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The Law/Politics Distinction in Romanian Constitutional Law Adjudication

- D R A F T -

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Ideally, in contemporary states adjudication should not be political. One of the most discrediting labels that can be attached to a constitutional court decision is “politicized”. Classical constitutionalism worked hard around theoretical justifications and practices that made the separation between law and politics easier. Against the two major tendencies, namely judicialization of politics and politicization of justice, legal theory and practise developed number of approaches (*e.g.*, the matter of standards of review and the problem of deference in judicial review of discretionary administrative action or the matter/appropriateness of judicial deference to political discretion in constitutional adjudication; theories and methodologies of constitutional interpretation, etc.).

However, politics is not a normative vacuum. With the exception of few pure positivists, for whom no substantive connection between law and political values is possible, law does provide a constraint on power. Even more so the Constitution provides the legal framework for the political game, while the constitutional judges enforce those legal boundaries to politics and politicians, despite possible interferences in this process coming from other actors. The Romanian Constitution, adopted in 1991 and revised in 2003, fully embraced this line when it created a Constitutional Court in charge with controlling the constitutionality of laws adopted by Parliament, and this both before and after their coming into force. However, it is the “living Constitution” that (sometimes) reveals new aspects of well-known legal institutions and represents the ultimate test for the law/politics distinction in constitutional adjudication.

Based on a specific case (I) and a brief presentation of its political context (II) this paper will try to analyse how the traditional self restraint of the Romanian Constitutional Court transformed itself into a potential danger for its capacity of overview (IV) based on the same constitutional provisions (III).

I. The case

In a first decision (n°375/2005) the Constitutional Court reached the conclusion that some of the provisions of a legislative package dealing with the reform of the judiciary are unconstitutional, basically: (i) those which obliged members of the Superior Council of Magistracy to choose between their activities at the courts and the activities within the Council, (ii) those which stopped at the moment of coming into force of the legal package all on-going mandates of head of courts and (iii) those which made impossible for magistrates to cumulate salaries with

retirement pension/entitlement in case they were professionally active after they had reached the age-limit for retirement and which fixed a new age limit for retirement of magistrates to be enforced to all current magistrates from the day the legal package came into force.

This decision had two separate opinions. Three judges considered that incompatibilities established through the new legal provisions for magistrates are not unconstitutional as they do not infringe upon the principle of independence of magistrates. One judge considered in a separate opinion that even the provision regarding the age limit for retirement was not unconstitutional as nothing in the Fundamental law limited the discretionary competence of the legislator to fix such thresholds or incompatibilities for magistrates.

The Constitutional Court ruled a second decision (n°.419/2005) regarding the same provisions of the same legal package because the President of Romania asked it “to check how did the Romanian Parliament bring into line the criticised legal provisions with the decision of the Constitutional Court n°375/2005”. The Court ruled that the re-examination of the legal package managed to solve out all situations of unconstitutionality save one, namely the age limit for retirement of magistrates. Since in its new version the legal package no longer referred to the general law in the area of retirement of all professional categories, but only made a general reference to a law dealing with the retirement of magistrates, the Court considered this particular provision “could be interpreted as constitutional if understood that it referred to a future law that will provide for a specific age limit for the retirement of magistrates”, necessarily different than the age limit foreseen for all the other categories of employees. However, to avoid a *vacuum legis*, until this future law would be adopted by Parliament, the provision of the precedent law on the Status of magistrates (the one that was entirely revised through the new legislative package dealing with the reform of the judiciary), namely article 64 of Law 303/2004, should be considered as enforceable. This second decision had no separate opinion, not even with regard to the age limit of retirement.

Note has to be made here with regard to article 64 of Law 303/2004 – it was expressly *abrogated* through article 89 of the legislative package dealing with the reform of the judiciary.

II. The political context

The law twice discussed by Parliament and twice examined by the Constitutional Court has a peculiar history.

