Who Is Defending the Romanian Constitution? Between Presidential Obligation and Constitutional Adjudication

Professor Elena Simina TĂNĂSESCU, PhD
Faculty of Law, University of Bucharest

Abstract

Defending the Constitution and guaranteeing its supremacy have become increasingly normal in modern states governed by the rule of law under the strong influence of constitutionalism. An observer may even note that, at least in Europe after the Second World War, these functions are generally imparted upon heads of states and constitutional jurisdictions, as consequence and direct application of theories of both Hans Kelsen and Carl Schmitt. This paper will try to find out the peculiarities of the Romanian pattern and how they adjust to the "reality proof". Based on a specific case and a brief presentation of its political context we will try to observe the balance of powers established by the text of the Constitution and analyse how it functions in reality only to finish with the conclusion that this capacity of for overview poses potentially dangerous challenges to the traditional self restraint of the Romanian Constitutional Court.

Keywords

Constitution, judicial review, guardian of the Constitution, president, constitutional court

The question regarding the guardian of the Constitution is not new, nor is the debate between Hans Kelsen and Carl Schmitt unknown. Defending the Constitution and guaranteeing its supremacy have become increasingly normal in modern states governed by the rule of law under the strong influence of constitutionalism. An observer may even note that, at least in Europe after the Second World War, these functions are generally imparted upon heads of states and constitutional jurisdictions, as consequence and direct application of theories of both Hans Kelsen and Carl Schmitt. This paper does not have as goal to address whether the Romanian Constitution has followed one specific model. The Romanian Constitution, adopted in 1991 and revised in 2003, clearly embraced a mid-line and this choice does not seem to be unique; France and Portugal have also empowered both the head of the state and a constitutional jurisdiction with attributions relating to the respect and guarantee of the Constitution.

However, it is the "living Constitution" that makes the difference between all these models and sometimes reveals unknown aspects of well-known legal institutions. The Constitution provides the legal framework for the political game, while constitutional judges interpret those legal boundaries to politics and politicians, despite possible interferences in this process coming from other actors. Whenever judges review a normative decision, that is a decision taken by another public authority, they risk putting in danger their own legitimacy simply by making possible the interpretation that they are replacing the appropriate decision-maker. An otherwise technical and sometimes even dull legal decision, regarding mainly the conformity of a political decision framed in legal terms with provisions of the Constitution,

may easily become politically sensitive due to the subject matter or due to the types of rules involved. All of a sudden judges find themselves transformed into political bodies that have to obey rules of the political game, including an intense public scrutiny of their nomination procedures as if they were political actors. While a precise definition of the concept of "political questions" is not yet available, nor a clear dividing-line between legal questions and political ones, courts in general and constitutional courts in particular seem to have developed at least two basic techniques in order to deal with such sensitive issues, namely non-justiciability and self restraint.

This paper will try to find out the peculiarities of the Romanian pattern and how they adjust to the "reality proof". Based on a specific case (I) and a brief presentation of its political context (II) we will try to observe the balance of powers established by the text of the Constitution (III) and analyse how it functions in reality (IV) only to finish with the conclusion that this capacity of for overview poses potentially dangerous challenges to the traditional self restraint of the Romanian Constitutional Court (V)

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 put an end to all on-going mandates of presidents of courts at the moment of coming into force of the legislative package and (iii) those which made impossible for magistrates to cumulate salaries with retirement pension in case they were professionally active after they had reached the age-limit for retirement and which fixed a new age limit for the retirement of magistrates to be enforced to all current magistrates from the day the legal packaged came into force.

This decision had two separate opinions. Three judges[1] 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[2] 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.

Days later the Constitutional Court ruled in 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 parliamentary re-examination of the legislative package managed to solve all situations of unconstitutionality save one, namely the age-limit for the retirement of magistrates. Since in its new version the legal package no longer referred to the general law on retirement (valid for all professional categories), but only made a general reference to a law dealing with the retirement of magistrates, the Court considered that 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

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[1] Aspazia Cojocaru, Gàbor Kozsokàr, Constantin Doldur.

