

*Decision No 26 of 22 January 2020 on the request for resolution of the legal dispute of a constitutional nature between the Minister of Justice and the Ministry of Justice, on the one hand, and the Superior Council of Magistracy, on the other, published in Official Gazette of Romania, Part I, No 168 of 2 March 2020*

## **Summary**

**I. As grounds for the request for resolution of the dispute,** the President of the Superior Council of Magistracy argued that the Minister of Justice, Ana Birchall, caused a serious interference in the prosecution activity carried out by prosecutors and undermined the independence of the Romanian judiciary by negotiating a rule of law “roadmap” with the representative of a foreign state, outlining the idea that justice problems in Romania are not managed by the competent constitutional bodies, but by certain external factors. Also, with the repeated actions of the Minister of Justice, the Superior Council of Magistracy lost its credibility.

The author of the referral pointed out that, by Decision No 53 of 28 January 2005, the Court held that public statements made by representatives of the various public authorities, having regard to the context in which they were made and their specific content, could also give rise to confusion, uncertainty or tension, which could subsequently lead to conflicts between public authorities.

With regard to the serious interference by the Minister of Justice in the prosecution, it was stated that it took place in connection with the criminal investigation conducted in the “Caracal” case, in that the Minister of Justice had communicated to the family of a victim information on the content of the evidence adduced in the case. The Minister of Justice could not have known the information contained in a piece of evidence adduced during the investigation stage, which was not public, and could have communicated that information in lieu of the competent prosecuting body only by going beyond the powers lawfully conferred on her as Minister.

On the second aspect of the request, it was noted that on 5 September 2019, at a press conference in Bucharest, Mr Gordon Sondland, Ambassador of the United States of America to the European Union, stated that the US Attorney General William Barr had invited Minister Ana Birchall to Washington to continue working with him and his team directly for a roadmap on the rule of law in Romania. When asked by the President of the Superior Council of Magistracy about the existence of that document, the Minister of Justice did not deny the existence of that “roadmap” and did not answer the questions relating to the interference with the independence of the judiciary in that regard. Through her public position, the Minister of Justice created the appearance of her own justice agenda, debated at external level, but not discussed with the institution which has the constitutional role as guarantor of the independence of the judiciary.

With regard to the repeated actions aimed at blocking the activity of the Superior Council of Magistracy, the author indicated the Council’s referrals regarding the need to initiate or amend legislative acts addressed to the Minister of Justice, how the Minister of Justice decided to make public some issues relating to her participation in plenary sessions of the Council as a member as of right, the way in which the Minister of Justice expressed herself with regard to the Section for the Investigation of Offences in the Judiciary, and the approach taken by the Minister of Justice to the situation of the Council's seat.

As regards the Superior Council of Magistracy’s referrals to the Minister of Justice, it was noted that they were either unexamined or rejected without reasonable justification. Thus, the principle of sincere cooperation between the State authorities was infringed.

Furthermore, through public statements, the Minister of Justice talked about difficulties encountered in participating in plenary sessions of the Council, as a result of the way in which they were planned by the institution's management. Those statements create in the public perception the idea that there is an obligation to consult members with regard to the setting of sessions and the draft agenda, an obligation not respected by the Council.

With reference to the way in which the Minister of Justice spoke about Section for the Investigation of Offences in the Judiciary, it was noted that the Minister of Justice's grievances concerned the procedure for appointing prosecutors in this structure and the role of the Prosecutor General, who, in her view, would no longer be able to censor that section's prosecution measures. These allegations were considered to be completely false in view of the legal provisions governing the hierarchical control of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice of the solutions, acts or measures ordered by the Chief Prosecutor of the Section for the Investigation of Offences in the Judiciary. Since in the present case the Council does not have the necessary tools to prevent the impairment of public confidence in the activity carried out by the aforementioned section of the prosecution service, as a result of the statements made by the Minister of Justice, an institutional deadlock has been created requiring the intervention of the Constitutional Court.

