The Romanian Constitutional Court: Law, Politics and Judicial Activism

1. Introduction

The embodiment of twentieth century constitutionalism, constitutional adjudication appears to be relied upon as an absolute constitutional insurance by many Central and East European countries in their transitions to democracy. Moreover, the absence of a constitutional court or another means of constitutional adjudication has tended to cast long shadows of suspicion over the democratic character of a country. Clearly, however, the existence of a constitutional court is no panacea. The paradox that democracy is to be ensured by the existence of an institution whose democratic legitimacy is quite insecure is largely overlooked.

Almost all East European courts pride themselves in playing a most vigorous role in guaranteeing the supremacy of the constitution, the principle of separation of powers and, more than anything else, the rights of the individuals. Constitutional Courts, similarly to Ombudsmen, are new institutions in East Central Europe, and thus untainted

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1 At a minimum, constitutionalism means the preservation of some fundamental legal rules that limit at any point what a particular organ of government can do. Constitutionalism also includes the existence of an entrenched, supreme, relatively rigid, but not necessarily written, constitution. Constitutionalism also includes the requirement that laws are general, precise, public, not retroactive, stable and applied impartially. Furthermore, constitutionalism requires separation of powers (especially judicial independence), individual rights, judicial review, and democracy. Finally, the particular democratic model embraced and its specific institutional arrangements distinguish brands of constitutionalism. For a detailed analysis, see CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996) and ANDRÁS SAJÓ, LIMITING GOVERNMENT. AN INTRODUCTION TO CONSTITUTIONALISM (1999).
by recent history. 2 Not surprisingly, their potential for ensuring a smooth transition to democracy and rule of law has been greatly emphasized.

This paper introduces the Romanian Constitutional Court, discusses its role in the constitutional and political system, and illuminates some of the factors that limit the activity and potentiality of this Court. The Romanian Court took oath and started its activities on June 5, 1992. Almost ten years later, it would be difficult to point out any significant impact that the Court has had. Compared to other Constitutional Courts in the region, such as the Hungarian Court, the Polish Constitutional Tribunal or even the explosive Zorkin Court in Russia, the Romanian Constitutional Court has been relatively obscure, quickly becoming known as an exponent of judicial restraint.3 There are a number of reasons for this situation, and this article will try to initiate a discussion about them.

The establishment and activity of the Romanian Constitutional Court has been shaped by multiple factors. Among them, one can count the constitutional history of Romania, the multiple transition to democracy, rule of law and a market economy, the powers of the Constitutional Court, and the influence of legal positivism. Specifically, the legacy of legal positivism can be seen in how the Court perceives its role, and in how the Court understands the ambiguous nature of constitutional adjudication as defined by the inter-play between law and politics.

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2 During the communist period, only Yugoslavia, Poland and Hungary practiced some form of judicial review of legislation. Constitutional Courts proper are entirely new institutions for all of these countries except Czechoslovakia. See generally ARNE MAVCIC, SLOVENIAN CONSTITUTIONAL REVIEW: ITS POSITION IN THE WORLD AND ITS ROLE IN THE TRANSITION TO A NEW DEMOCRATIC SYSTEM 15-6 (1995).

3 Judicial restraint and its opposite, judicial activism, define the attitude of a judicial body vis-à-vis a democratically elected legislature. Judicial activism is conventionally understood as judicial disregard for the legislative judgment, while judicial restraint means that courts allow the decisions of other branches to stand, even when they offend the judges’ sense of what the broad constitutional principles say. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137 (1978), FREEDOM'S LAW 75 (1996); see also Peter H.G. Wallach, Judicial Activism in Germany, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland ed., 1991).
2. The constitutional history of Romania

Romanian constitution-makers, like their counterparts throughout the region, took for granted basic principles such as separation of powers and judicial review, concepts like constitutionalism and human rights. Thus, the Constitutional Court’s birth was not grounded in a stable, well-established political and constitutional culture. The Romanian framers adopted a minimal form of centralized judicial review, which allows only preventive review of statutes and, for *a posteriori* review, only the referral system. The pre-war tradition of parliamentary democracy, the French influence, as well as the relative ignorance of many of the members of the Constituent Assembly with regard to judicial review, led towards a hermetic Constitutional Court.5

A fear of judicial review, based in part on Romania’s pre-war experiments with judicial review, was a major factor in the limited mandate of the Constitutional Court. In 1902 an objection of unconstitutionality was upheld by the highest court of appeal, the Court of Cassation.6 The control of constitutionality of laws was decisively assumed by the Court of Cassation in 1912 with the *Streetcars Trial*,7 when an ordinary court (the Ilfov Tribunal) and the Court of Cassation (in appeal) declared a law unconstitutional and refused to apply it in a pending trial.8 The *Streetcars Trial* could have opened the way for the diffuse control of constitutionality in Romania, especially in light of future constitutional provisions -- Art. 103 of the 1923 Constitution expressly granted the

