



MINISTRY OF JUSTICE

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REPORT

On the managerial activity of the National Anticorruption Directorate

We have a justice - some say it is good, others say it's bad

Justice must be equal for all, it must be in the service of the citizen, it must be good, not bad!

Six months ago, six months had passed since taking over the dignity of minister of justice, we were together here in the MJ council room, when we presented the directions for amending the laws of justice.

The laws amending the laws of justice have been adopted, some solutions have been declared unconstitutional, will be modified in the sense of those decisions, will eventually be adopted and published in the Official Gazette and produce legal effects.

Six months later, one year after the taking over of the dignity of justice minister, we are together in the same place and I will present to you the **Report on the Managerial Activity of the National Anticorruption Directorate (DNA)**.

I. **Introductory remarks.**

The dignity of a prosecutor is absolutely respectable if it is practiced within the limits of constitutional powers, if it is exercised in good faith, if it is exercised to serve the public good, which is one of the requirements of the rule of law.

Personally, I started my professional activity exercising this dignity of a prosecutor. I was valedictorian, I was asked to stay on as a University assistant at the Law School of the "Alexandru Ioan Cuza" University in Iasi, the first Law School established in Romania, I could have chosen to be a judge, a notary or a lawyer, but I chose the dignity of a prosecutor.



I was and still am very pleased with this choice, because that's when I established my professional coordinates, even if later I went back to the same faculty, climbed all the steps of the university career, exercised the prerogatives of the Chancellor's position for three years, vice-dean for 8 years, dean for 12 years, and since February 2016 I am rector of UAIC in Iasi!

This report is not an evaluation of DNA activity. The synthesis report on the activity of the Public Ministry, DIICOT and DNA will be submitted to Parliament, in accordance with the provisions of the Law 304/2004 on judicial organization. By the end of February, I shall receive said reports from these institutions and summarize them, a synthesis I will present to Parliament.

This report represents a position taken by the Minister of Justice, determined by its constitutional role, enshrined in art.132 of the Fundamental Law which, referring to the status of prosecutors, establishes in paragraph (1) that *"Prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice"*. Its elaboration was carried out in the context of debates that have increased a great deal in public space in the last year, namely February 2017 - February 2018, debates that have deeply divided the public opinion, have raised to unprecedented odds in the recent history of Romania the attacks on a person and the questioning of constitutional, European and universal values such as the benefit of the doubt, the right to defence, personal liberty, have polarized the attention of the European and international fora on Romania, have triggered evaluation mechanisms which have never before been used for our country, threatening the achievement of the undertaken objectives, of lifting other evaluation mechanisms, endangering the rule of law.

The positioning concerns the managerial activity carried out by the chief prosecutor of DNA, and the grounds of the analysis on which it is based, distinct from the one concerning the report to Parliament, is given by the provisions of art. 54 par. (4) in conjunction with art. 51 paragraph (2) let. b) of the Law 303/2004 on the position of judges and prosecutors, which establish the competence of the Minister of Justice to request the revocation of the chief prosecutor of the DNA: *"b) in case of an inadequate exercise of managerial duties regarding efficient organization, behaviour and communication, assuming responsibilities and management skills."*

According to article 51 par. (3) of Law 303/2004, *"When checking the efficient organization of human and material resources, evaluation of necessities, managing crisis situations, the report in invested resources – results, managing information, the organization of professional training and improvement and assigning tasks within institutions or the offices of public prosecutors."*

Regarding the legal framework invoked, we have conducted an analysis on:



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- **efficient organization;**
- **behaviour;**
- **communication;**
- **undertaking responsibility;**
- **managerial skills related to**

Mrs. Laura Codruta Kovesi, Chief Prosecutor of the DNA.

The reference period is February 2017 - February 2018, and the institutional steps preceding this assessment are:

- **the evaluation report on the managerial efficiency and the manner of fulfilling the obligations of the Chief Prosecutor of the DNA** following the pronouncement by the Constitutional Court of Romania of Decision no. 68 of the 27th of February 2017, published in the Official Gazette of Romania, Part I, no. 181 of the 14th of March 2017, which found that there was and there is a legal conflict of a constitutional nature between the Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate and the Government of Romania, generated by the action of the Public Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate to have the authority to verify the legality and the appropriateness of a normative act, namely Government Emergency Ordinance no. 13/2017, in violation of the constitutional powers of the Government and Parliament, provided by art. 115 par. (4) and (5) of the Constitution, respectively of the Constitutional Court, provided by art. 146 let. d) of the Constitution. We concluded then that the negative outcomes of this reporting may, in the future, call into question, in relation to the facts found, the opportunity to revoke the heads of the institutions concerned or other institutional measures in accordance with the Constitution and the law;
- **the control** requested on the 19th of June 2017 by the Judicial Inspection, control established by the Chief Inspector of the Judicial Inspectorate Order No.71 of the 3rd of July 2017, **Report of the Directorate for Judicial Inspection for Prosecutors** (annex 1)¹ and the measures established by this Report, **with a verification horizon in the first part of 2018**. We have taken note of the conclusions of the Report, of all the circumstances surrounding its preparation and adoption, and I have stated that I will make a decision regarding DNA management based on the analysis and evaluation of all the circumstances, but specifying that the decision will not be taken solely on the basis of the Judicial Inspection Report.

¹ No. 5115/IJ/982/DIP/2017, http://old.csm1909.ro/csm/linkuri/03_11_2017_89853_ro.docm



The conclusions of this Report are therefore based on the accumulations from the beginning of the reference period and up until the present moment, on the analysis of the documents, facts, concrete actions, including the public statements of the Chief Prosecutor of DNA, reflected in documents of public authorities, at the end of a period targeted by the Report of the Directorate for Judicial Inspection for the said prosecutors.

II. Analysis

- 1) **Unprecedented situation in the relations between the Romanian public authorities: in a single year three legal conflicts of a constitutional nature in which the National Anticorruption Directorate, through its leadership, was summoned to the Constitutional Court at the request of other public authorities invoking violations of their competence by the DNA and the lack of constitutional loyalty of the chief prosecutor of the DNA; three legal conflicts of a constitutional nature in which the Constitutional Court firmly circumscribed the competence of the National Anticorruption Directorate and, in two of them, sanctioned the behaviour of the Chief Prosecutor, contrary to constitutional loyalty.**

I have shown in the first Analysis Report on the activity of the DNA Chief Prosecutor that, in itself, the finding of a single legal conflict of a constitutional nature is not apt to determine the revocation of the leader of the institution that produced the conflict. Conduct contrary to the Constitution, isolated, can be corrected, which is also the reason for the constitutional consecration of an appropriate instrument and the proper establishment of the competence of the Constitutional Court to resolve this type of conflict.

The conclusions are obviously different when violations of the Constitution, exceeding the limits of competence provided by the Constitution and the law, become systematic.

In less than half a year since the Constitutional Court's Decision No. 68/2017 was published, the DNA, through its leadership, was summoned to the Constitutional Court for two more legal conflicts of a constitutional nature. **So 3 complaints about constitutional legal conflicts in a single year, of which in two cases the Court found the violation of the Constitution by the DNA.** In the third situation, although the Court did not find a constitutional legal conflict, it required clarifications to guide the conduct of the DNA, especially with regard to a press release issued by it on the actions taken.

It is a significant balance on the scale of the Court's work, if we examine the most recent statistics of the Constitutional Court (the 31st of January 2018), which reveals that the number of decisions establishing legal conflicts of a constitutional nature between public authorities is 13-14.94% of the total of 31 decisions taken.

Thus, in the 14 years since the jurisdiction of the Constitutional Court to settle legal conflicts of a constitutional nature was introduced, 13 such conflicts were found. Of these, 2 were found in 2017 and were created by the Public Ministry - the National Anticorruption Directorate, in breach of the limits of competence in relation to Parliament, the Government and the Constitutional Court and, respectively, by conduct contrary to the constitutional principle of loyal cooperation.

In relation to the legal provisions underlying the revocation, a **behaviour** constituting the systematic violation of the Constitution undoubtedly falls within the grounds that support the revocation of the Chief Prosecutor of the DNA in office.