[2] Constantin Doldur.

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 (i) the general organisation of the judiciary, (ii) the statute of magistrates and (iii) the organisation and functioning of the Supreme Council of Magistracy) dealing with the reform of the judiciary in the late autumn 2004, days before parliamentary and presidential elections, the entire legal framework of the judiciary has been re-drafted during spring 2005 by the current Government in place.

The new Government had a different political colour than the one who managed to pass the laws dealing with the reform of the judiciary. In fact, parliamentary elections of November 2004 did not come up with a clear-cut result; the political party (Social Democratic Party) initially disposing of a relative majority of seats in Parliament[3] has not succeeded to invest an Executive. An electoral coalition (made up of the Liberal Party and the Democratic Party) 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. Following some political migrations, this coalition also managed to secure a majority of seats in both Houses of Parliament.

The new Government proceeded to make radical legislative changes in several areas, among others the judiciary. In 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. While declaring that the legal framework needed to be adopted with the exact wording to be found in the bill of 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

[3] Due to a well-known phenomenon, called « political migration », members of Parliament elected on the lists of one party may change their political affiliation thus changing also the political composition of Parliament. Asked whether provisions of Standing Orders (of both Houses of Parliament) which allow for this situation to be quite frequent are consistent with the Constitution the Constitutional Court ruled they are as long as « political migration » does not affect the ratio between majority and opposition in Parliament (decisions n°45 and 46/1994 published in the Off.Gaz. n°131/27.04.1994)

responsibility[4] on a so-called "reform bill". The Executive succeeded to pass this consistent "reform bill", although with a few cosmetic changes resulted from the political bargaining in Parliament where opposition worked hard to re-draft some provisions.

Despite this minor success, at the end of parliamentary procedures opposition addressed an impressive list of issues to the Constitutional Court. Most of those issues had been raised also with Government, but did not gather its consent, and were still considered highly problematic by a large number of MPs. They 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 was unleashed. The Executive and MPs supporting it loudly, publicly expressed their frustration, at the same time questioning the political independence of members of the Constitutional Court and even the legitimacy of the institution. The *horribile dictu* "political decision" has been used.[5] Journalists suddenly discovered the existence of the Constitutional Court and found it … unconstitutional because not validated by principles of moral politics valid in the XVIIIth century[6], 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 unconstitutionality[7]. A portion of the legal doctrine and practitioners rushed with examples of comparative law, from countries where judicial review is accomplished by regular courts[8], while another part delicately tried to defend the Constitutional Court not so much for the merits of that particular decision[9], but more on the grounds of institutional architecture and checks-and-balances theory. On top of everything,

[4] Article 114 of the Romanian Constitution provides that "Government may 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 in 2003 of the Constitution 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.

[5] "In my opinion, it is more a political decision, than legal and constitutional" declared the president of Democratic Party, Emil Boc, who is also professor of constitutional law at a public university in Cluj Napoca. http://www.bbc.co.uk/romanian/news/story/2005/07/050706_reactii_curte.shtml (last visited 28.05.2007)

[6] Cătălin Avramescu, "Desfiinţarea Curţii Constituţionale" ("Dismantling the Constitutional Court"), in Cotidianul 4.10.2005, at http://www.revista22.ro/html/index.php?art=2092&nr=2005-10-04 (last visited 28.05.2007)

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

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

[9] Simina Tănăsescu, comment on decisions n°375/2005 and n°419/2005 in Curierul Judiciar 7-8/2005, p. 1 et seq.

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 that had little to do with judicial review or the reform of the judiciary.

Decision n°375/2005 proved to be a highly sensitive one, despite its limited effects (partial unconstitutionality). Some observers qualified it as "political" not because of the subject matter or (lack of legal) arguments, but due to the impact it had on the general public.