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4 The principle of separation of powers has become a much broader concept in the past fifty years. Like political parties and territorial units, constitutional courts are also new players in this game, acting as political and legal actors. See ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 2-7 (1992).
7 Jurnalul [Journal] nr. 909 of February 2, 1912, with a separate opinion, Curierul Judiciar [Official Gazette] 13/February 16, 1912, at 152-156. Upheld in appeal, decision 261/March 16, 1912, Curierul Judiciar 32/April 29, 1912, at 237. Amply discussed in FOCȘENEANU, supra note 5, at 46-9, and TANASE, supra note 6, at 275-6. Excerpts from both first and appeal decision are found in FLOREA, supra note 6, at 37-40.
8 See FLOREA, supra note 6, at 36.
judiciary the power to decide on the constitutionality of laws, as did Art.75 of the 1938 Constitution. However, in 1940, the constitution was suspended, and later communist constitutions adopted a political (i.e. legislative) system of review.

3. Transitional constitutionalism

Like most other countries of the region, post-1989 Romania faced the need for several transformations at once—to a market economy, to democracy, and to rule of law. This unprecedented and extremely difficult transition must contextualize the emergence of Romania’s Constitutional Court.

Like all the institutions of the new state, the Romanian Court had to struggle to find its way. New constitutional courts usually face threats from many sides. The Romanian constitution has not yet achieved the revered status it has in the United States or Western Europe. There are dangers from the executive, as well as from a simple majority will. The effective protection of constitutionalism requires that the constitution is set above the Parliament, the Government and the judges. Constitutionalism requires the supremacy of the constitution, and thus obliges the constitutional court to resist legislative or executive encroachments on the national constitutions.9

The transitional character of the new constitutional order is one of the major factors that induce constitutional courts to balance the delicate relation between law and politics. “Transitional constitutionalism,” in Ruti Teitel’s words, includes “constitutional developments that occur in particular, limited periods that immediately follow periods of substantial political change.”10

Transitional constitutionalism is characterized by the role constitutional courts choose to play.11 In opposition to the United States, where courts face the counter-

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11 Teitel explains the explosion of Constitutional Courts in the region in terms of the communist legacy. While in the eighteenth century the results of revolutions (constitutional change) were constitutions, in the
majoritarian difficulty, new democracies are challenged by a time of “anti-politics.” Thus, the problem becomes how to legitimize politics, rather than how to legitimize the courts.12

For constitutional courts, the question is how to define their role and primary tasks. On the one hand, constitutional courts guarantee the supremacy of the constitution,13 the abstract constitutional order, and thus sustain the legal system. On the other hand, they also protect fundamental human rights and remedy individual injuries.14 Like the majority of East European Constitutional Courts, the Romanian Court chose to primarily guarantee the supremacy of the constitution. However, in either case, a transitional constitutional system imposes a political, if not necessarily an activist, role on the courts.15

The danger of politicizing the Court is much greater when it is allowed to reshape the legal system and to arbitrate between the other branches. In these cases, political questions are transformed into legal issues, and, on the basis of legal rationality, given final, binding answers.16 For Romania, the fact that both the constitution and the Constitutional Court are relatively new and that the latter has had no experience, have contributed to the politicization of constitutional justice.17 Inexperience and heavy
twentieth century the change is signified by the enforcement of constitutions, their transition from paper to reality. Id. at 173.
12 Id. at 188.
14 This function is mainly ensured by the institution of constitutional complaint. In Eastern Europe, the Hungarian Constitutional Court has gained a reputation for being very active in this area. See Péter Paczolay, The New Hungarian Constitutional State: Challenges and Perspectives, in CONSTITUTION MAKING IN EASTERN EUROPE 44-5 (Dick A.E. Howard ed., 1993).
15 Ruti Teitel identifies a distinctive trait of the post-communist Courts in the connection between the Courts' protection of individual rights, and their involvement in political controversies. The dilemma here is whether the courts can be active without becoming politicized. Teitel, supra note 10, at 182-90.
17 In the early years of the transition, observed Herman Schwartz, the new Eastern European constitutional courts faced power disputes between the other branches, whose solution was not to be found in their constitutions. Consequently, the losers attacked the decisions as 'political'. HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 79-80 (2000).
reliance on legal positivism can easily prompt any court to fall into the trap of trying to solve political disputes based on non-political principles.\textsuperscript{18}

4. Abstract Review and the Politicization of the Court

Clear limits to the activity of the Romanian Constitutional Court are the powers of the Court as established by the 1991 Constitution. Dangerously, these powers have an open political prong. Under art.144 of the Constitution and art.1 of Law No. 47/1992, the Court’s powers include preventive review of statutes, standing orders of Parliament and constitutional amendments, as well as \textit{a posteriori} review (the referral system or ‘exception of unconstitutionality’) with regard to laws and statutory orders.