2) **The Constitutional Court's Decision no. 68/2017 (Annex 2) - the National Anticorruption Directorate has acted *ultra vires*, has arrogated a competence that it does not possess.**

By means of **Decision no. 68 of the 27th of February 2017²**, which was the subject of the analysis of the previous Report, the Court held that, in said case, *"the Public Ministry, as part of the judiciary authority, considered its competence to verify the appropriateness of observing the legislative procedure and the legality of adopting the Government Emergency Ordinance. Such conduct amounts to a serious violation of the principle of the separation of powers in the state, guaranteed by art. 1 par. (4) of the Constitution, because the Public Ministers not only exceed its attributions provided by the Constitution and by the law, but it attributes itself attributions that belong to the legislative power of to the Constitutional Court. In its activity of interpreting and applying the law, the prosecutor must strike a balance between the spirit and the letter of the law, between the drafting requirements and the aim pursued by the legislator without having the competence of substituting competent authorities in this area. The duty incumbent upon prosecutors derives directly from the constitutional norms of art. 131 of the Constitution, according to which, in their judicial activity, they represent the general interests of society and defend the rule of law and the rights and freedoms of citizens. [...] By checking the circumstances in which the Government Emergency Ordinance 13/2017 was adopted, amending and supplementing Law 286 / 2009 on the*

² Published in the Official Gazette of Romania no. 181 from the 14th of March 2017



*Criminal Code and Law 135/2010 on the Criminal Procedure Code, the **Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate** has assumed the competence to carry out a criminal investigation in an area that exceeds the legal framework, fact which can lead to an institutional blockage from the perspective of the constitutional provisions devoted to the separation and balance of powers in the state. Thus, when the initiation of the criminal prosecution involves research and criminal investigations on the manner in which the Government has fulfilled its delegated powers, the action of the Public Ministry ceases to be a legitimate one, becoming abusive as it exceeds the jurisdiction established by the legal framework in force. Moreover, the action of the Public Ministry creates pressure on the members of the Government, which affects the proper functioning of this authority under the act of enactment, as a result of which the **delegated legislator is deterred/intimidated from exercising its constitutional powers. The triggering of a large criminal investigation, which resulted in inquiries at the Ministry of Justice, the extradition of documents, the hearing of a large number of civil servants, state secretaries and ministers led to a state of tension, psychic pressure even during the carrying out of legislative procedures, creating the premises of a blockage in the law-making activity. Thus, in the face of a fear triggered by a criminal investigation activity and the formulation of future allegations that may determine the incidence of criminal liability, the Government is blocked in its work as legislator. The circumstance created empties the content of the constitutional guarantee on the immunity inherent in the decision-making act, which benefits the members of the Government, a guarantee aimed precisely at protecting the mandate against possible pressures or abuses against the person in the position of minister, immunity ensuring its independence, freedom and security in exercising its rights and obligations under the Constitution and the laws. Through its conduct, the Public Ministry – the Public Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate acted ultra vires and has taken on a competence that it does not have - the control of the way of adopting a normative act, in terms of its legality and opportunity, which affected the proper functioning of an authority (...)" (paragraphs 120-121). The Court therefore found the existence of a legal conflict of a constitutional nature between the Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate, on the one hand, and the Government of Romania, on the other hand, while retaining the conduct in accordance with the Constitution, respectively that "the exercise of the powers established by the law in accordance with the constitutional provisions regarding the separation of powers in the state and thus the **abstain from any action that would*****



have the effect of subrogation on the duties of another public authority. Therefore, the Public Ministry does not have the competence to conduct criminal investigations on the legality and opportunity of a legislative act adopted by the legislator.”

In relation to the legal provisions underlying the revocation, **exercising the management of an institution in violation of the limits of its competence** falls within the grounds of justifying the revocation of the head of the institution. Even more so since, according to the statements made by the Chief Prosecutor of the DNA, it has personally supervised the investigation carried out by the prosecutors, referring to OUG 13/2017: "I undertook this case together with Mr. Dumitriu and Mr. Unckeşelu. They did move an inch to the right or left without my approval"³. So, it personally supervised/engaged in investigations, as it also personally engaged in an investigation conducted contrary to the limits of constitutional competence.

- 3) **The Constitutional Court's decision no. 611/2017 (Annex 3) - by its conduct, the Chief Prosecutor of the DNA not only eliminates a priori any loyal cooperation with the authority exercising the sovereignty of the people - the Romanian Parliament, but refuses to participate in the clarification of certain aspects by an event of public interest; by this refusal, the authority of the Romanian Parliament, the representative body of the people, is violated and the activity of the Romanian Parliament is prevented from performing the duties of control through the parliamentary committees.**

By means of **Decision no. 611 of the 3rd of October 2017⁴**, on the applications for settlement of legal conflicts of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry – the Public Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, formulated by the Presidents of the Senate and the Chamber of Deputies, published in the Official Gazette no. 877 of 07.11.2017, **the Court found that there is a legal constitutional conflict between the Romanian Parliament on the one hand and the Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice on the other hand, generated by the refusal of the Chief Prosecutor of the National Anticorruption Directorate to appear before the Special Investigation Commission of the Senate and the Chamber of Deputies for the verification of the issues related to the organization of the 2009 elections and the result of the presidential election. The Court held,**

³ Statement recorded in the Judicial Inspection's report no. 4759/IJ/912/DIP/2017

⁴ Published in the Official Gazette of Romania no. 877 of the 7th of November 2017



as far as Mrs. Laura Codruta Kovesi is concerned, that she, as the Chief Prosecutor of the National Anticorruption Directorate, refused to give course to the three invitations and to appear before the Special Investigation Commission and, at the commission's request to receive a written answer to the questions asked, Mrs. Laura Codruta Kovesi replied that she did not attend the commission's proceedings because she was not and is not aware of the issues that could serve to find the truth in the cause which forms the object of the commission's activity, because of the powers conferred by the law, she did not have and does not have any prerogatives or knowledge of any of the issues under the parliamentary inquiry, *"neither in the exercise of her job nor in her free time she did not become acquainted of situations or circumstances according to which the presidential elections from December 2009 would imply public authorities and/or persons, other than those provided for by the law, respectively in the conduct of the electoral process, with the consequence that the result of these elections will suffer."* The Court concluded that *"the answer thus formulated does not contain the elements to compete in establishing the factual situation which the Special Investigation Commission has in the investigation, in the sense that Ms. Laura Codruta Kovesi has neither denied nor confirmed a concrete de facto situation, merely stating that she does not have the necessary information. The Court notes that, in fact, Ms Laura Codruta Kovesi did not respond to the two questions raised by the special investigation commission. Moreover, this situation, coupled with the Commission's inability to establish the truth, although it has taken a number of steps in view of the hearing and other people who may have been aware of the investigated events but who refused cooperation on the grounds that they were cited as witnesses in a criminal prosecution case on the role of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, a circumstance that does not constitute a legal impediment for the continuation of the parliamentary inquiry, are likely to create a blockage in the work of the special commission of inquiry (as also mentioned in the partially drawn up report), a blockage which has led the Romanian Parliament to adopt a decision extending the term of office of the commission with 60 days in order to continue the legal steps to achieve the objectives for which the parliamentary control was triggered."* The Court also noted that *"the conditions under which the person invited to participate in the sittings of the inquiry commission is a person who represents, by virtue of its management position, a public authority not under parliamentary control - the Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice, in the application of the principle of loyal cooperation between state institutions/authorities, it has the obligation to take part in the works of the commission in all cases and irrespective of the subject matter of the parliamentary inquiry (see, in this respect,*



