to review of legality. An administrative act is intended to organise the enforcement or to enforce the law, not to substitute law or to act counter to the law. Therefore, as a rule, the acts of collaboration concluded by the Prosecutor General in the representation of the Public Ministry are administrative acts of a normative nature and cannot include primary normative provisions.

The Prosecutor General, as a representative of the Public Ministry, may conclude cooperation protocols with other public authorities, including the Romanian Intelligence Service. However, the author of the referral indicated that, in reality, the Public Ministry, by means of “collaboration protocols”, amended and supplemented in a covert manner the existing primary regulatory framework in the matter of prosecution.

Article 2 of Protocol No 00750 of 4 February 2009 provides that “[t]he parties shall cooperate [...] in the use of information in the field of preventing and combating criminal offences against national security, acts of terrorism, offences that have a correspondent in threats to national security and other serious criminal offences, in accordance with the law”. The Court held that neither the 1969 Criminal Code nor the Criminal Code in force lays down in their general part the concept of a serious criminal offences, meaning that the definition of that term is to be determined by the specific nature of each law. The Protocol was therefore not limited to those categories of criminal offences which fell within the competence of the Romanian Intelligence Service. It is therefore clear that a primary legal standard with flexible content, which could be assessed on a case by case basis by the public prosecutor’s office or the intelligence service, was generated in the form of an apparently administrative act.

The Court observed that a rule attributing competence to the secret service could not even be adopted by the Parliament, as it would have meant an implicit redefinition of the role of the Supreme Council of National Defence, governed by Article 119 of the Constitution. As the activity of the Romanian Intelligence Service is organised and coordinated by the Supreme Council of National Defence, it cannot acquire by means of a “collaboration protocol” a broader competence than that of the entity under the auspices of which it operates.

At the time of the conclusion of the Cooperation Protocol under review, the Romanian Intelligence Service was not entrusted with criminal investigation tasks, its activity being

limited to providing technical support to the carrying out of criminal investigation activities in relation to criminal offences threatening national security. In principle, procedural acts in the course of criminal proceedings are carried out by prosecution bodies and in no way by other bodies external to them. However, the contested text has a broad normative content which allows that the prosecutor's powers be taken over by the secret service in the investigation of any criminal offence assessed as "serious". In other words, since 2009, normative premises have been created for the Romanian Intelligence Service to carry out criminal investigations in any area. This leads to the infringement of Article 1 (4) on the separation and balance of powers in the State and of Article 61 (1) of the Constitution on the role of Parliament as the sole legislative authority of the country.

The imprecise wording of Article 17 (1) of the Protocol leads to the conclusion that an expert report may be drawn up by experts of the Romanian Intelligence Service. Strict legal regulation of the acquisition of expert capacity ensures, from a regulatory point of view, impartiality and a high degree of professionalism on their part. The Public Ministry has no competence to request expert reports from experts of the Romanian Intelligence Service, by extending the competence of the Romanian Intelligence Service.

The Protocol regulated the competence of the Romanian Intelligence Service to implement the technical surveillance warrant in criminal proceedings without being a criminal prosecution body. Although the Code of Criminal Procedure has not entrusted the secret service with this power, the Public Ministry, on its own initiative, transfers to the secret service a task which should be carried out by the prosecutor. In practice, this protocol adds to the provisions of the Code of Criminal Procedure. However, the Public Ministry does not have the right to transfer its powers derived from the constitutional text of Article 131.

The Protocol sets out the obligation for the Public Ministry to report on how to use of referrals received from the secret service. The Court has pointed out that, according to its case-law, the prosecutor is independent, therefore no relationship of subordination to a secret service in the criminal proceedings can be accepted. This shows that relations have been established between the Public Ministry and the Romanian Intelligence Service contrary to the law and affecting the role and work of the public prosecutor in the criminal proceedings. The Court therefore found that Article 131 (1) and Article 132 (1) of the Constitution were infringed, with reference to the role of the Public Ministry and the status of the public prosecutor.

Article 65 (2) (h) of the Constitution establishes a civilian oversight of the secret services of the State, by Parliament, in joint meeting. It follows from the analysis of the Verbatim Reports of Joint Meetings of the Chamber of Deputies and the Senate that, upon the submission and discussion of the reports relating to the performance of the duties incumbent on the Romanian Intelligence Service, there was no objection to possible problems arising from the conclusion of the Protocol under review.

The Parliament preferred to remain in a continuous state of passivity, although it had the necessary constitutional means to remove the effects of the Protocol. On the contrary, instead of exercising its power of oversight, Parliament referred the matter to the Constitutional Court. Through the superficial exercise of its powers, Parliament implicitly accepted an act which was contrary to the constitutional order. There is therefore a complex legal dispute of a constitutional nature which was determined by the conclusion of the Protocol under review and favoured by improperly exercised parliamentary oversight.

In addition, the Protocol imposed a certain judicial practice which is not entirely in line with the requirements of Article 124 of the Constitution, according to which justice is to be carried out in the name of the law. The provisions of the Protocol breached a wide scope of fundamental rights and freedoms, in particular those relating to the right to a fair trial [Article 21 (3)], but also to the right to personal, family and private life (Article 26) and individual

freedom [Article 23 (1)], since they made it difficult to apply the penalty of absolute nullity of unlawfully obtained evidence.

III. For all these reasons, by a majority vote, the Court upheld the referral and found the existence of a legal dispute of a constitutional nature between the Public Ministry — the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice and the other courts, on the other, arising from the conclusion between the Public Prosecutor's Office and the Romanian Intelligence Service of Protocol No 00750 of 4 February 2009, as well as the improper exercise of parliamentary oversight over the activities of the Romanian Intelligence Service. The Court also found that there was a legal dispute of a constitutional nature between the above parties also with regard to the conclusion of Protocol No 09472 of 8 December 2016, but only with regard to Article 6 (1), Article 7 (1) and Article 9. The High Court of Cassation and Justice and the other courts, as well as the Public Ministry — the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the subordinated establishments must verify in the pending cases the extent to which there has been a breach of the provisions relating to the substantive jurisdiction and the individual capacity of the prosecution body and must order appropriate legal measures.