The Minister of Justice also asked the Council to take a decision on its seat, in the sense that either it will be part of the "Justice District" project or that the procurement procedure for new premises outside this district is to be completed, stressing that the project in question is delayed and cannot proceed until a clear reply from the Council has been received. However, under Government Decision No 949/2018, the Council was made available the amount necessary to purchase an establishment corresponding to its operational needs. Thus, the attempt by the Minister of Justice to prevent the acquisition of an establishment for the Council is liable to affect its very functional capacity, whereas the difficulties it faces in this respect have been known as from the time when this body was set up.

**II. Having examined the request for a settlement of the dispute**, the Court held that Ms Ana Birchall's mandate as Minister of Justice had ended on 4 November 2019, with the result that the question arises as to whether the request of the President of the Superior Council of Magistracy could still be considered where that conflict did not appear to exist anymore.

In its case-law, the Court has held that a finding that there is no conflict at the time of delivery of the decision does not, however, lead to the implicit finding that the conflict did not exist before, that is to say, at the time when it was notified on the same. By Decision No 158 of 19 March 2014, published in the Official Gazette of Romania, Part I, No 292 of 22 April 2014, the Court stated that the proceedings before the Constitutional Court have all the characteristics of judicial proceedings governed by public law and that they are not compatible with the principle of availability specific to the rules of civil procedure. By Decision No 148 of 16 April 2003, published in the Official Gazette of Romania, Part I, No 317 of 12 May 2003, the Court emphasised that the remedying or disappearance of the situation giving rise to the conflict, after the matter was referred to the Court, cannot, in the absence of an express provision to that effect, render the request devoid of purpose and be dismissed as such.

Therefore, even if some aspects of the present conflict concern the personal conduct of the former Minister of Justice, Ana Birchall (communication of the result of the genetic tests to the family of the victim in the "Caracal" case, negotiation of a rule of law "roadmap", issues relating to the determination of the date of Council sessions, statements made in relation to the activity of the Section for the Investigation of Offences in the Judiciary), the Court has jurisdiction to rule on the acts/action of which she was accused.

The Court found that the request concerns a contentious situation, since it relates to a dispute between the Minister of Justice/Ministry of Justice and the Superior Council of

Magistracy concerning the limits of their competence and the way in which the relationship between the executive and judicial authorities is conducted.

Exception to the above finding is the allegation made by the President of the Superior Council of Magistracy that the Minister of Justice would have negotiated a rule of law “roadmap” with the representative of a foreign state. The Court found that this allegation is not substantiated. Therefore, even if a legal question with possible constitutional relevance is raised, it is not a present one and is hypothetical. However, in the context of the power set forth in Article 146 (e) of the Constitution, the Court cannot analyse hypothetical legal disputes of a constitutional nature. Consequently, the existence of a contentious situation cannot be accepted since it must, by definition, relate to specific acts or actions committed by the public authorities.

The situation at issue is also of a legal nature, since the Minister of Justice/Ministry of Justice is accused of conduct which, on the one hand, undermines the constitutional role of the Public Ministry and, on the other hand, affects the work and role of the Superior Council of Magistracy as guarantor of judicial independence.

An exception to the above finding concerning the legal nature of the disputed situation are the statements made by the Minister for Justice in connection with the dissolution/reorganisation of a public prosecutor’s structure, as these statements did not produce any legal effect. Opinions, value judgements or statements made by the holder of a public office with regard other public authorities do not in themselves constitute legal conflicts between public authorities. Opinions or proposals concerning the manner in which a particular public authority or its structures acts or should act, even if critical, do not trigger institutional blockages unless they are followed by actions or omissions that would hinder the fulfilment of the constitutional tasks of those public authorities. Such views or proposals remain within the limits of freedom of expression of political opinions, with the restrictions laid down in Article 30 (6) and (7) of the Constitution.

The Court pointed out that, in carrying out their constitutional mandates, representatives of public authorities, through their positions, are required to avoid the creation of conflict between powers. In the present case, the statements of the Minister of Justice were of a political nature, which fell within the limits of her freedom of expression. They have not produced any legal effects capable of leading to an institutional deadlock or hindering the exercise of the constitutional prerogatives of any public authority. Moreover, since the Government has the right to legislative initiative, in accordance with Article 74 of the Constitution, and is at the same time a delegated legislator, in accordance with Article 115 of the Constitution, its members may propose various legislative solutions for the completion of a draft law or an ordinance.