Decision no. 411 of the 14th of June 2017, paragraph 55). The fact that, in the present case, the Special Investigation Commission has asked for a written answer to certain questions, does not detract the person holding a management position in an authority of the Romanian State from appearing before a parliamentary commission. This is all the more so since the reply submitted avoids giving any information which the parliamentary commission can make use of in the determination of the factual reality which it is investigating. The Court further held that: **"through its conduct, the chief prosecutor of the National Anticorruption Directorate not only removes a priori any loyal cooperation with the authority exercising the sovereignty of the people - the Parliament of Romania but refuses to participate in the clarification of some aspects related to an event of public interest (participation in the evening of the 6th of December 2009, when the national elections for the election of the President of Romania were held, together with other persons holding public functions - the Director of the Romanian Intelligence Service, the deputy director of the Romanian Intelligence Service and senators, in the residence of Senator Gabriel Oprea) fact which if proven real would have a major negative impact on the social, political and legal level, thus preserving a state of uncertainty about the veracity of the investigated events. Or, through its activity and attitude, the person occupying a management position in a public authority of the state must ensure the prestige of the exerted function, which requires legal, social and moral conduct in accordance with the rank of public dignity, with the degree of representation and with the confidence provided by the citizens in the state authority. The exercise of public management positions, as well as of any public position in the state, cannot be summed up only in the carrying out the rights, obligations and duties imposed by the mandate held, but implies a priori loyalty to all the values and principles enshrined in the Constitution and respect for the other public authorities with which they enter into collaboration. From this context, it is the primary duty of any representative of public authorities to present themselves and provide the documents/documentary evidence or useful and conclusive information to the parliamentary inquiry committees in order to clarify factual circumstances that lead to finding the truth in a matter of public interest. "**

In conclusion, the Court found that, **by the refusal of the Chief Prosecutor of the National Anticorruption Directorate to appear before the Special Investigation Commission of the Senate and the Chamber of Deputies for the verification of the issues related to the organization of the 2009 elections and the result of the presidential election and to provide the requested information or to make available the other documents or evidence, useful for the activity of the commission, violate the authority of the Parliament of Romania, a**



representative body of the people, preventing it from carrying out its activity, in terms of fulfilling its powers of control through the parliamentary committees.

In relation with the legal provisions that constitute the basis of the revocation, we consider that a conduct by which any loyal cooperation with the representative public authorities of the Romanian state is avoided and refusal to clarify some aspects of public interest are also reasons for the chief prosecutor DNA to no longer be in office.

- 4) **The Constitutional Court's decision no. 757/2017 (Annex 4) - the Public Prosecutor's Office/DNA does not have the power to start criminal prosecution regarding the opportunity to issue individual administrative acts.**

By means of Decision **no. 757 of the 23rd of November 2017**⁵ on the request for settlement of the legal conflict of a constitutional nature between the Government of Romania, on the one hand, and the Public Ministry - the Public Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, on the other hand, related to the investigation of the circumstances of the issuance of two Government Decisions, although the Court did not find a legal conflict of a constitutional nature, however, stated in the recitals of the Decision, also binding, that *"regarding the opportunity of issuing the individual administrative act, the prosecutor's office has no jurisdiction to start criminal prosecution, but has the power to investigate criminal offenses committed in connection with its issuance."* Thus, the Court found that **"there is no mechanism for controlling the opportunity of issuing an administrative act. Therefore, if the law allows for the carrying out of a particular administrative operation in the sense that it leaves it to the discretion of the administrative body, it cannot call into question censoring the opportunity to appreciate the latter"**. Considering the above-mentioned, the Court held that *"it is for the court to verify whether the charge in criminal matters relates to acts/facts relating to the opportunity or circumstances of and the circumstances of the issue of the individual administrative act."*

In relation to the legal provisions underlying the revocation, **the exercise of the management of an institution in violation of the limits of its competence** falls within the grounds justifying the revocation of the head of the institution.

⁵ Published in the Official Gazette of Romania no. 33 from the 15th of January 2018



5) **Accreditation of the DNA's competence to assess the opportunities for drafting Government Decisions**

The statutes of the Constitutional Court were required by Decision no. 757 /2017, also taking into account the **DNA statement** by which this institution showed that the two above-mentioned Government Decisions "*violated the provisions of the Constitution of Romania, those of the Organic Law 213/1998, Law 107/1996 and Government Emergency Ordinance 107/2002, [...]* Also, a number of provisions have been violated, which regulate the normative technical norms, aspect repeatedly signalled by the Ministry of Public Finance and the Ministry of Justice, during the period preceding the adoption of the decision", and the initiation and promotion of Government Decisions were made, "*in violation of the Government's procedure for the elaboration, approval and presentation of normative acts drafts*", claims of nature **to put DNA in the position of an evaluator without any distinction, including on aspects of the opportunity of drafting Government decisions**, in contradiction with the reference constitutional framework.

Again, in relation to the legal provisions which constitute the basis of the revocation, the public communication in the sense indicated to support the same **exercise of the management of the institution in violation of the limits of its competence** falls within the reasons justifying the revocation of the chief of the said institution, the chief prosecutor of DNA.

6) **Not taking responsibility for a breach of constitutional and legal provisions, i.e. correcting such a conduct**

Subsequently, stating that those encompassed in the above-mentioned press expressed *simple opinions* of the institution, DNA **withdrew the press release. We appreciate the inadmissibility of such an approach, which affects the values and fundamental rights of a natural person(s)**, which is all the more serious as the person has a public dignity.

In relation to the legal provisions that constitute the grounds for revocation, not taking responsibility for an error occurred in the management of the institution/its public communication falls within the reasons justifying the revocation of the chief of said institution, that is to say the chief prosecutor of DNA.

7) **Violation of the Principles Governing the Exercise of a Public Authority The performance of the "DNA Chief Prosecutor to determine the Constitutional Court to**



explain at length that the DNA institution is neither a Government nor a Parliament, neither a Constitutional Court nor a court of law, and that, as the leader of this institution, the legal competencies of the DNA must be respected and also undertake a fair constitutional conduct

There were, therefore, three legal constitutional conflicts in less than a calendar year (and practically almost a quarter of those that have ever existed), in which the DNA, respectively, the chief prosecutor, violated the legislator's competencies, the Parliament's investigative function, and positioned itself to prevent the risk of substituting the Government for assessing the opportunity to issue acts of law enforcement, the jurisdiction of the Constitutional Court with regard to constitutional control, and the administrative litigation authorities in the area of legality control.

There were, therefore, **three legal conflicts of a constitutional nature that demonstrate (one of them developing and highlighting rigorously) the refusal of loyal constitutional cooperation by the Chief Prosecutor of the National Anticorruption Directorate and the abandonment of the principles governing the exercise of the leading role of a public authority.**

In the decisions made on these legal conflicts of a constitutional nature which contain the most extensive explanation of the constitutional loyalty principle, unprecedented at this scale in the case law of the Constitutional Court, and a detailed explanation of the duties of the persons in charge of a leading position in a public authority of the state, based on the consistent invocation of the Venice Commission Recommendations, a European reference authority for defining standards of rule of law.

Thus, we hold that *in the Opinion on Compatibility with Constitutional Principles and the Rule of Law of the Romanian Government's Actions Concerning Other State Institutions and the Government Emergency Ordinance amending Law 47/1992 on the organization and functioning of the Constitutional Court and the Government Emergency Ordinance to amend and complete Law 3/2000 on the organization and conduct of the referendum in Romania, adopted at the 93rd Plenary Session/Venice, 14-15 December 2012 (annex 5), the Venice Commission noted that "73. In Romania the political and constitutional cultures must be developed. The dignitaries do not always pursue the interests of the state as a whole. Firstly, there was a lack of respect towards the institutions. The institutions are not seen separately from the people who lead them. This is reflected in the way dignitaries have been treated as representatives of the political forces who have been appointed or voted for them to hold the said positions. It is expected that the dignitaries will favour the positions of the respective political parties, and that the new parliamentary majority may consider the dismissal of the dignitaries appointed by the former majority. Such a lack of*



respect towards the institutions is closely linked to another political and constitutional culture problem, namely the violation of the principle of loyal cooperation between the institutions. This principle is of particular importance in cases where positions, such as the President and the Prime Minister, are held by people with different political convictions. Only mutual respect can lead to the establishment of mutually accepted practices that are in line with the European constitutional heritage and which allow a country to easily avoid and overcome crises.”

