CONSTITUTIONAL REVIEW OR JUDICIAL ACTIVISM?

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Abstract

Constitutional courts have come to play an important role in the transformative processes of their respective states and societies. While legal scholarship is divided on the issue of the beneficial impact that judicial activism of constitutional judges may have on a democratic transition, there is little to support the same conclusion with regard to judicial activism in general. The activism of the Romanian Constitutional Court seems to be discovered as of lately, thus bringing into question its raison d’être.

Keywords: constitutional review, judicial activism, democratic transition.

Controversies on the legitimacy of judicial1 or constitutional review2 are a regular feature of doctrinal analysis. However, they are rarely causes for social or

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2 According to Mauro Cappelletti, unlike judicial review, which is performed in a decentralised way by all ordinary courts - as in US - constitutional review refers to the review of legislation as performed in a centralised way by special courts, created specifically for this purpose – like in most of the European countries. See M. Cappelletti, Judicial Review in Comparative perspective, California Law Review, vol. 58 (1970), p. 1033 et seq.
political unrest. According to some observers\(^3\), the events which unfolded in Romania during 2012 have threatened democracy and raised again the “mighty problem of judicial review”\(^4\). A closer analysis seems to point in a different direction. The issue at stake was not so much the obvious question of how can an appointed body check upon an elected body against its very own constitutive document, but rather how is the review performed and what are its consequences. In other words, the political (and not so much legal) debate that developed during 2012 in Romania had more to do with judicial activism\(^5\) than with constitutional review as such. In order to understand the deeper causes of that broad dissatisfaction of the Romanian society and polity with their Constitutional Court a incursion in the recent past might prove useful since, in Romania, constitutional review is a relatively new instrument of rule of law, endowed with an ontologically inherent political dimension, which only recently adopted an activist approach to its mission. Against a favourable political context, the activism of the Romanian Constitutional Court seems now unstoppable, just as are challenges to its *raison d’être*. Where and how did it all start? And what might be the consequences?

**A. Initial self-restraint**

Romania has joined the wave of democratisation sweeping Eastern Europe in the ’90 with its own specificities regarding both stages of democratic transitions. First, Romania did not have a negotiated initial transformation, but a rather radical one, the first revolution ever to be followed live on TV. Secondly, because of the socially disruptive character of that transformation, there has been a somewhat earlier and hasty passing to the second stage of the transition\(^6\), with the popular ratification on the 8\(^{th}\) of December 1991 of a new Constitution\(^7\). Indeed, after 1991, the mere fact that a Constitution could exist has managed to appease the social unrest and constitutionally frame political debates and the protection of

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\(^3\) Members of the European Parliament expressed worries with regard to the authority and scope of the Romanian Constitutional Court, http://www.europolitics.info/commission-urged-to-monitor-situation-in-romania-art339153.html (last visited on 1.09.2013); while Venice Commission voiced concerns regarding pressures put on the Romanian Constitutional Court, http://www.venice.coe.int/webforms/events/?id=1544 (last visited on 1.09.2013)


\(^5\) In this context activism refers to the readiness of judges to invalidate decisions taken by other legitimate actors in order to enforce their own vision of the Constitution. This approach of activism is opposed to restraint and involves no evaluation of the positive or negative character thereof.

\(^6\) J. Elster even considered that there was “a general impression that Romania forms the rear guard in the transition towards democracy and that a ‘second transition’ may be needed”. See J. Elster, *Constitutionalism in Eastern Europe: an Introduction*, University of Chicago Law Review, vol. 58 (1991), p. 463.

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Irrespective of all these, it is not at all sure that along the process the urgent need for a Constitutional Court was felt; rather to the contrary. Indeed, although in 1911 Romania had imported judicial review through a precedent, following the US pattern of *Marbury v. Madison* (1803) and with consistent theoretical and practical support from French scholars, in 1991 it shifted to constitutional review and created a Constitutional Court. However, as I have argued in another place, that experiment did not seem to have immediate and direct effects neither on the Romanian judicial, nor more generally on the legal culture or the institutional organisation of the state, although an enduring and remnant impact is to be noticed as of lately.

So, when in 1990 the draft Constitution provided for the creation of a Constitutional Court instead of judicial review, reactions have been rather unfriendly: members of the Constituent Assembly thought it was an undemocratic political authority, while the judicial system thought it was a device meant to take away power from it. In fact, already in 1990 and in the absence of a Constitution, the judicial system had shyly started to remember its mighty past and proceeded,

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9 One of the indicators that doubts still persist with regard to the soundness of the democratic transition in Romania is the mere existence of the European Commission's Mechanism for Cooperation and Verification assessing on-going progress. See http://ec.europa.eu/cvm/ (last visited 1.09.2013)

10 Gaston Jèze, *Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l’occasion des procès portés devant eux*, Revue de Droit Public et de science politique en France et à l’étranger, tome XIX (1912), p. 140. At footnote n° 1 of this contribution mention is made of a Mémoire sur le caractère inconstitutionnel de la loi roumaine du 18 décembre 1911, relative à la Société communale des tramways de Bucarest that several French law professors («Messieurs Henri Bathélemy et Gaston Jèze, professeurs à la Faculté de droit de l’Université de Paris, avec l’adhésion de MM. P. Beauregard, A. Esmein, F. Larnaude, A. Pillet, A. Colin, A. Wahl, N. Politis, tous professeurs à la Faculté de droit de Paris») have put with the local court of Bucharest arguing in favour of judicial review.