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 that he had 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 function 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 scale and number of actors. Only to present the essential, it is worth mentioning that meanwhile, due to the negative impact[10] 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 court, 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 89[11] 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 guaranteed in the democratic (far) past of the Romanian 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 if they were to base all their future (political) actions on the volatile majority then existing, faced with a numerically strong opposition. 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 offered no room for an electoral campaign.

In this general turmoil, the President of Romania managed to rise above all trouble and held consultations with leaders of political parties represented in Parliament, together with the President of the Constitutional Court. The result consisted in a mere confirmation of Constitutional provisions referring to the effects of unconstitutionality decisions[12]:

[10] 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 and is not likely to end in the nearby future in Romania.

[11] 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".

[12] 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

Parliament had to re-examine the articles found unconstitutional by the Court. At this stage, and according to the Constitution, the resulting legal text was supposed to be constitutional, without any need for supplementary checks. However, the President of Romania 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 Parliament[13] on texts found unconstitutional ended up with a new wording of the law. Since the President had not used his power 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 Court in its previous decision". In other words, the President did not ask the Court to perform its normal function and evaluate a law against the standard of the Constitution, but 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.

Decision n° 419/2005 had all chances to be a purely "political" one, but thanks to the approach taken by the Constitutional Court it became highly technical, with even more limited consequences (constitutionality with interpretation) than decision n°375/2005. At the same time, its impact on the general public was less strong, although, in fact, its legal effects were comparatively more important. After all, it was this last decision of the Constitutional Court that ended the debate on the legal framework of the judiciary reform.

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 resignation).

III. Constitutional provisions and their interpretation

A. Constitutional provisions …

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

Art.1 para.5 (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."

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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."

[13] According to article 114 para.4 of the Constitution, in case a law which has been adopted by Government while assuming its responsibility 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 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 citizens[14]. Including them in the very first article of the Constitution meant they were recognised as core values to be protected at the highest level, together with human dignity, democracy, rule of law and separation of powers. Article 142 of the revised Constitution has to be correlated with this new provision in article 1. Article 142 has also been altered by the constitutional revision; it now spells out the role of the Constitutional Court. The main function of the Constitutional Court could be found, via interpretation, even before the constitutional revision; attributions of the jurisdiction as well as its legal framework were strong indications in that sense. But to mention *expressis verbis* the role of the Constitutional Court in the text of the Fundamental Law means to underline the importance not only of the jurisdiction, but also of its activity. Finally, the role of the President of Romania remained untouched by the revision of the Constitution.

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 task to *ensure the supremacy of the Constitution*, (iii) while the Head of the State has the specific authority 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 related to the protection of the Constitution imparted upon separate public authorities - respectively, the Constitutional Court and the President of Romania - benefit of distinct 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* between public authorities in order to ensure compliance of their conduct with the Constitution. Thus the Constitutional Court is dealing mainly with formal and legal issues, while the President of Romania is dealing mainly with institutional and political matters.

B. … and their interpretation

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.[15] 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, based on a fundamental rejection, common to all political parties represented in the Constituent Assembly, of the intolerable. This negative agreement transformed and sublimated in the constitutional text into a positive consensus 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 quo* will not change. That is the reason why number of powers of the Romanian President search to ensure

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

[15] Tudor Drăganu 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", in "Drept constituţional şi instituţii politice.Tratat elementar", vol.II, Lumina LEX, 1998, Bucureşti, p.226.

the respect of the Constitution, while, at the same time, the President is not endowed with important means[16] or, indeed, a true decision-making competence.[17]

Article 142 seeks to impose a Constitutional Court faced with difficulties in justifying its legitimacy in a country where judicial review used to belong with ordinary courts since 1912.[18] Debates in the Constituent Assembly testify to the strong opposition the European model of judicial review faced in Romania not only with the legal strata of society, but even with non-specialists in law.[19] Therefore, reinforcing the role of the Constitutional Court as a guarantor of the supremacy of the Constitution does not mean diminishing the role of the Head of the State to promote respect for the Romanian Constitution, but it helps to promote the image of a jurisdictional guarantor of the Fundamental law.