The reform of the Romanian judiciary has developed over the past decade from a legitimate goal into a goal in itself and even a continuous and never ending process. Following the adoption of a much awaited, long time prepared and quite consistent legal package (three pieces of legislation concerning the general organisation of the judiciary, the statute of magistrates and the organisation and functioning of the Supreme Council of Magistracy) dealing with the reform of the judiciary late in the autumn of 2004, days before parliamentary and presidential elections, the entire legal framework of the judiciary has been re-drafted during the spring of 2005 by the new Government in place. In fact, parliamentary elections did not come up with a clear-cut result; political parties initially (that is immediately after the elections) having the majority of seats in Parliament have not succeeded to invest an Executive. An electoral coalition added up with representatives of the Hungarian minority and another minuscule party (Conservative Party) managed to get a fragile majority of votes for their programme and Cabinet members.

The new Government proceeded to a radical change of legislation in several areas, among others the judiciary. In a relatively short laps of time (approximately three months) the Executive has come up with an entirely revised legal package concerning the reform of the judiciary (the same three laws as those adopted in the autumn of 2004). While declaring¹ that the legal framework needed to be adopted with the exact wording suggested by the Executive and that any modification brought to it via parliamentary debates would only be detrimental both to the legal text and to the reform of the judiciary, the Government decided to add this legislative package to another one (dealing with the restitution of property abusively confiscated during the communist regime) and put them in front of Parliament through a particular legislative procedure: assuming its responsibility on a so-called “reform bill”. Indeed, article 114 of the Romanian Constitution provides that “the Government can assume its responsibility before the Chamber of Deputies and the Senate, in a joint session, with respect to a programme, statement of general policy, or a bill.” The Government is considered dismissed if a motion of censure, tabled within three days after the presentation of the programme, statement or bill, is passed. Otherwise, the political programme or the statement of general policy are considered binding, or the bill is considered adopted. However, the revision of the Constitution in 2003 added a few words to article 114 in order to underline the importance of Parliament in this process: the bill presented is deemed to have passed “be it modified or supplemented with amendments consented by Government”. Thus, the wishful thinking of the Executive with regard to the precise wording of a bill passed through this particular procedure has been slightly twisted.

However, since the question of confidence tabled by the parliamentary opposition was not adopted, the legal package - considered as one bill - was deemed as passed, even though it contained a few cosmetic changes resulted from the political bargaining in Parliament. Despite this minor success, the opposition addressed to the Constitutional Court quite an impressive list of issues, which had been raised with the Government, but did not gather its consent, and continued to be considered highly problematic by a large number of MPs. These issues referred to the normative content of both legal packages presented by Government as one bill (intrinsic constitutionality), as well as to the very fact that two such different legal packages could (not) be passed as a unique bill (extrinsic constitutionality).

Following a difficult and somewhat controversial decision of partial unconstitutionality ruled by the Constitutional Court (see above decision n°375/5.07.2005) a full scale political storm unleashed. The Executive and MPs supporting it loudly and publicly expressed their frustration, at the same time questioning the political independence of members of the Constitutional Court and even the legitimacy of the institution². Opinion leaders suddenly discovered the existence of the Constitutional Court and found it ... unconstitutional because not validated by principles of moral politics valid in the XIXth century³, while magistrates all over the country found the best occasion to remember all the difficulties they ever faced in their relation with the Constitutional Court through the exception of unconstitutionality⁴. Part of the legal doctrine and practitioners

¹ Press declarations of the Prime Minister and of the Minister of Justice (actual initiator of laws).

² Press declarations of Emil Boc, president of PD, mayor of Cluj and professor of constitutional law at a public University in Cluj.