11 E.S. Tănăsescu, *L’exception d’inconstitutionnalité qui ne dit pas son nom ou la nouvelle sémantique constitutionnelle roumaine*, Revue internationale de droit comparé, n° 4/2013 (forthcoming)

12 Qualified as "super-parliament" or "the fourth power in the state". See, ***, *Geneza Constituției României*, Regia Autonomă "Monitorul Oficial", București, 1999, p.954-876.

13 An ex-president of the supreme court of the land was justifying the preference of the Romanian judicial system for judicial review in the following terms: "Case-law has the power of prestige and not the prestige of power. The supreme court of the land considered itself able to adjudicate on the constitutionality of law on the basis of two principles: the supremacy of the Constitution and the separation of powers. The fundamental law declared that courts have the jurisdiction to resolve controversies and no other legal norm forbids the judicial power to review legislation. Per a contrario, the judicial system can only prove itself useful by doing so". (See Teofil Pop, *Rolul practicii judiciare a Curții Supreme de Justiție în consolidarea statului de drept*, Studii de drept românesc n° 3-4/1992, p. 27.)
in only three cases, to judicial review\textsuperscript{14}. Unlike in Poland or Hungary, during the transformative phase in Romania there was no Constitutional Court to support democratic transition, and the judicial system only made some timid attempts to adapt to the new values promoted by the democratic revolution. The main vectors and supporters of the Romanian transition were the political actors, unconstrained by any review mechanisms or referential standards, so they felt free to define the main characteristics of the future political system as they deemed appropriate.

Due to its soothing effects on the social and political unrest, the popular ratification of the Constitution on the 8\textsuperscript{th} of December 1991 is considered to be the beginning of the consolidation phase. However, it was only after that moment that Romania actually began to build, at times from scratch, almost all its democratic institutions. The text provided for what, at that time, seemed to be the standard pattern of design for ‘transitional constitutional review’, allowing for an \textit{a priori} review of laws and initiatives to revise the Constitution, and an \textit{a posteriori} review of laws, standing orders of Parliament and delegated legislation\textsuperscript{15}. The jurisdiction of the Romanian Constitutional Court had been drafted as close as possible to the theoretical model designed by Hans Kelsen\textsuperscript{16}, but its actual clout was far from that standard since whenever a law was found unconstitutional through an \textit{a priori} review it could be confirmed with the qualified majority of two thirds of the MPs, who were thus rejecting the decision of the Court\textsuperscript{17}. Although in practise such a situation never occurred, the mere fact that this was possible seemed to comfort MPs and stress constitutional judges.

Despite this “sword of Damocles”, during its first twelve\textsuperscript{18} years of existence, constitutional review has proven to be a rather efficient tool for the transformation of both the normative and the political systems during the Romanian transition. It


\textsuperscript{15} See article 144 of the Constitution in its version before the revision of 2003.

\textsuperscript{16} Already in 1929 Hans Kelsen was advising that constitutional courts should have jurisdiction over law and delegated legislation, as well as any other legal act (individual acts of Parliament included) which can be directly connected to the Constitution, but not on: (i) treaties due to difficulties which may arise on the international arena, (ii) administrative acts in order to avoid overlapping with administrative review, and (iii) judicial acts due to their individual character. See H. Kelsen, \textit{Wesen und Entwicklung der Staatsgerichtsbarkeit}, Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Wien am 23. und 24. April 1928, Walter de Gruyter, Berlin und Leipzig, 1929, vol. 5, p. 86. The jurisdiction of the Romanian Constitutional Court is limited, generally speaking, to acts of \textit{réglementation primaire} (see article 146 of the Constitution).

\textsuperscript{17} According to article 145 of the Constitution in its initial version, in case a law would be found unconstitutional in an \textit{a priori} review “the law shall be returned to Parliament for reconsideration. If the law is passed again in the same wording by a majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality shall be removed and promulgation thereof shall be binding”.

\textsuperscript{18} Upon the first revision of the Constitution, in 2003, that specific provision of article 145 has been repealed.
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was precisely through an *a priori* review that already in 1992 the Constitutional Court imposed the separation of powers as a constitutional standard, although was the principle was not textually enshrined in the Constitution. The same procedure has been used in 1994 in order to limit the appetite of the governing coalition to overrule the Court’s decisions by trying to get their policies promoted through legislative delegation. It was again *a priori* review that prevented parliamentarians from attributing themselves privileges or trying to limit democracy by framing too tightly the popular consultations that the President may initiate.