As the Constitutional Court found, *through its conduct. the Chief Prosecutor of the National Anticorruption Directorate not only avoids a priori any loyal cooperation with the authority exercising the sovereignty of the people - the Parliament of Romania. but refuses to participate in clarifying aspects of an event of public interest.*

Such conduct, sanctioned by the Constitutional Court, is exactly what the Venice Commission criticized in the Opinion I referred to in the first point of this Report and is contrary to the recommendations of this Commission in terms of the *development of political and constitutional cultures in Romania*. This demonstrates a fundamental distance from the role that the leader of a public authority, especially one of the size of the National Anticorruption Directorate, must have, and a confusion made by the DNA chief prosecutor between its status as a natural person and the holder of a leading position in a public authority of the state.

Undoubtedly, we are talking about an institutional dilemma of the DNA management, which continues, and the ultra vires actions previously do not constitute isolated conducts, that can be corrected, but continuous, regardless of the intervention of the constitutional instruments intended to correct them. In other words, the Chief Prosecutor of the DNA has “succeeded” in determining the Constitutional Court to explain at length that the institution it manages is neither the Government, nor the Parliament, nor the Constitutional Court, nor the court, and that, as a leader of this institution it must respect the legal competencies of the DNA, and have a loyal constitutional conduct.

In view of the provisions that constitute the legal basis of the revocation, we find the illegal use of the human and material resources by the chief prosecutor of DNA in the sense of misappropriating the National Anticorruption Directorate from its legal scope and competences, an unjustified assignment of tasks from the same perspective, a manifestly unconstitutional behaviour contrary to the principles of the rule of law, enshrined in Art. 1 of the Romanian Constitution.

8) **Excessively authoritarian, discretionary behaviour, contrary to the reserve and deontological obligations imposed on magistrates.**

In fulfilling the commitment assumed in the previous Report, we requested on the 19th of June, 2017, the control of DNA by the Judicial Inspection, which was established by Order no.71 from the 3rd of July 2017 of the Chief Inspector of the Judicial Inspection. The report of the Directorate for Judicial Inspection for Prosecutors has a total of 501 pages, and its drafting and then approval has not been exempt from controversy.

The Inspection Report contains a number of difficulties faced by inspectors, **taking into account the indications regarding the committing of the disciplinary deviation provided by art. 99 let. p) of Law 303/2004, namely “the obstruction of the inspection activity of the judicial inspectors, by any means” by the “chief prosecutor”, ..., its personal counsellor, and the chief prosecutor of the judiciary service, ...” (p.148; see also p.160 of the Report).** The approach towards the control team is reflected in the very findings of the Judicial Inspection Report after the DNA tests. We publicly expressed concern that it was not a unitary one, three inspectors being of the opinion that the DNA chief had a good management, the other three found deficiencies. By means of Decision No. 686 of the 31st of October, 2017 of the Prosecutors’ Section of the Superior Council of Magistrates, the Report of the Judicial Inspection was approved with a series of observations, disposing, amongst other issues *“a control in order to remedy the deficiencies found at the level of the Section for combating offences assimilated to corruption offenses within 6 months from the date of approval of the report.”* **Thus, and the prosecutors’ section of the Superior Council of Magistrates found deficiencies in the management of the institution.** Undoubtedly, the issues raised are in themselves grounds for legal revocation, but as long as the Prosecutors’ Section of the Superior Council of Magistrates has found that there are deficiencies that can be remedied within a reasonable time, by virtue of the principle of loyal cooperation, we waited for remediation, including with regard to the behaviour of the Chief Prosecutor of DNA.

It is worth pointing out that the Report of the Judicial Inspection reveals the authoritative behaviour towards Mrs. Laura Codruța Kovesi's discretion, materialized not only in the obstruction of the control activity but also in other manifestations, an example being the one mentioned on page 288, by the DNA Chief Prosecutor of the Order ... / 30.03.2017 setting up an Interview Committee. The report notes that *“by issuing the order, self-signing as the President of the Commission, and subsequently requesting the appointment notice and issuing the order for the prosecutors declared admitted at the interview on April 26, 2017, the Chief Prosecutor ... created the appearance of lack of impartiality in the procedure for the selection and appointment of*



prosecutors within the National Anticorruption Directorate.” The same report mentions that, although members of the commission, according to art. 87 paragraph 2-6 of the Law 304/2004, should have been 3 prosecutors, the commission constituted according to Order no.... / 30.03.2017 was made up of 2 Chief Prosecutors and 1 Judge, in the person of lady ..., Advisor to the Chief Prosecutor of the Section. The latter deficiency, also shows the same Report, in pages 288-289, “we find it in Order no. .../ 7.12.2016 regarding the establishment of the commission for the interview of the candidates for appointment as prosecutor within the National Anticorruption Directorate - Criminal Judicial Section dated 26.01.2017. ”

9) **Involvement in investigations of other prosecutors, investigations conducted in violation of constitutional competencies.**

Indeed, notorious public statements reveal the overly authoritative behaviour, such as that it personally supervised the prosecution’s investigation, referring to OUG13/2017: “*I undertook this case together with Mr. Dumitriu and Mr. Unckeşelu. They did move an inch to the right or left without my approval*” (Annex 6)⁶. As such, it personally supervised/was involved in conducting inquiries on which the Constitutional Court ruled on the establishment of a legal constitutional conflict.

In relation to the provisions that constitute the legal basis of the revocation, we find, as in the previous paragraph, the **behaviour contrary to the status of the prosecutor in a state governed by the rule of law** and the lack of genuine managerial skills, confusing the management position with the discretionary leadership.

The passing of time has not led to a correction of this type of behaviour, but to an aggravation of the problem, as evidenced by the outflows in the public space to which I refer also other findings of the Judicial Inspection.

10) **Prioritizing the resolution of media impact cases. Unworthy attitudes. Violation of the minimum standards of ethics and deontology of a magistrate.**

Recently, the Judicial Inspectorate published a press release (Annex 7) that “on the 12th of January 2018, the Judicial Inspection conducted disciplinary action against *Mrs. Laura Codruța Kovesi*, Chief Prosecutor of the National Anticorruption Directorate (“DNA”) for committing disciplinary deviations provided:

⁶ Judiciary Commission’s Report no. 4759/IJ/912/DIP/2017



- by art. 99 lit. a) of Law no. 303/2004, on the status of judges and prosecutors, republished and amended, namely "manifestations that affect the honour or professional probity or the prestige of justice, committed in the exercise of or outside the exercise of their duties" consisting in the fact that *during a working session, had manifestations of nature to bring offence to the professional probity of magistrates prosecutors, as well as the prestige of justice, circumstances identified in the audio recordings in the media on 18.06.2017.*

In particular, the chief prosecutor of the DNA expressed itself in the sense of combating the negative effects in the image and credibility of the institution, generated by the RCC Decision no. 68/2017, **urgently dealing with "ministers" cases with media impact**, disagreed with the legally binding, definitive and general binding nature of CCR Decision 68/2017 and used inappropriate expressions in the Constitutional Court and of a judge of the Constitutional Court, inducing the idea in the public opinion that one of the criteria according to which the resolution of the cases is prioritized is their media impact and the official quality of the investigated persons.

Also, the Chief Prosecutor of DNA used a superior and aggressive tone towards prosecuting colleagues, inadmissible in relation to the minimal standards of ethics and deontology of a magistrate, likely to generate a feeling of indignation and legitimate doubt among the public opinion regarding the observance of the principles of the supremacy of the Constitution and of the laws, as well as the impartiality of the prosecutors.