The two institutions are bound to collaborate, despite differences in their attributions and available means. Since one of main functions of a Constitution is to ensure stability, the Constitution itself becomes an important value for the Romanian state; therefore the President has to watch for its preservation. This explains why the President has an important role as "guardian of the Constitution", even if its functions are limited to what the doctrine named the "Constitution of Powers"[20], that is a function of political mediation between public authorities and monitoring of the respect of the Constitution by the same public authorities (Powers of the State). The other possible face of the "guardian of the Constitution" is the Constitutional Court in its capacity of guarantor of the "Constitution of Rights"[21], which means a promoter of fundamental rights and a preserver of fundamental principles underlying the general architecture of the State. For a complete protection of the Constitution both guardians need to be in place and that is the approach taken by the Romanian Constitution.

However, this approach reminds of the well-known polemic between Hans Kelsen and Carl Schmitt with regard to the "guardian of the Constitution", where the basic difference is not so much referring to judicial review, but rather addresses a more fundamental and

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[16] "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 Drăganu, op.cit., p.227.

[17] Another equally important consensus among framers of the Romanian Constitution concerned decision-making powers of the President, reduced to minimum as not to allow repetition of history. The fact that, at the time when the Constitution was drafted, the incumbent of this high office had not managed to get full support of all political forces also played a role in the legal design of the institution of President. (See debates in the Constituent Assembly published in "Geneza Constituţiei României 1991 – Lucrările Adunării Constituante", Regia autonomă Monitorul Oficial, 1999, Bucureşti, p.724 et seq.)

[18] Gaston Jèze, "Sur le pouvoir et le devoir des tribunaux de contrôler la constitutionnalité des lois", RDP 1912, p.112; Gérard Conac, "O anterioritate românească – controlul judecătoresc al constituţionalităţii legilor", R.D.Pb n°1/2001, p. 4.

[19] "Geneza Constituţiei României 1991 – Lucrările Adunării Constituante", op.cit., p.851 et seq. It worth mentioning that some debates occurred even after the final vote on the text of the Fundamental law with regard to attributions of the Constitutional Court and legal effects of its decisions. (Ibidem, p.964 et seq. and p.968).

[20] Massimo Luciani, "La Costituzione dei diritti e la Costituzione dei poteri", in "Scritti in onore di V.Crisafulli", Padova, 1984, tome 2, p.497.

[21] Massimo Luciani, op.cit., p.497.

ontological level, namely the very concept of Constitution. Thus, starting with its very origins, the polemic was not exactly a dialogue, rather two parallel monologues which have in common only one word, but not necessarily the same concept.

For Hans Kelsen the Constitution represented a purely formal and quite relative concept. The material Constitution was for Hans Kelsen the supreme legal norm which fixed rules for the normative production of the State, i.e. the State organs competent to adopt subsequent legal norms and the procedural rules that those organs have to obey. The formal Constitution meant for Hans Kelsen an ensemble of legal norms which can only be revised through a special procedure. The two meanings of the Constitution were intrinsically linked for him, as a special procedure for the revision of the Constitution is needed precisely because those legal norms fix rules for the normative production of all the other legal norms valid in a given legal order. Therefore, the rigidity of the Constitution is a necessary feature of it if the legal system is to perform its primary function, namely ensuring the predictability of human behaviour.[22]

For Carl Schmitt the Constitution is a decision on the characteristics of a political entity. It is precisely this approach to the material Constitution which allows Carl Schmitt to underline the difference between the Constitution and merely constitutional laws. Not just any provision enshrined in the Constitution can be considered as material Constitution, he says. There is a difference of importance between articles which characterise the State as social or democratic and those referring to the legislative technique. Therefore, the special procedure for the revision of the Constitution is not due to some formal criteria related to the production of legal norms, but rather to the importance and significance of certain provisions in the Constitution which require a greater stability; the rigidity of the Constitution is a necessity due to the need of the State power to maintain that power as long as possible.[23]

Obviously, the same word is used with two very different meanings. It is this fundamental difference that has led to the other aspect: Hans Kelsen thinks that entrusting judicial review to a *sui generis* state authority of jurisdictional nature, called Constitutional Court, is the logical consequence of the principle of legality, while for Carl Schmitt it is the legitimacy that justifies the need to make the Head of the State the ultimate "guardian of the Constitution".