³ Catalin Avramescu, “Desfiintarea Curtii Constitutionale”, in Cotidianul 4.10.2005, at <http://www.revista22.ro/html/index.php?art=2092&nr=2005-10-04> (last visited 28.05.2007)

⁴ forum www. reforma in justitie . yahoo.com ???....

rushed with examples from comparative law of countries where judicial review is accomplished by regular courts⁵, while another part delicately tried to defend the Constitutional Court not so much for the merits of that particular decision⁶, but more on the grounds of institutional architecture and checks-and-balances theory. On the top of everything, the President of Romania initially declared he was not surprised with the decision since it came from a Constitutional Court with a composition established almost entirely under the previous Government by the main political party now in opposition. There have been a few days in the summer of 2005 when the very fate of the Constitutional Court seemed doomed for reasons which had nothing to do with the principles of legality or, indeed, with the decision itself.

However, a few days latter the President of Romania declared that, although he personally did not agree with the decision made by the Constitutional Court, in his capacity of head of the State he has to take note of it and try to move things forward. While announcing he spotted a potentially difficult situation for state authorities who might be tempted to disregard the decision of the Constitutional Court, the President decided to make use of his attribution of mediator between State powers (article 80 of the Constitution) and asked leaders of political parties represented in Parliament and the President of the Constitutional Court to take part at a discussion at Cotroceni Palace.

The political context was even more complicated with collateral evolutions and political intentions and actions of a much bigger number of actors. Only to present the essential, it worth mentioning that meanwhile, due to the negative impact⁷ the decision of the Constitutional Court had on the political scene, the Prime Minister announced his intention to resign. His argument was that the reform of the judiciary seemed to stall due to the decision of a jurisdiction, which was considered to be yet another proof of the tough resistance the system was opposing to being reformed. Political consultations started immediately, as well as talks on potential anticipated parliamentary elections. However, clear provisions of article 89⁸ of the Constitution were quickly noticed and ways around them were looked for.

In fact, this was just another attempt to force anticipated elections into a political regime which had barred them on purpose, in order to guarantee a political stability which was not necessarily the rule in the democratic (far) past of the State (particularly between the two World Wars). Also, this was a desperate try to get a comfortable if any majority in Parliament for a Government and a President who both knew they would have a hard time based on the current volatile majority and facing a numerically strong opposition in Parliament. Despite all these considerations, a few days after his first announcement related to the resignation, the Prime Minister decided to no longer resign due to an extreme situation in the country (severe floods affected an important part of the territory), which made it absolutely necessary for the country to be governed.

⁵ <http://www.sojust.ro/sistemul-juridic-din-romania-raport-independent/8-curtea-constitutionala-si-avocatul-poporului.html> (last visited 28.05.2007)

⁶ Simina Tanasescu, comment on decisions n°375/2005 and n°419/2005 in *Curierul Judiciar* 7-8/2005, p. 1 et seq.

⁷ And not so much to the negative legal or institutional consequences on the general reform of the judiciary, which is a process still going on even nowadays and which is not likely to end in the nearby future in Romania.

⁸ Article 89 of the Romanian Constitution mentions the possibility of anticipated general elections only in the rare situation “where no vote of confidence to form the Government has been obtained within 60 days after the first request and only after rejection of at least two request of investiture”.

In this general turmoil, the President of Romania managed to raise above all trouble and held consultations with leaders of political parties represented in Parliament together with the President of the Constitutional Court where it has been decided that Parliament had to re-examine the articles found unconstitutional by the Court⁹. At this stage it was not clear whether the legal text thus resulted and dealing with judiciary reform had to be sent again to the Constitutional Court for a second check. However, the President decided a second check by the Court was part of the bargain and stuck by his part of the deal.

Debates in the joint session of Parliament¹⁰ on texts found unconstitutional ended up with a new wording of the law. Since the President had not used his possibility to notify the Constitutional Court with regard to the draft-law on the reform of the judiciary, he did so on this occasion. Only this time the President did not ask the Constitutional Court to perform its duty and control the conformity with the Constitution of the new wording of the law; instead he asked the Court to check “whether the new phrasing of the texts followed the indications given by the jurisdiction in its previous decision”. In other words, the President did not ask the Court to perform its normal duty and control a law against the standard of the Constitution, rather to check whether Parliament enforced decision n°375/2005 or not. This was no longer in the realm of the Constitutional Court. However, as mentioned before, the Constitutional Court preferred to answer in formal and legal terms to what it had considered to be a formal notification over a legal act.