A part this, the *a posteriori* review of legislation has been an important device for filtering preconstitutional statutes and modernising legal standards up to the requirements of the new Constitution, a task that the Constitutional Court has accomplished despite fierce resistance of the judicial system. Even more importantly, most of the case-law of that period is dedicated to the protection of fundamental rights as enshrined in the fundamental law and the Constitutional Court went as far as identifying new fundamental rights based on the interpretation of the Constitution. All in all, during the first twelve to fifteen years of its existence the Constitutional Court has managed to accomplish its main functions (negative legislator, guarantor of fundamental rights and pedagogue) despite reluctance or even opposition of co-workers (Parliament and Government) or competitors (judicial system).

But it seems safe to say that until roughly 2003-2005 the Romanian Constitutional Court has been rather discreet and preferred self restraint to judicial

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19 Decision n° 6/1992 stopped the Parliament from regulating facts which were already examined by courts with regard to the situation of real estate nationalised by the communist regime.

20 Decision n° 75/1994 and decision n° 139/1994 stopped the Government from adopting delegated legislation with the same normative substance as laws previously declared unconstitutional by the Court.

21 Decision n° 19/1995 declared unconstitutional a law meant to increase revenues of individual MPs through an extensive interpretation of statutory provisions, while decision n° 6/1996 found that any increase in the revenues of MPs has to respect the constitutional requirement of a balanced budget.

22 Decision n° 70/1999 found that, according to the Constitution, the President may initiate a referendum either before taking certain measures or after and cannot be limited to organise such a popular consultation only in order to test the will of the people prior to a decision-making process.


24 The principle of equality, in its double function of overarching value of democracy and fundamental right, has been one of the most important tools for accomplishing this task. See E.S. Tănăsescu, *Principiul egalității in dreptul românesc*, All Beck, 1999, București.

25 Such as the right to a differential treatment (positive discrimination) which has been deduced on the basis of the principle of equality (decisions n° 107/1995 and n° 27/1996) or the right of a person to answer in the press to allegations concerning her or him previously published by the same media which has been deduced on the basis of the constitutional protection of human dignity and the freedom of expression (decisions n° 8/1996, n° 55/1996, n° 394/1997, n° 132/1998, n° 177/2000)
activism: when having to directly confront the legislator in *a priori* review the Court would rather act through interpretative decisions than through unconstitutionality ones\(^{26}\) and when daring to be bold its most ‘activist’ decisions were on procedural grounds\(^{27}\) or made appeal to the legislator not to allow for a *vacuum juris*\(^{28}\). It most daring and controversial interventions on the realm of political questions referred to the constitutional legitimacy of the person then occupying that position to run again in the presidential election\(^{29}\) and to the immunity of MPs\(^{30}\).

This self-effacing attitude of the Constitutional Court attracted criticism from some authors\(^{31}\) who were comparing Romanian constitutional review with, say, its Hungarian or Polish counterparts, often forgetting that those constitutional courts had lived their most important activist times when the Hungarian or Polish Constitutions were precisely under construction and political forces driving transition were at their weakest, which enabled courts to manifest as main promoters of change. In stark contrast with that situation, in Romania it was the Constitution that ignited the real process of change, and consolidation actually happened in several stages: the adoption of the new Constitution allowed only for the preconditions of further consolidation to be put in place while the effective creation of democratic institutions and their adaptation to the new values and standards followed later. Therefore simply enforcing the Constitution despite (sometimes opposition of) Parliament, Government or the judicial system was progress enough and the Romanian Constitutional Court did not need to be creative with regard to values or arguments as they were already provided by the very text of the fundamental law. The strong democratic legitimacy of the Romanian Constitution was sufficient to legitimise both constitutional review as

\(^{26}\) Between 1992 and 2004, out of 28 decisions of unconstitutionality ruled in *a priori* review in no less than 16 cases the Court struggled to find an interpretation that would allow for the law to come into force albeit with some limitations.

\(^{27}\) Confronted with inconsistencies in its own case-law the Constitutional Court dared once in 1993, twice in 1994 and three times in 1995 to gather its Plenum and adopt rulings with general binding force despite the fact that such a procedure was not specifically mentioned in its internal regulation (organic law n° 47/1992).

\(^{28}\) Decision n° 38/1993 prolonged with three months the validity of an unconstitutional provision of the Criminal Code in order to avoid a *vacuum juris* and allow Parliament to take appropriate legislative measures. Decision n° 1/1993 of the Plenum of the Constitutional Court has been adopted as a consequence of inconsistencies in the case law of the Constitutional Court with regard to that specific provision of the Criminal Code.

\(^{29}\) Ruling n° 1/1996 confirmed it.

\(^{30}\) Decision n° 63/1997 established that with a new mandate an MP gets a new immunity and thus criminal investigations started under the previous mandate need to be refreshed with a new application for the withdrawal of that new immunity.

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process and the Constitutional Court as institution. So, there was no need for judicial activism since judicialisation\(^{32}\) of social and political life happened anyway via the slow but sure construction of the rule of law\(^{33}\).

**B. Expansion of jurisdiction**

The revision of the Constitution in 2003 offered the opportunity for a political bargaining with regard to the status of constitutional review: while its impact was to be consolidated, its jurisdiction was to be reframed.