- **by art. 99 lit. c) of Law no. 303/2004** on the status of judges and prosecutors, republished and amended, namely "attitudes that are not worthy in the exercise of their duties towards colleagues, the other personnel of the court or prosecutor's office, judicial inspectors, lawyers, experts, witnesses, representatives of other institutions *"consisting in the fact that by electronic mail (e-mail) it adopted an unworthy attitude, addressing prosecutors words and expressions with a clearly denigrating, insulting and threatening content, namely "cowards," "slanderers" criminals", making them known that "there is already a list of suspects", referring to a criminal case, thus violating the reserve requirement and the rules of conduct attached to the profession of magistrate.*

- **by art. 99 point. m second thesis a) of Law no. 303/2004** on the status of judges and prosecutors, republished and amended, namely "unjustified non-compliance with administrative provisions or decisions ordered in accordance with the law of the court or prosecutor's office or other administrative obligations stipulated by law or regulations *"consisting of having knowingly violated the provisions of Article 7 letter b of the Internal Order of the National Anticorruption Directorate, approved by the Order of the Minister of Justice No 1643 / C of 15.05.2015, published in the*



Official Gazette of Romania no 350 21.05.2015, which refers to the duties of the Chief Prosecutor of the National Anticorruption Directorate and states that it: "follows the distribution of cases or, as the case may be, assigns cases in relation to objective criteria such as the specialization and training of the prosecutor, the volume of activity, the complexity and the operability settlement cases, conflicts of interest or incompatibilities in the exercise of his office "by designating as a prosecutor a magistrate who is in a manifest incompatibility.

[...] The disciplinary action was submitted to the Section for Disciplinary Prosecutors of the Superior Council of Magistrates, which will decide on the magistrates' liability. "

Again, in relation to the provisions constituting the legal basis of the revocation, we notice the **manifestly unconstitutional and illegal behaviour contrary to the status of the prosecutor in a state governed by the rule of law and the lack of genuine managerial skills, in the sense of the confusion of the management function with that of discretionary leadership.**

11) Appeals against the acts and authority of the Constitutional Court

On the occasion of public events, the Chief Prosecutor of DNA "blamed" the Constitutional Court, basing on the decisions made by this alleged impossibility of the DNA to follow up some facts appreciated by the DNA leadership as being of a criminal nature, and to recover some damage.

Thus, for example, in the speech at the Forum of the Republic of Moldova-Romania in the field of justice, II edition, Bucharest, November 23-24, 2017⁷, as the representative of the institution he is leading, the DNA prosecutor claimed that the Constitutional Court "*ruled in 2016 a decision on the offense of abuse of office by which it declared itself constitutional insofar as the phrase "defective" is understood to be a violation of the law. **For this reason, prosecutors can only investigate those acts of abuse in the service in which violation of primary legislation, respectively laws or ordinances, stipulating that "it appears that the society remains in the face of such practices after the decision of the Constitutional Court last year."** Next, he gave some examples from the DNA cases, underlining that " of the above mentioned Constitutional Court's decision, 245 cases and 188 million were closed in 2017 our euro - damages from public money - can no longer be recovered for the state budget. **In addition to millions of euros in the state budget, the entire society will look at how public officials will be busy satisfying interests that are very different from***

⁷ <http://www.pna.ro/comunicat.xhtml?id=8530>

community interests. And then we raise a legitimate question: In the context of the proposed changes to the legislation on abuse of service and the fact that millions of euros are lost by society through such acts, is it justified to limit such investigations? "

Through these statements and the question of the end of the speech, the Chief Prosecutor of the DNA disputed, practically, formally and publicly, the generally binding character of the Constitutional Court's decisions, as it raised the issue of the "justified" character of the limitation enshrined in these decisions. However, art. 147 of the Constitution enshrines the generally binding character of the Constitutional Court's decisions, and the examination it carries out is a constitutionality and not an opportunity.

The Chief Prosecutor of the DNA contested the Constitution of the country itself, unilaterally assessing the need to criminalize facts which, according to the Constitutional Court's decisions, are contrary to the Constitution. It is clear that the position of Laura Kovesi in that context was not a matter of analysing and identifying solutions in the light of the Court's decisions, but of their open criticism, despite the entire constitutional framework outlining the role and competence of the Constitutional Court.

The statements from the Romania Moldova Forum are not singular. They have been repeatedly in the media⁸. Thus, in an article titled "Kovesi: EUR 188 million in Injury Complaints Offsets cannot be recovered because of the CCR decision", a title or content to which the Chief Prosecutor of the DNA did not react in any way, that the DNA Chief Prosecutor Laura Codruta Kovesi said at a debate organized by the Social Dialogue Group that this year, **due to the decision of the Romanian Constitutional Court (CCR) to redefine the abuse of office, 245 cases were classified and EUR 188 million prejudice as a result of these cases cannot be recovered, as the facts can no longer be investigated.** She said that the effects could be even greater if other changes were made with regard to this offense. "If these effects occurred only through a decision of the RAC, what happens if we modify the notion of civil servant, if we set a minimum threshold for abuse of office or if we make other changes in the criminalization of the crime of abuse service alongside bribery?", Kovesi said. At the same time, the chief prosecutor of the DNA also said that the crime of abuse of service exists in the Criminal Code in Romania since 1968, thousands of civil servants were convicted, but this discussion appeared "suddenly, this year."

It is a challenge to the decisions of the Constitutional Court and a firm rejection of a change in legislative policy, the DNA prosecutor being the chief prosecutor and the

⁸ http://adevarul.ro/news/eveniment/kovesi-prejudicii-188-milioane-euro-dosare-abuz-serviciu-nu-mai-recuperate-cauza-deciziei-cer-1_5a14819eab6550cb864d44a/index.html

Constitutional Court alike. The only objective still seems to be the condemnation of thousands of civil servants, in violation of the principle of legality, the law being challenged, reducing everything to the level of a simple discussion ... suddenly. However, neither the Constitutional Court's decisions nor the law is a "simple discussion", but the sole reason for prosecutors' action and criminalization of deeds, in a rule of law.

12) Contesting authority and acts of Parliament

At the beginning of 2017, the DNA Chief Prosecutor told the BBC that it was afraid of abolishing the DNA, warning in an interview for the British post about a "huge risk to the judiciary, daily," evoking that he feared changes laws that may affect the fight against corruption, modify jurisdiction or abolish the direction it is leading⁹.

Throughout his year, his internal and external speech evolved into a furious attack on institutions, politicians, and businessmen. in an interview with Euronews¹⁰, the Chief Prosecutor of DNA has launched a harsh criticism of addressing parliamentary draft laws, accusing both politicians and businesspeople of hitting the effort to clean one of the most corrupt countries in the Union EU. There are very serious assertions, unsupported by any concrete example of the draft laws, statements that could affect not only the image of Romanian justice, but also the country. The article also cites another extremely serious assertion by the DNA Chief Prosecutor that the vote of the laws of justice will have a serious impact on the independence of the judiciary and will result in political control of the work of prosecutors and obstruction of the fight against corruption. the same article has accredited a mobilization of the system of politicians and businessmen who feel threatened, and for this reason would have the interest of maintaining control over public resources.

Even more recently, in an interview with the Libertatea newspaper, the same DNA Chief Prosecutor argued that the legislative changes discussed in Parliament are in fact “a pretext to eliminate the ability of criminal prosecution bodies to discover and prove crimes” and that

⁹ <https://www.digi24.ro/stiri/actualitate/justitie/kovesi-a-declarat-pentru-bbc-ca-se-teme-de-desfiintarea-dna-667006>

¹⁰ <http://www.euronews.com/2017/11/24/-unbelievable-attacks-trying-to-derail-romania-s-anti-corruption-drive-claim>

“the anti-corruption fight will end¹¹”, revealing an obsessive fear, in essence, of the loss of the DNA's leadership.

13) Vigorously criticisms to some legislative amendment proposals; the respective legislative solutions have subsequently been approved as constitutional.

From this perspective, Laura Codruța Kovesi has vehemently criticized the legislative proposal to set up the Criminal Investigation Section, the Constitutional Court found the constitutionality of this legislative amendment¹², precisely in relation to the criticisms that raised the issue of diminishing the competence of the Directorate National Anticorruption.

Similarly, more recently, in another interview¹³, it was noted that Laura Codruta Kovesi claimed that the laws of justice would have a devastating effect. However, in the interview there are examples of alleged changes in the criminal law, being distorted, almost caricatured, reduced to absurd proposals for amendments (i.e. decriminalization of the false testimony).