Finally, the President declared that decisions of the Constitutional Court have to be respected, laws adopted by Parliament have to be enforced and words given cannot be taken back (with a clear hint to the attitude of the Prime Minister who changed his mind with regard to his resignation).

III. Constitutional provisions and their interpretation

Let us start with quoting the relevant provisions of the Constitution:

Art.1 para.5 (The Romanian State) – “The respect of the Constitution and of its supremacy, as well as of the laws is compulsory in Romania.”

Art.80 para.2 (Role of the President) – “The President of Romania shall watch the respect of the Constitution and proper functioning of public authorities. To this effect he shall act as a mediator between State powers as well as between State and civil society.”

Art.142 para.1 (Structure) – “The Constitutional Court shall be the guarantor for the supremacy of the Constitution.”

⁹ Article 147 of the revised Constitution provides that « Any provisions of laws and ordinances in force, as well as of standing orders, which are held as unconstitutional shall cease their legal effects within 45 days from the publication of the decision ruled by the Constitutional Court if Parliament or Government, respectively, have failed meantime to put them in line with the Constitution. For this limited length of time provisions declared unconstitutional shall be suspended as of right.

Referring to laws declared unconstitutional before their promulgation Parliament must reconsider those provisions in order to bring them into line with the decision rendered by the Constitutional Court.”

¹⁰ According to article 114 para.4 of the Constitution in case a law which has been adopted through the assuming of responsibility by Government is sent back by the President of Romania for reconsideration Parliament has to carry debates in a joint session. *Mutatis mutandis* the same procedure has been applied for the re-examination of this type of laws due to a decision of unconstitutionality.

Some of these provisions did not exist or were not worded like this in the initial version of the Constitution adopted in 1991. They have been added or changed at the revision of 2003. Thus, the principle of legality *lato sensu*, including the principle of constitutionality and the compulsory character of the supremacy of the Constitution, were mentioned in the original Constitution, only as a fundamental obligation of Romanian citizens¹¹. Including them in the very first article of the Constitution meant they were recognised as core values to be protected at the highest possible level in the legal system, together with human dignity, democracy, rule of law and separation of powers. Correlated with this new provision, article 142 of the revised Constitution spells out the role of the Constitutional Court, which could have been deduced even before 2003 from its attributions, but now is clearly and specifically mentioned in the normative text of the fundamental law. The role of the President of Romania remained untouched.

Irrespective of their changes or revisions, these legal norms are relatively clear: (i) the Constitution is the supreme law of the land, (ii) there is a specific public authority, namely the Constitutional Court, who has the attribution to *ensure the supremacy of the Constitution*, (iii) while the Head of the State has the specific attribution to *watch for the respect of the Constitution* in the day-to-day life of the State, particularly in the functioning of State authorities. The different functions imparted upon distinct public authorities - respectively, the Constitutional Court and the President of Romania - benefit of separate means of accomplishment. The Constitutional Court has the competence to *solve conflicts* between legal acts through *generally binding decisions*, while the President of Romania can (without necessarily issuing legal acts) *act as a mediator*¹² between public authorities in order to ensure compliance of their conduct with the Constitution. One might say that the Constitutional Court is dealing mainly with formal and legal issues, while the President of Romania is dealing mainly with institutional and political matters.