On one hand the Constitutional Court saw its jurisdiction\(^ {34}\) expanded by the possibility to adjudicate on international treaties prior to their ratification by Parliament, in an attempt to put in line Romanian constitutional review with what seemed a generalised trend in European constitutional review despite Hans Kelsen’s views on the subject matter\(^ {35}\).

On the other hand, noting that the Court had been quite efficient in dealing with political actors and imposing on them the constitutional standards with regard to the repartition of powers, it was also granted the attribution to settle “legal conflicts of constitutional nature” despite contrary advice from the Venice Commission\(^ {36}\).

And finally, displeased with the fact that - as an outcome of political negotiations - it could no longer have the possibility to overturn decisions of unconstitutionality taken within the *a priori* review, Parliament decided to get at least some control over the jurisdiction of the Court and appended the respective

\(^{32}\) G. Caspar, *loc. cit.*, p. 445: “Every social issue will become a constitutional issue, and law and its oracles will be severely overtaxed. It will also create the potential for constitutional disappointments on the part of those who will come to believe that constitutional promises have been breached.” Also see R. Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, Fordham Law Review, vol. 75 (2006-2007), p. 722.


\(^ {34}\) Currently, article 146 of the revised Constitution provides that the Romanian Constitutional Court can rule upon initiatives for the revision of the Constitution, international treaties as ratified by Parliament, laws, delegated legislation, and standing orders of houses of Parliament and can solve legal conflicts of constitutional nature between public authorities; supervise the procedure for the election of the President and of circumstances that justify the vacancy/suspension of that office; supervise the procedure of and ascertain the results of referendums; supervise the procedure for popular legislative initiatives; decide on the constitutionality of political parties.


\(^ {36}\) Who was right in asking "What does “conflict of a (legal) constitutional nature between the public authorities” mean? It may, of course, mean, first of all, positive or negative conflicts relating to powers in a specific case. However, the proposed text goes further. It appears to embrace all conflicts between the public authorities concerning the interpretation and application of the Constitution in a specific situation. The concept of “conflict” remains to be defined". See http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)004-e, p.11. (last visited 1.09.2013)
article of the Constitution with the following sentence: “other duties stipulated by the organic law of the Court”\(^{37}\). This meant that Parliament would be able to dispose of the Court’s jurisdiction and no longer exclusively the pouvoir constituant, a noticeable depart from the legitimacy envisaged for constitutional review in the theory of Hans Kelsen\(^{38}\). Constitutional judges have tried in vain (decision n°148/2003) to warn the pouvoir constitué that this would represent a breach of the general framework under which constitutional review functioned so far in Romania and thus alter the delicate balance of legitimacy, functions and purpose between Constitutional Court and Parliament, although nothing explicitly forbade such an action in the “eternity clause”\(^{39}\) of the Constitution.

Irrespective of all these considerations, the jurisdiction of the Court in this last respect had been altered already in 2003 in the Constitution but not in the organic law of the Court. Therefore no effective impact could be noticed, despite the sharpening of the political struggle on the Romanian political arena after 2005, with violent in-fights between Parliament, Government and President often taking the Constitutional Court as hostage. The situation remained as such until 2010, when the political context allowed for a revision of the organic law of the Court to be performed by Parliament\(^{40}\).

Indeed, following an unsuccessful impeachment\(^{41}\) of the Romanian President in 2007, when Parliament suspended President but the people refused to remove him from office\(^{42}\), both President and Parliament have tried to prevent or, respectively, prepare future political actions. The Constitutional Court has to deliver an advisory opinion on the circumstances that would justify the suspension from office of the President, but Parliament can take its decision irrespective of the opinion of the Court, and this is exactly what happened in 2007 and again in 2012\(^{43}\). Such parliamentary decisions were not part and parcel of the Court’s jurisdiction according to the Constitution and the Court’s organic law, but they became so in 2010 through parliamentary (and not constitutional) procedure\(^{44}\).

\(^{37}\) Constitutional provision which reminds art. 93(3) of the German Fundamental Law: "The Federal Constitutional Court also acts in such other cases as are assigned to it by federal legislation."

\(^{38}\) H. Kelsen, Judicial Review of Legislation, loc. cit.

\(^{39}\) See article 148 of the Constitution in its version prior to the revision of 2003.


\(^{41}\) See detailed provisions of article 95 of the Constitution. It worth mentioning here that the Romanian Constitutions has a separate provision (article 96) for the criminal liability of the President, which requires a more intensively judicialised procedure.

\(^{42}\) Also see E.S. Tănăsescu, The President of Romania, or the Slippery Slope of a Political System, European Constitutional Law Review, vol. 4 (2008), p. 64-97.

\(^{43}\) Also see E.S. Tănăsescu, Suspension du Président de la Roumanie, Constitutions, n° 4/2012, p. 550-557.