Without detailing the numerous public outings of the DNA Chief Prosecutor with regard to the laws of justice, the claims of **unprecedented and unrealistic gravity of the DNA chief have irretrievably affected Romania's image. These are likely to create a distorted, false image on the actual and legal reality in Romania, and the examples can continue.** I myself saw the devastating effects of all these public outings on the occasion of the debate held in the European Parliament in Strasbourg on 7 February 2018 on the alleged threats to the rule of law in Romania. I had a large number of representative meetings of the various political groups and I had to clarify what Laura Codruta Kovesi had wrongly accredited. We have made a distinction between the laws of justice and the amendment of criminal law, we have explained that the laws of justice do not criminalize or decriminalize, and that there are various proposals for amendments to be debated in criminal law. I explained that in Romania there is a Constitution, constitutional procedures, instruments of mutual control, constitutionality control, levers of the President of Romania. I had to

11 <https://www.stripesurse.ro/kovesi-definite-modificarile-aduse-legilor-justitie-lupta-anticoruptie-va-fi-terminata>"1238002.html 12.

12 See Decision No. 33 of 23 January 2018, paragraphs 125-128

13 <https://www.libertatea.ro/stiri/ora-1200-procuroral-sef-al-dna-vine-la-interviurile-libertatea-live-laura-codruta-kovesi-va-vorbi-despre-controversatele-legi-ale-justitiei-2077192>

dismantle the false belief that the false testimony had been disinclined or that the persons accused of corruption were exempted from the preventive arrest. All these false ideas were generated, among other things, by numerous interventions, public exits, interviews at national and international posts given by Laura Codruta Kovesi.

The confusion deliberately created by the DNA Chief Prosecutor was also seen in the debate in the European Parliament which, again, although claimed to be about justice, concerned alleged changes to criminal law that were not even debated.

The confusion created by the DNA Chief Prosecutor is also evident in the reaction of bodies such as GRECO, which triggered extraordinary mechanisms for assessing the laws of justice on the basis of their alleged threat to the fight against corruption.

Nine ambassadors came to the Ministry of Justice in a single day on the same suspicions, and the laws of justice became the subject of "concern" of some Embassies and international publications.

Even though the Romanian Government, the two Presidents of the Chambers of Parliament, the European Parliamentarians, I as the Minister of Justice reacted as a reply to these serious statements, expressly requesting to show which provision in the laws of justice is likely to lead to subordination justice policy and that the fight against corruption is even an objective assumed by the Romanian state, the effects of DNA boss outputs have remained and continue to occur.

Although the three laws of justice have passed through the Constitutional Court's filter, and even if the few unconstitutional elements found are not of political subordination or "kneeling" of the fight against corruption, the effects of DNA boss outputs have remained and continue to occur. Even after the decisions of the Constitutional Court, even after the positions of Parliament and Government representatives were taken, the DNA prosecutor continues to denigrate the country, defying any rules of deontology, reserve requirement, rule of law, qualifying actions by the authorities to correct this misinformation, as follows: **"we are witnessing a desperate festival of defendants"**¹⁴

There are some examples that show that, through **attitudes, acts, affirmations, publicly defamatory positions of the Romanian institutions, Romania, the chief prosecutor of the DNA has obviously exceeded his role, his powers, violating the rules of minimal professional ethics**, which require it not to participate in audio-visual programs, political events, or those that may

14 <https://www.hotnews.ro/stiri-esential-22286355-19-30-sefa-dna-laura-codruta-kovesi-sustine-conferinta-presa.htm>

damage the independence of the judiciary, and refrain from any acts or deeds that are likely to compromise their dignity and others, in office and in society.

The Chief Prosecutor of DNA discredits the Romanian authorities and Romania more and more virulent, creating the image of a profoundly corrupt state with only one efficient institution - DNA, but which would be in danger of being abolished, and if not abolished, the tools to act. It can be said that such actions, which have credibility among the population and the foreign partners, precisely because DNA has worked for a good period of time, raises the issue of affecting the national interest.

14) Violation of the role and place of prosecutors in a rule of law. Accreditation of a different status of the prosecutor than the one established by the Constitution.

Analysing, in context, the institutional structure of the power, we note that in Romania, the legislative power is exercised by the Parliament, characterized by Art.61 of the Constitution as "supreme representative body" and "the sole legislator of the country", the executive power by According to Article 102 (1) of the Constitution, the Government, *"in accordance with its governing program accepted by Parliament, ensures the achievement of the domestic and external policy of the country and exercises the general management of the public administration"* and the President, .80 paragraph (1) of the Constitution, *"represents the Romanian State and is the guarantor of the national independence, unity and territorial integrity of the country"*, and the judicial power by the courts, Article 126 paragraph (1) of the Constitution, this meaning that *"Justice is done through the High Court of Cassation and Justice and through the other established courts it is by law."* As for the Public Ministry, it does not have any legislative, executive or judicial powers. **According to the Romanian Constitution, the Public Ministry is part of the judicial authority and not of the judiciary, and therefore does not exercise this power, nor does it benefit from the specific guarantees of the judiciary.** According to art. (2) The prosecutor's office is incompatible with any other public or private office, with the exception of the didactic functions in the education system "The issues related to the status of prosecutors are developed in the Law no.303 / 2004 on the status of judges and prosecutors, republished in the Official Gazette of Romania, Part I, No 826 of 13 September 2005, which stipulates that both professional categories belong to magistrates, defined as the judicial activity carried out by judges for the purpose of justice and prosecutors in order to protect the general interests of society, the rule of law and the rights and freedoms of citizens.

Distinguished in this respect between the prosecutor and the judge and the specific guarantees, the Venice Commission¹⁵ (Annex 8) held that "29. A clear distinction must be made between a possible independence of the Prosecutor General's Office or Prosecutor's Office from the status of prosecutors, other than the Prosecutor General, who are more "autonomous" than independence. "Autonomy" refers to prosecutor's offices, and "independence" concerns prosecutors considered individual way 30. Any kind of "independence" of the prosecutor's office, in its very essence, differs in scope from that of the judges. The main element of this "external" independence of the Prosecutor's Office or of the Prosecutor General lies in the impossibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to other prosecutors). General instructions such as, for example, with severity and celerity certain types of offenses are less problematic. This guidance can be considered as a policy issue that can be duly decided by Parliament or the Government CDL-AD (2010) 040 8 SI Independence of the Tracking Body the prosecutors are obliged to observe the orders, instructions and instructions given by their superiors, and the independence of the prosecutors, other than the Prosecutor General, in a system of hierarchical subordination, can be regarded as a system where legal activities are exercised by prosecutors, other than the general prosecutor, does not require the prior approval of the superiors or a confirmation of their actions. Prosecutors, other than the Prosecutor General, often enjoy guarantees about the hierarchical superior's involvement. 32. In order to avoid inadequate instructions, it is essential to develop a list that includes assurances of non-infringing the activities of the prosecutor. Non-infringing involves ensuring that the prosecutor's activities at the trial stage are not subject to either external pressures or other inappropriate or unlawful internal pressures coming from inside the parcel system. Such safeguards should aim at appointment, disciplinary responsibility / dismissal, **and specific case management and decision-making rules. "**

Contrary to the status already established at the constitutional and European level, in another interview¹⁶, the DNA chief prosecutor said "there is an attempt to increase the authority of the Minister of Justice over the work of prosecutors, which will seriously affect their independence." We have shown in great detail the constitutional position of the Minister of Justice, it has not been consecrated now, but by the constituent legislator, and we have also shown the firm statutes of the Venice Commission regarding the lack of independence of the prosecutor in its sense of judge. The

¹⁵ EUROPEAN COMMISSION FOR DEMOCRACY BY RIGHT (VENICE COMMISSION) REPORT ON THE EUROPEAN STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY SYSTEM: PART II –CRIMINAL PROSECUTION BODIES Adopted by the Venice Commission on the 85th plenary session (Venice, 17-18th of December 2010)

¹⁶ <http://www.aktual24.ro/kovesi-desfiinteaza-argumentele-lui-tudorel-toader-cu-o-logica-de-fier-de-sunt-atat-de-stupide-si-rau-intentionate-propunerile-lui-si-ale-coalitie/>



foolish DNA chief incites the idea of an identical constitutional status in terms of guarantees of independence between the judge and the prosecutor and of an attempt by the Romanian authorities to change now, through the laws of justice, this aspect. As we have pointed out and emphasize again, prosecutors do not bring justice, they are not part of the judiciary, they do not have and cannot have the same status as the judges, and the Venice Commission makes it clear.