At the same time, this difference of approaches can be considered as, both, not so obvious (if a normative view is taken) and quite obvious if we refer to the nature of the attributions entrusted upon each public authority. Indeed, according to the normative theory of Hans Kelsen, legal acts are merely the legal expression of the competence of public authorities; the State is, in fact, the institutionalisation of the normative system. Thus, institutional matters can only be dealt with through legal acts. Therefore, no difference can be noticed between formal legal issues and their institutional aspects. However, at the same time, the substance of the attributions imparted on the Constitutional Court and the President of Romania is quite different: while the special jurisdiction is competent to guarantee the supremacy of the Constitution through legal tools, the President of Romania can barely watch for its respect at political level.

¹¹ Article 51 of the Romanian Constitution (before its revision) provided: « The respect of the Constitution, of its supremacy and of laws is compulsory / mandatory ».

¹² Mediation has its sources in international public law where it is considered to be a peaceful way of solving conflicts between states, hereby the mediator actively and directly takes part, including by suggesting possible solutions, in the negotiations between the conflicting parties in order to reach an agreement between them. See Grigore Geamanu, "Dreptul international contemporan", Bucuresti, p.663-664. If this institution has to be applied to constitutional law one has to identify a conflict between State authorities and then place the head of the state as mediator.

Article 80 of the Romanian Constitution enumerates the main functions of the President, thus defining the role it should have in the institutional architecture of the State.¹³ The text imposes a paternalistic figure, ambivalent and complex, but fundamentally turned towards the maintaining of the national unity. The Constitution of Romania is the result of a *negative consensus*,¹⁴ based on a fundamental rejection, common to all political parties represented in the Constituent Assembly, of the intolerable. This negative agreement was transformed and sublimated in the constitutional text into a *positive action* in favour of the unity of the State, the symbol of which is the Head of the State. The President incarnates the continuity and the stability of the State and has to make sure this status of things will not change. That is the reason why number of attributions of the Romanian President search to ensure the stability of the Constitution, while, at the same time, the President is not endowed with important means¹⁵ or, indeed, a true decision-making competence.

On the other hand, the Constitutional Court represents a preserver of fundamental principles underlying the general architecture of the State and a promoter of fundamental rights, in other words a true “guarantor of the Constitution”¹⁶. Paragraph 1 of article 142 of the Constitution was added at the revision of 2003 as a corollary of the entire Title V of the Constitution. Since the option of the Constituent Assembly was for the kelsenian model of constitutional justice it seemed only logical to specifically mention that in the text. Although this option was not necessarily following the Romanian traditions in the area of judicial review¹⁷ and despite the relatively strong resistance of important strata of the political class, judiciary and even legal doctrine¹⁸, the choice for modernity has been slowly but gradually accepted and internalised.

In this context it may seem surprising that the Constitutional Court actually participated in a political negotiation organised and managed by the President of Romania on the wording of a law that was to become later subject of its own control.

IV. Self restraint in the adjudication of politically sensitive questions

Despite the hesitant attitude of the Constitutional Court in its relations with the President and the Parliament of Romania, and somewhat in spite of the political turmoil, both decisions it has

¹³ Tudor Draganu considered that article 80 of the Romanian Constitution « exaggerates the role of the President in the State, using words which go beyond its real attributions » - Drept constitutional si institutii politice.Tratat elementar, vol.II, editura Lumina LEX, 1998, Bucuresti, p.226.

¹⁴ Political commentators also noticed that the result of presidential elections of 2004 were also an expression of a negative consensus ; more than a positive decision with regard to the person that should be vested with the highest dignity in the State, the electorate took the decision who was not to become President of Romania. www.adevarul-on-line ???

¹⁵ “It seems that the Commission in charge with drafting the Constitution had as purpose to reduce the role of the President to the point where the main executive authority would be the Prime Minister. <...> In order to underline the distance taken from the French model the political regime of Romania is presidential “parliamentarised” or “soft-presidential”. – Tudor Draganu, op.cit., p.227.

¹⁶ Carl Schmitt, «Hüter der Verfassung »,

¹⁷ Gaston Jèze, “Sur le pouvoir et le devoir des tribunaux de contrôler la constitutionnalité des lois”, RDP 1912, p.??, Gérard Conac, « O anterioritate românească – controlul judecătoresc al constituționalității legilor », R.D.Pb n°1/2001, p. 4.