IV. The „guardian of the Constitution" in the "living Constitution"

However, several countries have decided to overcome this famous dichotomy and to entrust both President and the Constitutional court with distinct attributions regarding protection of the Constitution. France[24] and Portugal[25] are in the same cluster with Romania, imparting the defence of the supremacy of the Constitution to a special jurisdiction, while respect of the Constitution is watched by the Head of the State. Irrespective of variations and national specificities that may be noticed in each of these examples, a common pattern can be

[22] Hans Kelsen, "Teoria generală a statului", Tiparul Oltenia, Bucureşti 1924, *passim*.

[23] Carl Schmitt, "Teoria Constituţiei", *passim*. (Translation in Romanian consulted in manuscript with permission of translator. The author wishes to thank the translator and the publishing house for this opportunity)

[24] See articles 5 and 61 of the French Constitution.

[25] See article 137 and 225 of the Portuguese Constitution.

identified whereby the two public authorities complement each other in a *sui generis* form of institutional collaboration.

A. Reciprocal influences

The two public authorities need one another for their organisation or functioning, thus creating the need for an implicit but reciprocal recognition.

The proper organisation of the constitutional jurisdiction cannot take place without an action of the head of the state: in Romania, like in France or in Italy, one third of the judges are nominated by the President. This is a power that Presidents can exercise discretionarily, without countersignature. This does not involve a relation of dependence between members of the constitutional jurisdiction (or the jurisdiction itself) and the head of the state. Furthermore, the President has no possibility to revoke those nominated. Hence, the constitutional jurisdiction may preserve its functional independence and can effectively decide in all neutrality, even on politically sensitive matters. Practise has shown that, at least in Romania, Presidents were less and less concerned with legal qualifications of potential nominees, but paradoxically, the Constitutional Court has gathered more and more independence.

On the other hand, constitutional courts have attributions which oblige them to mingle with political life, but in all neutrality. In Romania, like in France, Italy or Portugal the Constitutional Court is responsible for the continuity of the presidential function and for the regularity of presidential elections. Some of the most delicate and sensitive political questions may arise in this context, but the role of constitutional courts is to remain an impartial judge and/or adviser and not to transform into political actors. So far, no presidential election has been invalidated, and practise has shown a highly cautious Constitutional Court in case stability of the presidential function was at stake.

Although the Romanian doctrine has long ago noticed that "it would be unconceivable to see representatives of the judiciary negotiating with the legislative authority in front of the President because of the infringement of the separation of powers that it would involve"[26] no constitutional provision makes it impossible for the head of the state to hold consultations with the Constitutional Court or, indeed, its president, like it happened in the case above. In fact, since both President of Romania and Constitutional Court have the mission to protect the Constitution, nothing would seem more appropriate than to have consultations on possible interpretation and/or application of the Fundamental law, provided this does not involve discussions on a given case pending in front of the constitutional jurisdiction. Defending the Constitution implies guaranteeing its supremacy; as long as these two functions belong with separate public authorities it is only natural that they collaborate in accomplishing their respective roles. As paradoxically as it may seem, complementary functions imply not reciprocal limitation, but rather reciprocal recognition and institutional respect.

B. Specific attributions

In Romania, like in France or Portugal, both head of the state and constitutional jurisdiction have to protect the Constitution, but in different ways. "The real force of the relation between the two institutions lies in their non-conflictual relationship"[27].