\(^{44}\) It worth to be noted that although initially wanted by political forces opposing President, as the composition of the Constitutional Court seemed favourable to them back in 2007-2008, the expansion of the Court’s jurisdictions in 2010 proved beneficial to the President due to the fact that
The provision added to the organic law of the Court was idly drafted and the Court, after several attempts to enforce it in ways which it thought were best adapted to the circumstances of the cases, ended up by clarifying it in one of its decisions although later it continued with a peculiar type of indiscriminate examination of parliamentary decisions. However, even under these circumstances, in some cases strong doubts subsisted that the Court had simply replaced the will of MPs with its own political preferences. And, despite claims of the Venice Commission that review of parliamentary decisions exists elsewhere (e.g. Germany) and that "judicial control of individual acts of Parliament is not only a rule of law issue but, as the right to vote is affected, even a question of human rights," it is not clear whether it was "the procedure, not necessarily the substance meanwhile he, together with the parliamentary parties supporting him, had managed to appoint four out of the nine constitutional judges.

It merely appended "and decisions of the Plenum of the House of Deputies and decision of the Plenum of Senate and decisions of the Plenum of houses in common seating" to the legal provision stating that "the Constitutional Court adjudicates the constitutionality of standing orders of Parliament upon notification from one of the Presidents of houses of Parliament, a parliamentary group or at least 50 deputies or 25 senators."

In decisions n° 53/2011 and n° 54/2011 the Court ended up invalidating nominations made by MPs to the Superior Council of Magistracy although, in separate opinions to both decisions, three judges have tried to draw a distinction between political and normative parliamentary decisions, and among these last ones between those referring to individual persons (appointments to public offices) and purely normative ones, arguing that only the later can be subject to constitutional review. No longer taking the same precautions, in the years to come the Court simply invalidated several parliamentary decisions of political nature or void of normative substance: decision n° 667/2011 invalidated a memorandum of understanding between parliamentary groups on the composition of the standing bureaus of the Houses of Parliament, decision n° 1630/2011 invalidated an agreement with regard to the legal regime of a specific senator, decision n° 1631/2011 invalidated the election of the President of the Senate; decision n° 209/2012 invalidated the vote of no confidence granted to Government, decision n° 307/2012 invalidated the nominations made by MPs for the National Council of Audiovisual.

In decision n° 732/2012 the Court ruled it cannot invalidate a parliamentary decision which bears effects with regard to a specific person (nomination or dismissal in a public office).

In its decision n° 783/2012 the Court not only invalidated nominations made by MPs for the Council of Administration of the national television, but it also introduced a different distinction among parliamentary decisions between those which pertain to values and norms of constitutional ranking, which can only be review against the high standard of the Constitution itself, and those pertaining to public authorities mentioned in the Constitution, which can be reviewed against legal standards of the Constitution and other relevant laws. Through this interpretation, in fact, the Court has expanded even more its jurisdiction, far beyond the Constitutional and legal limits.

I. Muraru, A. Muraru, Un siècle de contrôle de constitutionnalité en Roumanie, Est Europa, numéro spécial 2013, p. 49-50

of the decision (e.g. which person is appointed to a given post)\textsuperscript{51} that had been controlled. Moreover, neither the Constitution, nor the revised organic law of the Court ever allowed it to review various internal decisions of Parliament against different yardsticks (some of them not even of constitutional ranking) as the trend seems to have developed as of lately.

The events which unfolded during the summer of 2012 placed the Constitutional Court in the middle of a political storm. The Court had no choice but to step into the realm of politics by addressing political questions which meanwhile had become part and parcel of its jurisdiction. Although the words "judicial activism" were never articulated by any of the concerned actors, not even at the highest of the political struggle, all grievances and complaints against the Constitutional Court pointed rather in that direction. In a nutshell, long and continuous political in-fights contributed to a large extent to the weakening of political actors, which created some room that has been quickly grabbed by the Court. Unlike in other East European countries, where political actors had been weak in the beginning of the transition, but once consolidation started they grew stronger and thus reduced the possibilities of self-expansion of constitutional review, in Romania political actors have led the transformation, but seem to have exhausted their forces on the way and created strong premises for self-promotion of constitutional review.

Judicial activism does not fall from sky; it is politically constructed and it would be unfair to put the entire burden of such an enterprise on the sole shoulders of constitutional judges\textsuperscript{52}. As the case of Romania plainly shows, judicial activism of constitutional judges would not have happened if political actors would not have enabled and even stimulated it. However, the timing, dimensions and, more importantly, the consequences of that phenomenon do deserve further attention.

\textbf{C. Judicial activism}

The summer of 2012 was not the first time that the Romanian Constitutional Court had been faced with accusations of political interference and saw its legitimacy questioned. Following the parliamentary and presidential elections of November 2004, the Romanian political scene became more and more conflictive and, given the expansion of its jurisdiction, the Constitutional Court more often than not found itself in the middle of the storm. And, step by step, constitutional review of legislation became the arena on which political fights were fought until the Constitutional Court found its own interest in power sharing and, finally, resorted to judicial activism.

\textsuperscript{51} Ibidem.