¹⁸ Mircea Criste, teza, p. ??

rendered here are strictly within its matter of jurisdiction and refer only to the legal/constitutional aspects. No political reasoning can be found in Court's arguments, not even elements of a theory of interpretation of the Constitution or attempts to create a specific methodology in order to deal with such politically sensitive questions. However, this appearance of containment in its (imparted by the Constitution) matter of jurisdiction is not to be mistaken for an effective self restraint. For between past case law of the Romanian Constitutional Court¹⁹, where a true self restraint attitude could be noticed (although the special jurisdiction never developed its own doctrine with regard to it) and the current situation there is no comparison. Only once in 15 years of existence did the Romanian Constitutional Court enter the realm of politics and issued a decision that actually ended a political debate on an MP's immunity²⁰. In general, the Romanian constitutional judge is quite deferential when it comes to the discretionary competence of the legislator.

However, in this particular case, under the appearance of a strict delimitation between legal/political questions, the Constitutional Court in fact pursued its own agenda, while dealing with issues at stake in a rather diplomatic way. Avoiding to raise the problem of the notification made by the President of Romania, the Court rendered two decisions which have opposite solutions but serve the same purpose: to harmonise the protection traditionally offered by the constitutional judge to the discretionary competence of the legislator with the protection now needed for a specific social category (magistrates). In order to achieve this delicate goal the Constitutional Court ignored all its precedents and the necessary self restraint in its relations with Parliament and President, participated in negotiations on the actual enforcement of its own decisions and had a role event in the drafting of controlled legislation.

Thus, although even the new wording of the law which was the object of the control was not entirely exempt of any critique, the Court decided it could be interpreted as constitutional if certain requirements were met. One should notice here the attitude of the Court, despite different positions it adopted: while the first time the Constitutional Court ruled a decision of partial unconstitutionality, although the circumstances might have justified a decision of total unconstitutionality, the second time it decided to interpret the law as to find it in line with the Constitution, although conformity with the Constitution was not granted in all situations.

All these efforts came at a price though. One specific provision in the law, on which the Court did not seem inclined to make any compromise, had to be interpreted in such a twisted manner that the final result is somewhat puzzling: while abrogated already by the first version of the law the article regarding the age for retirement of magistrates was declared ultra-active by the Court and therefore still enforceable. It is true that the principle put at stake through the provision of the law repeatedly repelled by the Court was a foundational one for any legal system, namely the legal security and, on that basis, the very predictability of the human behaviour. But it is entirely surprising to see that such a fundamental principle, underlying the entire legal architecture of a state governed by the rule of law, is secured through "trembling" means, which go directly in the opposite direction. For what is more contrary to the principle of legal security than retroactivity or ultra-activity of laws? In order to defend (and rightly so) a basic principle underlying the entire architecture of the Constitution and, through it, a value intrinsic to the state governed by the rule of law, the Romanian Constitutional Court misused precisely that important legal value.

¹⁹ See Chronique, AIJC 2002, p.787, AIJC, 2003, p.783.

²⁰ Chronique AIJC 1997, p.826.

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Finally, the Constitutional Court lost a lot in credibility; its legitimacy - not entirely consolidated anyway, although it was much better than in the initial phase of its existence - got a serious blow. It will probably take years of high quality and highly consistent jurisprudence to the Court to find its natural position, role and importance.

Last but not the least, even nowadays, when the Constitutional Court rules a law unconstitutional the general public automatically remembers the eternal question of its legitimacy, despite the well grounded legal arguments which support such decisions. The last example, of the decision through which the des-incrimination of the insult was considered unconstitutional because it disregarded the highest value in the Constitution, namely the human dignity, was not appreciated as a step forward on the way to a better protection of fundamental rights, but rather as yet another attempt to block needed reforms for the modernisation of the State.