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[26] Tudor Drăganu, op.cit., p.258.

[27] Isabelle Richir, "Le Chef de l'Etat et le juge constitutionnel, gardiens de la Constitution", in RDP n°4/1999, p.1047 et seq.

For Hans Kelsen the principle of the separation of powers is effectively applied and the Constitution respected only when a special jurisdiction oversees the entire process, while for Carl Schmitt the same happens only in presence of a high political institution. The Romanian Constitution, like the French or Portuguese, has mixed these two recipes and made possible a new state activity, namely prevention of infringements to the Constitution[28], through a complex mechanism of public authorities which balances from inside. The President can only interfere with the application of the Constitution, whereas the Court has to guarantee its supremacy. The President and the Constitutional Court are not opposed in the accomplishment of their respective tasks, rather have to complement each other and thus are bound to collaborate. While the President has to act as an arbiter, constantly mediating between public authorities, the Constitutional Court has to judge and take generally binding and enforceable decisions. In their task to protect the Constitution both public authorities have to place themselves above the political game. This proves that theories of Hans Kelsen and Carl Schmitt can co-exist. After all, "protecting the Constitution means defending it from its political enemies in case of danger or extreme crisis"[29].

The ultimate proof of the necessary collaboration between these two public authorities with regard to the protection of the Constitution is the possibility of the President to notify the constitutional court with a potential unconstitutionality. The President enjoys a discretionary attribution, while the Constitutional Court once invested with a case has to reach a decision. This spontaneous intersection of two institutions charged with relatively similar constitutional tasks is based on a somewhat solitary activity: the interpretation of the Constitution. Because if the interpretative competence of the constitutional judge is intrinsic to its functions this does not mean it is also exclusive. This also reminds of the polemic and possibility of conciliation on the issue of the "guardian of the Constitution". But such ideas only get validated in practise.

In Romania, it is not common practise that interpretation of the Constitution made by President and Constitutional Court coincide, but there were cases when this happened. The case here in discussion is an interesting situation where although, in principle, the two authorities shared a common view, in the end they nevertheless were on different sides of the barricade. This case is also the proof that the Constitutional Court makes wise use of all tools available, a decision of constitutionality with interpretation being a subtle way of setting limits to the interpretation of the Constitution made by the President without open confrontation. Two different systems of legitimacy complement each other in ensuring a complete protection for the Constitution: while the legitimacy of the interpretation made by the Constitutional Court derives from its jurisdictional nature and attributions, the legitimacy of the interpretation made by the President comes from its political legitimacy (designation). Thus, the interpretation of the Constitution which finally prevails, benefits of the advantage of both filters, which only reinforce it.

For the current incumbent of the position of Head of State, the President should be an active arbiter, with initiatives and various interventions that allow him to be more a player than a viewer. According to his interpretation of article 80 in the Constitution, at institutional level the President should represent the ultimate authority invoked whenever the state

[28] Ibidem, p.1060.

[29] Nicolo Zanon, "La polémique entre Hans Kelsen et Carl Schmitt sur la justice constitutionnelle" in Annuaire International de Justice Constitutionnelle 1989, p.177 et seq.

machinery blocks. However, in regular situations and under normal circumstances the President has to cope with a more discrete profile. If this approach seems not well adjusted to the current situation, it is not at all at odds with the constitutional text. In 1959 Georges Burdeau was writing on the subject of the President of a recently borne fifth French republic: « Sans doute cherchera-t-il à faire prévaloir un pouvoir d'arbitrage que les prérogatives dont il est par ailleurs investi lui permettront d'exercer (…). Main en fin, la règle démocratique lui imposera de s'incliner devant la volonté non équivoque du Parlement. Il lui appartiendra alors de peser ce que cette volonté met en cause »[30]. Coping with a changing majority in Parliament and faced with an ambivalent Executive might just have taught the Romanian President how useful the relationship with the Constitutional Court can be.