\textsuperscript{52} "Neither a constitutional framework that is conducive to judicial activism, nor a nondeferential, power-hungry constitutional court forms a sufficient condition for expansion of judicial power or the judicialisation of mega politics.[...] Political choices and interests are crucial factors in explaining the origins of constitutionalisation and judicial empowerment". R. Hirschl, \textit{Towards Juristocracy, op. cit.}, p. 12.
The first time the legitimacy of the Constitutional Court had been dramatically questioned was as early as 2005. Following a somewhat controversial decision of partial unconstitutionality (decision n° 375/2005) a full scale political storm was unleashed. The Executive of the time and MPs supporting it loudly 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 *horrible dictu* “political decision” has been used. 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, 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. The President of Romania 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, thus questioning the independence of the Court. 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 substance matter of the decision as such. With that decision, irrespective of its will, the Constitutional Court had not only entered the political arena, but it did so under the big lights on the front of the scene; from that moment on, constitutional review of legislation became a mere concealer of political fights.

Then came the political clashes of 2007-2008, when the Prime Minister, who no longer enjoyed presidential confidence since the political storm 2005, decided to replace, one at a time, two ministers of his Cabinet and faced the opposition of President. Asked to settle the legal conflicts of constitutional nature thus generated, the Constitutional Court had to step in and, trying to please both sides, it arrived to different conclusions in two identical cases. In the first one (decision n° 356/2007) the Constitutional Court ruled that the President cannot arbitrarily veto the replacement of a minister and may only check if the person suggested for replacement fulfils all necessary requirements. The second time (decision n°

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53 “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_curtel.shtml (last visited 1.09.2013)

54 C. Avramescu, *Desfiinţarea Curţii Constituţionale* (Dismantling the Constitutional Court), in the daily newspaper *Cotidianul* of 4.10.2005.

55 In fact, the political context was more complicated, with collateral evolutions and political intentions of a much bigger scale and involving a huge number of actors. The political storm was just another attempt to force anticipated elections into a political regime which had barred them on purpose, in order to avoid political instability known in Romania particularly between the two World Wars. It also was a desperate attempt to get a comfortable if any majority in Parliament for a President who knew he would have a hard time if he was to base all his future (political) actions on the volatile majority then existing, faced with a numerically strong opposition.
n° 98/2008) it found that the President may require the Prime Minister to suggest another person than the one already proposed, but he can only do so once because the Constitution also allows him to veto laws only once. Of course, all decisions concerning legal conflicts of constitutional nature are political questions in disguise, so the Constitutional Court can hardly be accused of stepping into the realm of politics at its own will since it was the very revision of the Constitution that made it possible. However, it is only the Constitutional Court who masters the consistency of its case-law\textsuperscript{56} and discrepancies like the one above do not enhance arguments in favour of constitutional review as a useful corrective instrument for power-sharing between political actors.

Then followed the difficulties of the most recent economic crisis, when President announced that salary cuts are unavoidable and Government proceeded, with the support of its political parties in Parliament. Asked by the supreme court of the land if a cut in the salaries of judges would not infringe upon the independence of justice, the Constitutional Court answered by the affirmative (decision n° 872/2010), while when asked by the opposition parties if such a cut would not undermine constitutionally protected socio-economic fundamental rights it answered by the negative (decisions n° 873/2010 and n° 874/2010). As a result of these decisions, salaries have been cut by 25% for all public employees save magistrates and pensions have been cut by 15% for all pensioners save retired magistrates. In addition, the general VAT had to be increased from 18% to 24%, thus worsening even more the economic situation of vulnerable categories of population. A general public perception of the Constitutional Court as an expression of judicial corporatism could not be prevented as it was difficult to anchor those specific decisions in the positive text of the Constitution.

Furthermore, if during the first ten to twelve years of its existence the Constitutional Court attempted to convince the judicial system to correctly implement the Constitution,\textsuperscript{57} just like its counterparts in other East European countries, over the past seven to eight years it started to prevent it from dealing directly with the Constitution. Following a long staged and complicated judicial war which took place between 2008 and 2010 among the highest court of the land and the Constitutional Court\textsuperscript{58} the later came to the conclusion that “the supreme court of the land does not have the jurisdiction over legal norms of legislative rank, nor can it adjudicate their constitutionality”. (decision n° 838/2009) As a result, the legislator

\textsuperscript{56} Previously the Court had resorted to procedural innovations in order to ensure the consistency of its case-law. See note n° 57.

\textsuperscript{57} B. Gutan, \textit{Transitional Constitutionalism and Transitional Justice in Post-Communist States - The Romanian Case}, Romanian Journal of Comparative Law vol. 1 (2010), p. 303. Also see decision n° 186/1999 where the Constitutional Court explicitly stated that regular courts “should directly implement relevant provisions of the Constitution and remove unconstitutional legislative provisions if the legislator has not revised or abrogate them”.

\textsuperscript{58} E.S. Tănăsescu, \textit{Cour Constitutionnelle et système judiciaire: des rapports de force?}, Analele Universității din București - Drept, n° 2/2012, p. 240-251.
had to intervene in 2010\textsuperscript{59} in order to deal with power-sharing between the judicial system and the Constitutional Court\textsuperscript{60}.