The Venice Commission also noted, inter alia, the qualities required for a prosecutor "14. Given that the prosecutor acts on behalf of society as a whole and due to the serious consequences of the criminal conviction, he must act at higher standards than the parties to the lawsuits civil prosecution 15. Prosecutor must act fairly and impartially Even in systems that do not recognize the status of magistrate of the prosecutor, he has to act in a judicial manner The role of the prosecutor is not to obtain a venal condemnation at any cost The prosecutor must make available to the court all credible and available evidence and cannot choose what suits. The prosecutor must disclose all relevant evidence to the defendant and not only the evidence that supports the accusation. for example, because it would compromise safely another person's name) is the duty of the prosecutor to stop the prosecution. 16. In view of the serious consequences of a criminal conviction for a person, even when the criminal proceedings are completed by an acquittal, the prosecutor must make a correct decision when deciding on the charge and for what. 17. A prosecutor, like the judge, cannot handle a case in which he has a personal interest and may be subject to certain restrictions in order to ensure his impartiality and integrity. 18. These attributions necessarily point to the fact that only persons with a good and high-moral character hold the position of prosecutor. The qualities required of a prosecutor are similar to those of judges and require appropriate appointment and promotion procedures. If necessary, the prosecutor, like the judge, will have the opportunity to make some unpopular decisions that may be the subject of criticism in the media and may also become a matter of political controversy. For these reasons, it is necessary to ensure an appropriate mandate and specific procedures for promotion, disciplinary liability and dismissal, which will ensure that prosecutors are not victimized for making unpopular decisions. 19. Of course, when the prosecutor does not resist the standards he is asking for. an impartial judge will be empowered to remedy the evil so born. However, such a remedy cannot be guaranteed, and the goods can be very mature. It is obvious that a system in which both the judge and the prosecutor act in accordance with the highest standards of integrity and impartiality implies greater protection of human rights than a system is based only on judges ".

The public ministry also has the obligation of constitutional loyalty, respecting and cooperating with the other state authorities, namely abstaining from violating the prerogatives



established by the law or from taking advantage of the guarantees constituted by the constitutional and legal framework. According to the Venice Commission, "41. Like any state authority, including judges, the prosecutor's office must be accountable to the public. A traditional means of ensuring this responsibility is the executive's control, which offers indirect democratic legitimacy through the dependence of the executive on those elected in Parliament. Another means is the control by a council of prosecutors, but this cannot be a purely self-governing instrument, but one whose democratic legitimacy comes from the election of at least a part of its members by Parliament 42. In many systems there is a system of accountability before Parliament in countries where the general prosecutor is elected by Parliament, it often has the power to dismiss it.

Also, the Venice Commission, in the same Opinion, draws attention to "the dangers of excessive powers of the prosecutor's office for the independence of the judiciary by showing that" 77. A distinction needs to be made between the interests of those who represent the power in the state and the public interest. 72. During its work on certain states, the Venice Commission sometimes criticized the excessive powers of the prosecutor's offices. In the Soviet system, the prosecutor's office was a powerful means of controlling the judiciary and, in some states, there are still remnants of this system. There is a risk that an ultra-powerful parquet can become a distinct authority without any responsibility. One of the purposes of this report is precisely to avoid this risk. 73. The above aspect is closely related to the question: what powers should the prosecutor's office have? There are strong arguments to give the prosecutor's offices the prerogatives of criminal prosecution, but not other supervisory powers that were mainly found in CDL-AD (2010) 040 15 "prosecution" systems. This is in fact a problem of "checks in any case, prosecutors' acts having implications for human rights, such as search or arrest, must remain under the control of judges. In some states, there is a "tendency to prosecute" because it appears that such requests from prosecutors are admitted almost automatically This poses a threat not only to respecting the rights of the persons concerned, but especially for the independence of the judiciary as a system. 74. Although it is normal and permissible for criminal investigating authorities to control criminal investigation, in some situations the prosecutor's failure to exercise such control is in itself a possibility of reducing the excessive powers to abuse that authority. Although there are deficiencies in the systems where the prosecutor and the investigator are separated, the advantage of this model is to reduce the risk of abuse of power by an excessively strong institution. On the other hand, there is an increased risk of the police abusing its powers. "

In a state governed by the rule of law, the prosecutor, even the head of DNA, must respect the principle of legality. According to the Constitutional Court, "the principle of legality is, in the



meaning of the Fundamental Law, specific to the activity of the prosecutors, who by virtue thereof have the obligation, in the exercise of the duties provided by law, to follow lawfully the provisions of the law without the possibility to act based on the criteria of opportunity, either in the adoption of measures or in the selection of procedures (Decision No 385 of April 2010, M of 317 of May 14, 2010), "the prosecutor, regardless of defects or duties, of all the guarantees of legality and impartiality required by Article 132 of the Constitution and is required to represent the general interests of society in the judicial activity, defend the rule of law and the rights and freedoms of citizens (Decision No 171 of 2 March 2010 , M. of No. 167 of March 16, 2010) "impartiality is a corollary of the principle of legality and responds, like this, to the requirement of ensuring equality of citizens before the law, formulated in the Constitution, with the right of law in Article 16. It follows from this principle that the prosecutor, in his capacity of representative of the whole society, as a defender of the rule of law, as well as the rights and freedoms of citizens, has the obligation to exercise its action objectively, without any other general pre-established purpose and without partiality in favour of the state or any of the parties to the judicial processes in which it participates (Decision no. 1 of June 14, 2005, M. of. no. 749 of August 17, 2005).

In other words, the prosecutor does not have to act with passion, blaming the legislator or the constitutional court for the legislative policy, namely the decisions made, on the grounds that he can no longer prosecute certain facts, but has to respect the legislative policy, the legal framework and the decisions of the Constitutional Court. We are witnessing a misappropriation of the constitutional order and the rule of law in which the DNA, through the Chief Prosecutor, orders the legislature, the executive authorities, the Constitutional Court to follow suit, culpably for these institutions for allegedly prejudicing the budget unconfirmed by any court, behaviour that supports its revocation.

15) Trying to obtain convictions at any cost

In order to obtain condemnation at any cost, **the Chief Prosecutor of the DNA appeared in a personal war with the Parliament, the Government, the Constitutional Court, politicians and businessmen, all guilty of alleged obscure interests**, all this of nature to annihilate anti-corruption fight.

In the public space, there are already notorious statements such as *"to pick up institutional matters in that case with the houses and get to the prime minister who signed those contracts."* *"I, after the decision of the Constitutional Court, would have liked to go out with a case on a minister, I think we still press the matter."*



The DNA Chief Prosecutor declares that he has no affirmation. in connection with the records submitted in the public space, two criminal cases and a check of the Judicial Inspection were concluded, which ended with the Resolution of January 9, 2018. The Judicial Inspection, on the basis of the administered evidence, found that:

- the records are from the operative workshop dated March 30, 2017, organized at the DNA headquarters, which resulted in a report that was clarified "confidential";
- as regards the alteration of the content of the records, it was not confirmed in the manner of juxtaposition or grinding by the technical-scientific or forensic expertise;
- "it is beyond reasonable doubt that during the working session dated March 30, 2017, the Chief Prosecutor of the DNA made allegations of prejudice to the honour or professional probity and the prestige of justice".
- "the legal conditions for ... the disciplinary action against Ms. Laura Codruța Kovesi. for the disciplinary offense provided by Art. 99 letter a) of Law 303/2004¹⁷" are maintained.

This type of attitude, also transmitted to DNA employees, transpires from the Report of the Judicial Inspection, which I have referred to where, on page 182, the invocation of a "passionate" behaviour manifested by some DNA prosecutors is affected, affecting the proper functioning of this institution, we cite from the Report: "being appreciated by a part of the Court of Appeal judges, as a way of pressure, which they brought to the attention of the leadership."