On the other hand, the Constitutional Court seems to act as if legal formalism is the only possible way to deal with a partner, no matter how close the relationship might be in the light of the Constitution. Only a "positivist" lecture of the notification made by the President can explain why the Constitutional Court did not choose to reject it on grounds of unjusticiability but rather deal with it under the framework of judicial restraint. But the second decision rendered by the Constitutional Court is telling for the way in which the jurisdiction has evolved since its creation in the area of politically sensitive questions: from a traditional self restraint to an overt review of any decision of the legislator.

V. Adjudication of politically sensitive questions

Despite the hesitant attitude of the Constitutional Court in its relations with the President, and somewhat in spite of the political turmoil, both decisions it has rendered in this case are strictly within its 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 regarding its (imparted by the Constitution) jurisdiction is not to be mistaken for an effective self restraint. For between past case law of the Romanian Constitutional Court[31], 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 immunity[32]. For the rest, the Romanian Constitutional Court is generally deferential when it comes to the discretionary competence of the legislator, constantly acknowledging and preserving it.[33]

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 raising the problem of the notification made by the President of Romania, the Court rendered two decisions which have

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[30] Georges Burdeau, "La conception du pouvoir selon la Constitution française du 4 octobre 1958", Revue Française de Science Politique 1959, p.98.

[31] See Chronique - Roumanie, Annuaire International de Justice Constitutionnelle 2002, p .787, AIJC, 2003, p.783.

[32] See Chronique – Roumanie, Annuaire International de Justice Constitutionnelle 1997, p.826.

[33] See Table Ronde „Autonomie locale et régionale et Constitution" - Roumanie, Annuaire International de Justice Constitutionnelle 2006, p. "241.

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 even 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 Constitutional Court decided it could be interpreted as constitutional if certain requirements were met. One should notice here the general trend expressed by the attitude of the Court, despite various 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 seemed 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-limit for the 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 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.

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As one commentator of the jurisprudence of the French Conseil Constitutionnel once put it "the functional legitimacy of the judge arises from his fulfilment of his social function. This means he has to use his freedom of interpretation in accordance with the social outcomes of constitutional justice. Contrary to the legitimacy of the elected officials, which is instantaneous because it results from elections, the functional legitimacy is acquired in time. One may qualify it as historical. This kind of legitimacy is not to be found in the way of nominating the interpreters, rather in the conformity of the interpretation with the objectives which are assigned by the social function"[34].

[34] Yann Aguila, "Le Conseil Constitutionnel et la philosophie du droit", LGDJ, 1993, Paris, p.101. In original the text reads: "Le juge est légitimé lorsqu'il remplit la fonction sociale qui lui est assignée. Sa légitimité peut alors être appelée fonctionnelle. Elle exige que le juge fasse de sa liberté d'interprétation un usage conforme aux finalités sociales de la justice constitutionnelle. Contrairement à la légitimité des élus, qui est instantanée dès lors qu'elle résulte des élections, la légitimité fonctionnelle s'acquiert avec le temps. Elle est historique. La légitimité n'est pas a rechercher dans le mode de désignation des interprètes, mais dans la conformité de l'interprétation aux objectifs qui leur sont donnés par leur fonction sociale."

If a constitutional jurisdiction decides not to take the path of free interpretation and add new meanings to old normative texts, the only available alternative for it remains the formal judicial review, which consists of self-limited legal technical control of normative decisions using for a standard the Constitution. The European model of judicial review imposes self restraint, particularly in political sensitive questions, because the jurisdiction of the constitutional court is clearly prescribed by the Constitution, although its capacity to interpret the Constitution is not affected. If Constitutional Courts cannot escape politically sensitive questions, expanding the area of their decisions so that they actually replace those of the competent authorities does not seem an appropriate method of dealing with the issue. The case here under debate cost the Romanian Constitutional Court a lot in terms of credibility. It will probably take years of high quality consistent jurisprudence for the Romanian Constitutional Court to find its natural position, role and importance.