As far as legislative procedures go, Parliament seems to be framed more by the wishes of the Constitutional Court than by the Constitution itself. Thus, "when laws have been declared unconstitutional before their promulgation Parliament must reconsider only the provisions concerned in order to bring them in line with the decision of the Constitutional Court. [...] Therefore, "other improvements" can only be operated through other laws or ordinances.\textsuperscript{61} The danger of excessive formalism in legislative procedures looms large behind such positions of the Constitutional Court, although the Court itself seems to fight against it in the name of rule of law\textsuperscript{62}.

But it is on substantive grounds that the Constitutional Court has decided to fight policies adopted by democratic bodies despite all odds. Thus, when Parliament resolved to abrogate insult and slander from the Criminal Code\textsuperscript{63} as a measure meant to take into account in the domestic legal system the consequences of a constant case law against Romania\textsuperscript{64} of the European Court of Human Rights, and the judicial system followed\textsuperscript{65}, the Constitutional Court re-enacted\textsuperscript{66} those

\textsuperscript{59} Through the revision of the organic law n° 47/1992 pertaining to the Constitutional Court through law n° 177/2010.

\textsuperscript{60} Beyond relevant provisions of the Constitution and its organic law, the Constitutional Court declared unconstitutional a ruling of the supreme court of the land and not the law on which that ruling was based upon. (decision n° 206/2013)

\textsuperscript{61} Decision n° 975/2010 dealt with a situation where Parliament attempted to take advantage of the re-examination of a law which occurred due to an a\ textit{priori} review of constitutionality and generally improve the content of that piece of legislation while also taking on board the arguments developed by the Court. The Court found this approach unconstitutional.

\textsuperscript{62} The fight however seems to be limited to the only year 2009 as only decisions n° 303/2009, n° 458/2009 and n° 1629/2009 mention that excessive formalism is not a consequence but an infringement of the rule of law.

\textsuperscript{63} Through Law n° 278/2006 for the revision of the Criminal Code, published in the Official Journal of Romania n° 601/12 July 2006 articles pertaining to the criminal punishment of insult (art. 205) and slander (art. 206) have been simply taken off the law on the books despite the fact that they did not concern only journalists, but every possible form of insult and slander.

\textsuperscript{64} Dalban (ECHR, 25 September 1999); Constantinescu, (ECHR, 27 June 2000); Cumpănă&Mazăre, (ECHR, 17 December 2004); Sabou & Pârcălab, (ECHR, 28 September 2004); Boldea (ECHR, 15 February 2007)

\textsuperscript{65} In its decision n° 8/2010 the High Court of Cassation and Justice ruled that no other body than Parliament can adopt or abrogate laws and a decision of the Constitutional Court which declares a piece of legislation unconstitutional cannot be mistaken for a normative act that would create new legal standards because that Court is defined as a mere "negative legislator"; such a decision can only prevent already existing legal standards from taking unconstitutional paths. In other words, the supreme court of the land imposed on all regular courts the interpretation in accordance with which insult and slander had been decriminalised by Parliament.

\textsuperscript{66} In a nutshell, in its decision n° 62/2007 the Court found that the abrogative law is unconstitutional and, instead of confronting the legislator with a situation where a \textit{vacuum legis} would have imperatively required its intervention, it reasoned that, as a result of the demise of the abrogative law from the books, the previously in force provisions would come back to life; \textit{id est} insult and slander are again criminal actions.
crimes and persisted with determination\textsuperscript{67}, irrespective of the constant contrary will of political authorities\textsuperscript{68}. And once the device of re-enacting legal provisions via the constitutional review of abrogative laws discovered, it has been used at will\textsuperscript{69}, despite the theoretical background developed by the 'father' of constitutional review\textsuperscript{70}. One of these decisions (n° 1039/2012) actually reads "no other public authority, be it even a regular court, can challenge the reasoning of the Constitutional Court, all of them being obliged to put in practice accordingly the decisions of the Constitutional Court as an essential element of the rule of law", thus inducing the idea that its mere legal reasoning is not enough convincing, and the Constitutional Court needs to constantly remind and impose its authority. Sad and worrying situation for a judge who feels obliged to resort to arguments of authority instead of laying its authority on legal arguments, and the more so since the Romanian constitutional judge has recently assumed the role of an active promoter of rule of law and defender of democracy.

\textbf{D. Potential consequences}

Judicialisation of politics being a world-wide phenomenon particularly over the last few decades\textsuperscript{71} it was probably inevitable that the Romanian Constitutional Court escapes it. Sometimes confused with a generic form of judicial activism and sometimes equated with a \textit{de facto} transfer of decision-making power from governmental bodies to judicial ones, when it is not conceived as a mere by-product of the enhancement of the rule of law, the phenomenon has its obvious

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\textsuperscript{67} In its decision n° 206/2013 the Constitutional Court invalidated the decision n° 8/2010 of the High Court of Cassation and Justice because "the highest court of the land cannot and should not interfere with constitutional review" and should only limit itself to the mere implementation of the legislation "without attempting to influence the rest of the judicial system". The outcome of all this, according to the Constitutional Court, is that insult and slander are criminal actions and must be so punished.