It is not by accident that the Venice Commission points out that the purpose of prosecutors is not to get a conviction at any cost. Because beyond procedural and procedural acts are people, fundamental rights and freedoms, their lives. Compliance with the law and the quality of the prosecutor's acts are all guarantees of the fundamental rights and freedoms of man and the citizen. Let us not neglect the convictions to which the Romanian State is exposed to the European Court of Human Rights as a result of such acts and deeds.

16) Increased number of acquittals. Increased spending. Incorrect reports

The many late payment solutions in DNA cases, which are already well-known, even if they are constantly put to the attention of the Constitutional Court by the DNA leadership, question how the DNA leadership ensures respect for fundamental rights and freedoms. The report submitted to

¹⁷ The report was sent to the Ministry of Justice – no. 4759/II/912/DIP/2017



Parliament will highlight the situation of this year's payments, significantly higher than in previous years.

It is only in this context that, given the fact that the budget allocations per prosecutor, the DNA level is about 75% higher than the public level of the Public Ministry or DIICOT, the efficiency indicators are below the national average. [Report 2016 - pages 26, 27, 45, 105] in any calculation method (the wrong or the real one), the payoff rate of DNA is about 5 times higher than the national average at the level of the Public Ministry. [The Public Prosecutor's Report 2016 - pages 50 / DNA Report 2016 - Chapter 10, page 34] The court's admission rate of DNA appeals is about 25% lower than the average at the level of the Public Ministry. [Public Ministry Report 2016 - page 57].

In addition, the Activity Reports, presented to the public, contain inaccuracies (extract from the Public Prosecutor's Report 2016 - The share of pay, irrespective of the basis, of the total sums sent to the court, according to the indicator established by the Superior Council of Magistrates, was 10.54% "... of 1,271 defendants sued in 2016, acquitted 134") The payment rate for the year 2016 refers strictly to the final acquittals received in 2016 as a result of the indictments brought before the court in 2016, and not the definitive judgments handed down by the court in 2016. In other words, the pay rate can be "established" according to the number of people sent to trial over a year, with as many people being sued year to year there is a lower payment rate. The payment rate must be calculated in relation to the judgments handed down during the year 2016, against all the defendants. Thus, given the number of persons sentenced permanently in 2016 (page 45 Public Ministry Report) of 879 and the number of paid persons 134, the payment rate is 13.22% and not 10.54% [pay out rate = $134 / (879 + 134) * 100$] (Annex 9).

17) Lack of involvement of DNA chief prosecutor in identifying and eliminating abusive behaviour of prosecutors

Thus, the public debates on the abusive / illegal conduct of the prosecutors (i.e. Prosecutor Negulescu) did not lead to any institutional reaction to undertake effective investigations. The Chief Prosecutor of the DNA not only did not take measures to check, remove such behaviour, but, on the contrary, publicly appreciated the work done by that prosecutor, contrary to his managerial, deontological, and legal duties and obligations.

18) Lack of measures in serious cases found by the courts - falsifying the transcription of telephone conversations



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This particularly serious behaviour is even observed by the courts. Thus, for example, in Case 3441/1/2016 - the ending number 18 of the High Court of Cassation and Justice in January 2017 following the complaint filed by the petitioners Sturza Paltin Gheorghe and Zaharia Gabriela Rodica against the Order of Classification of PICCJ, it is stated "In regarding the magnitude or the amount of errors included in the certified transcripts, the Judge finds that there are multiple errors in the minutes, petitioners claiming about 1,000 in 19 verbal minutes "; "... The second phrase" not only relates to the material object of the crimes imputed to the petitioners, but also has the amplitude to constitute a direct, useful and effective proof against the accusation, elements missing in the phrase "the phase of the two".

19) **Delaying the settlement of cases, with the consequence of prescribing criminal liability - example - Microsoft's case.**

20) **Lack of reaction in the verification of the professional activity and the conduct of some prosecutors**

Recently, following other heated debates on the Ploiești DNA situation, Laura Codruța Kovesi has convened a press conference in which she accused "a defenders' festival", basically not institutionally reviewing the reported ones.

According to the press release of the Judicial Inspection on the 12th of February, 2018 (annex 10), the Judicial Inspection made an ex-officio notification as a result of the information on the professional activity and conduct of some prosecutors from the National Anticorruption Directorate - Ploiesti Territorial Service. At present, a team of judicial inspectors from the Directorate for Judicial Inspection for Prosecutors performs preliminary checks in accordance with the provisions of Art. 45 of the Law no. 317/2004 on the Superior Council of Magistrates, republished, with subsequent amendments, in order to establish whether there are indications regarding the occurrence of disciplinary misconduct. We await the results of the checks, but we can say about the behaviour of the DNA chief, his lack of institutional role, the rather political reaction, lacking minimal professional deontology.

III. Conclusion

According to Article 1 of the Constitution, Romania is a state governed by the rule of law. In Romania, both preventive and anti-corruption components have developed. The good activity of



DNA in this last point is recorded in domestic and international documents. The standard of anti-corruption struggle must not and cannot cover and protect unconstitutional, unlawful, defamatory behaviours against Romania and the leaders of public institutions with anti-corruption competencies.

In other words, the same error noted in the Venice Commission Opinion adopted at the 93rd Plenary Session/Venice, 14-15 December 2012, according to which "73. In Romania, the political and constitutional cultures must be developed. The dignitaries do not always pursue the interests of the state as a whole. Firstly, there has been a lack of respect towards institutions, institutions are not seen separately from the people who lead them.

DNA must continue to function legally. The DNA does not identify itself with its chief prosecutor, whose actions over the last year have shown that they can endanger the very institution that it is leading through excessive authority, discretionary behaviour, defiance of Parliament's authority, the role and powers of the Government, challenging the decisions of the Constitutional Court and its authority. "Only mutual respect can lead to the establishment of mutually accepted practices, which are in line with the European constitutional patrimony and which allow a country to avoid and overcome seizures", the Venice Commission has held. However, the conduct of the chief prosecutor of the DNA was and is the creator of an unprecedented crisis in the recent history of this country, which made Romania falsely the target of concerns, acts, facts, statements, institutional responses at national, European level, internationally, with economic and social effects.

The Chief Prosecutor of the DNA used in good faith the representatives of the international forums of the citizens of this country, spreading information in the public space without any real, legal, constitutional support. It created a picture of the hero of the anti-corruption fight on this foundation of good faith, and lack of information. This situation cannot continue because we already speak of national interests and their protection, and any public authority that will tolerate it further will assume its actions to the detriment of national interest.

Like any other prosecutor, the Chief Prosecutor must remain in its constitutional boundaries, exercise his prerogatives in good faith, knowing and respecting the law, knowing and respecting the Constitution.

Both prevention and combating corruption must continue, but in accordance with the rule of law. The rule of law is the state in which the action of each public authority is regulated by law and is subject to the law in the spirit of democratic values and respect for human rights.

No one is above the law. Good deeds do not justify the bad ones.



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MINISTRY OF JUSTICE

We need to develop what is good and eliminate what is bad.

According to the Venice Commission, "an exercise of power that leads to abusive, irrational or unreasonable abuse, oppressive decisions violate the rule of law. It is contrary to the rule of law to exercise discretionary power."

All the elements submitted strongly support that the DNA Chief Prosecutor, Laura Codruta Kovesi, through all the deeds here detained, exercised and practiced her discretionary position by diverting the activity of fighting corruption and the DNA institution from its constitutional and legal role.

For these acts and deeds, intolerant to a state governed by the rule of law, pursuant to the provisions of Article 54 (4), corroborated with Art. 51 paragraph (2) let. b) from Law 303 / 2004 on the status of judges and prosecutors, I started the procedure to dismiss the chief prosecutor of DNA, Laura Codruța Kovesi.

This report, together with the proposal for the dismissal of the chief prosecutor, will be forwarded to the Public Prosecutor's Office of the SCM, as well as to the President of Romania, in order to decide, accordingly to the legal competences.

Minister of Justice

University Professor and PhD, Tudorel TOADER

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