The Court then assessed whether the legal situation at issue was constitutional or legal in nature.

As regards the “Caracal” case, the Court has held that the judicial activity actually carried out by a public prosecutor in a particular criminal case does not relate to the authority of the Minister for Justice, as these are two separate issues. Thus, in judicial activity, as concerns the solutions adopted, the prosecutor is independent, under the conditions laid down by law. The Venice Commission took the view that the application of a policy in no way presupposes the existence of specific orders personally given to prosecutors in a particular case.

Therefore, the fact that the Minister for Justice has communicated by telephone to the family of a victim information relating to the content of the evidence adduced in the case, which the Minister for Justice herself confirms in her viewpoint, cannot be classified as an expression of the authority which she enjoys in terms of the activities of the prosecutors, but appears to be an interference by the Minister for Justice in the investigation of the case by the prosecutor of the case.

Having analysed Article 94 of the Code of Criminal Procedure, the Court found that the public prosecutor has the power to restrict on reasoned grounds the consultation of the file at the pre-trial stage, if this could undermine the proper conduct of the criminal prosecution. Therefore, the case prosecutor or the superior prosecutor decides to what extent such consultation compromises the conduct of the criminal prosecution. As regards access to the criminal investigation file for other persons who, by reason of their constitutional or legal functions, become aware of information contained in the file, they are under an obligation not to disclose it and, if they consider that it must be made known to the public, they must address a request to the prosecutor investigating the case or to the superior prosecutor, as the case may be. Contrary conduct risks compromising the prosecution phase of the criminal proceedings and affect the constitutional role of the Public Ministry.

It is not within the competence and role of the Constitutional Court to investigate the precise manner in which the Minister for Justice had access to evidence in a criminal investigation file, and the possible deviation of the Minister for Justice from the rules of criminal procedure was covered by the fact that, subsequently, the prosecutor took the view, by issuing a press release, that that information did not call into question the proper conduct of the criminal investigation. However, in principle, it is not for the Minister for Justice to determine himself whether or not information in a criminal investigation file is information of public interest. This assessment shall be carried out by the prosecutor.

Therefore, even if from the point of view of the procedure a wrong route was chosen, the result reached was not outside the law. Since no legal practice has emerged in the present case for the purposes of the constant communication of information from the prosecution files by the Minister for Justice, the singular action of the Minister for Justice does not point to an institutional deadlock and has not affected the criminal investigation, with the result that there can be no legal dispute of a constitutional nature.

As regards the relationship between the Ministry of Justice and the Superior Council of Magistracy with regard to the initiation of legislative acts or the inclusion or not of the seat of the Superior Council of Magistracy in the “Justice District”, as well as the public statements made by the Minister of Justice on the way in which the date and agenda of Council sessions are determined, they do not call into question constitutional relations, even if they indicate a certain situation of tension and lack of collegiality in the conduct of institutional relations between the Minister of Justice/Ministry of Justice and the Superior Council of Magistracy.

**III. For all these reasons**, by a majority vote, the Court found that there was no legal dispute of a constitutional nature between the Minister of Justice and the Superior Council of Magistracy arising from the conduct of the Minister of Justice in relation to the activity of the Public Ministry, consisting of interfering with the prosecution activity carried out by the Public Ministry and challenging the authority of the provisions of Article 88<sup>1-11</sup> of Law No 304/2004 on the organisation of the judiciary. The Court also decided, unanimously, that there was no legal dispute of a constitutional nature between the Minister of Justice and the Superior Council of Magistracy, arising from an alleged negotiation by the Minister of Justice of a rule of law “roadmap” with the representative of a foreign State and the way in which the Minister of Justice decided to make public some issues relating to her participation in plenary sessions of the Council as a member as of right. The Court unanimously found that there was no legal dispute of a constitutional nature between the Ministry of Justice and the Superior Council of Magistracy, arising from the way in which the Council’s referrals to the Ministry of Justice concerning the need to initiate or amend legislative acts and the approach taken by the Ministry of Justice to the legal situation of the Council’s seat were dealt with.