\textsuperscript{68} Already in a draft Criminal Code adopted in June 2004 insult and slander were no longer criminal offences. This piece of legislation could not come into force until laws for its implementation had not been adopted by Parliament, which took longer than expected and meanwhile, in 2006, the decriminalising law had been adopted. In 2009 another draft Criminal Code has been adopted, which abrogated the one of 2004. This new Criminal Code together with all necessary laws for its implementation is now foreseen to come into force on February 2014. This new draft Criminal Code does not provide insult and slander as criminal actions and must be so punished.

\textsuperscript{69} The Constitutional Court ruled that the invalidation of abrogative laws simply brings back to life the legal act which had been abrogated in decisions n° 783/2009, n° 124/2010, n° 41/2010 and n° 1039/2012.

\textsuperscript{70} When H. Kelsen concluded that constitutional courts could be given, under specific conditions, the possibility to invalidate a legal norm and inferred that, for a \textit{limited period of time}, previously existing legal standards could be brought back to life, he rather had in mind the technique generally used by the German Constitutional Tribunal consisting in an explicit call to Parliament for an immediate legislative action in order to avoid a \textit{vacuum juris}. See H. Kelsen, \textit{Wesen und Entwicklung der Staatsgerichtsbarkeit}, Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Wien am 23. Und 24. April 1928, Walter de Gruyter, Berlin und Leipzig, 1929, vol. 5, pp. 80-88.

detractors and defenders among state powers, while providing an excellent ground for academic debates.

However, the activism72 recently displayed by the Constitutional Court cannot go without questioning. Openly assumed by members of the Court73 and clerks alike74, this form of activism is described as a transfiguration into a “positive legislator, official interpreter of the Constitution”, “associated to law-making activity” and whose actions are nothing less than “specific forms of ‘impulse’ or ‘coercion’ on the legislator to proceed in a certain way”75. How does it relate with the on-going democratic transition of Romania?

As mentioned before, the Romanian Constitutional Court has only recently discovered judicial activism. In the abstract, timing should not be an important factor in itself. After all, judicial review exists in the United States since 1803 and according to some it was the very product of judicial activism, while according to others the Supreme Court turned activist only once it started to challenge the New Deal, i.e. towards the beginning of the XXth century. And judicial activism proved relevant and even beneficial for democratic transitions elsewhere in Eastern Europe, particularly when practised during the early beginning of that transformative process. But then why did it not happen in Romania as well during the initial phase of transition? The brief saga presented above seems to point not so much to causes internal to the Constitutional Court as towards external, political ones76. When the political context became permissive, the Constitutional Court started to approach political questions more willingly and when relevant political actors supported it, the Constitutional Court turned activist. Such an activism represents a mere ‘collateral damage’ of sharpening fights between main political actors, which created a vacuum of power that, in its turn, allowed judges to get in the front row of the scene.

However, this timing may raise concerns with regard to the democratic transition. There are numerous ways in which incipient transitions differ from already consolidated ones; consequently judicial activism must be made relative to context. If political actors are still under construction, civil societies are weak and the complexity of a political, economic and moral transition is overwhelming, the

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72 In academic usage activism generally refers to the propensity of a judge to strike down the action of another branch of government or to overturn a judicial precedent, with no implied judgment as to whether the activist stance is correct or not. Activist judges enforce their own views of constitutional requirements rather than deferring to the views of other government officials or earlier courts. Defined in this way, activism is a mere antonym of restraint.

73 A. Zegrean, T. Toader, La Cour Constitutionnelle de Roumanie, Les nouveaux Cahiers du Conseil Constitutionnel n° 38/2013, p. 259.


75 M. Safta, loc. cit., p. 1.

76 R. Hirschl, Towards Juristocracy, op. cit., p. 12.
protection of fundamental rights can only be ensured by a strong promoter of change such as constitutional courts proved to be in Hungary or Poland\textsuperscript{77}. But if the main elements of a democracy are already in place and they have barely started to articulate together, despite inherent difficulties, the 'counter-majoritarian' argument\textsuperscript{78} may have a role to play and a hyper-activist constitutional review may endanger whatever limited democratic \textit{acquis} there could be, without even fully succeeding to protect fundamental rights. Trapped between political evolutions upon which it had no clout and lost in a transition which proved more difficult than others, the Romanian constitutional judge started by approaching political questions with lots of precautions and ended up in full judicial activism. The burst during the summer of 2012 has been symptomatic for this evolution but it did not question any deeper the legitimacy of constitutional review in Romania. However, it remains interesting to see what will be the path that the Romanian Constitutional Court will adopt for the future.

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\textsuperscript{77} For a different opinion, claiming that, overall, the record of constitutional courts as far as their contribution to the consolidation of democracy is concerned is "rather mixed" and one should avoid both unrestrained enthusiasm and radical criticism, see W. Sadurski, \textit{Transitional Constitutionalism: Simplistic and Fancy Theories}, in A. Czarnota, M. Krygier, W. Sadurski, \textit{Rethinking the Rule of Law after Communism}, Central European University Press, Budapest, New York, 2005, p. 16.

\textsuperscript{78} According to the now famous label coined by Alexander Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics}, Bobs-Merrill Company, 1962.
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