The power of abstract preventive review has been by far the most criticized competence of a constitutional court. Preventive review transforms the court from a negative to a positive legislator, and thus blurs separation of powers. It brings the court into the legislative process, and thus in the legislative battles between the legislature and the executive. The main danger, however, is that it increases the politicization of the court. Rules of standing, usually restricted to major political players, further enhance its politicization.\textsuperscript{19} Another disadvantage is that the review takes place before the economic and social impact of the law become known and clear. Nevertheless, exactly because the review takes place before the law is applied, it allows for constitutional violations to be remedied before the infliction of any real injury, thus enhancing legal security.\textsuperscript{20} Legal security can be undermined, however, if a law declared constitutional in a preventive review procedure is also subsequently open for \textit{a posteriori} constitutional review.\textsuperscript{21}

Despite its disadvantages, abstract \textit{a priori} review allows for “mechanisms of constitutional dialogue” between the three branches. This constitutional dialogue has at

\textsuperscript{18} \textit{Id}. at 22-48.
\textsuperscript{19} Thus, “the grant of standing to both the presidents and the minority has forced the constitutional courts to become umpires in what are basically political fights with constitutional ramifications.” \textit{Id}. at 30.
\textsuperscript{20} \textit{Id}. at 27-8.
\textsuperscript{21} \textit{Id}. at 32-3. \textit{See also} Helmut Steinberger, \textit{Decisions of the Constitutional Court and Their Effects, in The Role of the Constitutional Court in the Consolidation of the Rule of Law} 79-81 (Council of Europe Press, 1994).
least two beneficial consequences. First, the legislature and the executive have more leeway in developing solutions to constitutional problems. Second, the dialogue can “foster a higher degree of constitutional responsibility on the part of legislator”, and increase his efficiency.22

The Romanian Court tried to avoid political exposure by limiting the scope of preventive review. Thus, the Court held that it is not competent to rule on the constitutionality of drafts, bills, any legislative proposals or amendments.23 The Court also declared that it lacks competence to decide on issues of interpretation and application of the law, because they are within the powers of ordinary courts (decision 42/1993).24 The Court constantly declined to decide issues of legislative omission,25 arguing that this would transform it into a positive legislator (decision 54/May 29, 1995).26 The control of Parliament's standing orders is limited to their conformity with the Constitution. The Court also refused to control the acts of execution of parliamentary standing orders.27

The Romanian Court sees preventive review as a means of protection of political minorities.28 At times, this clashes with another favorite theme in the Court's jurisprudence, namely parliamentary supremacy. The most problematic area is the 'backdoor procedure' established by art.145 of the Constitution, and born as a political compromise aimed at maintaining parliamentary supremacy. Briefly, decisions of the

24 This rule has been incorporated into Law No. 47/1992. The new paragraph 3 of art.2 explicitly established that the Constitutional Court decides only on the unconstitutionality of a provision, not on its interpretation and application.
25 E.g. preventive review decision No. 62/June 13, 1995, M.Of. No. 122/June 19, 1995. The issue before the Court was the rejection of amendments proposed by the parliamentary privatization committee (which referred to the government's obligation to work on a special law and to accept, informatively, the requests of former owners).
27 The purpose of the limitation of standing for abstract control can be the desire to restrict it to serious cases, or to specify the limits of the political game in constitutional terms. See Luis Lopez Guerra, The Role and Competences of the Constitutional Court, in THE ROLE OF THE CONSTITUTIONAL COURT IN THE CONSOLIDATION OF THE RULE OF LAW 26 (Council of Europe Press, 1994).
Constitutional Court on the *a priori* unconstitutionality of statutes, as well as decisions on the unconstitutionality of parliamentary standing orders, are returned for reconsideration to Parliament. If laws (but not standing orders) are passed again in the same formulation by a super-majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality is removed, and promulgation is mandatory.\(^{29}\)

Clearly, the 'backdoor procedure' represents the most serious obstacle to the Constitutional Court's activism. The Court has to walk a fine line and avoid the serious political and constitutional consequences brought by an overruling. Nevertheless, the 'backdoor procedure' also looms on Parliament. Especially in times of transition and fragmentation of political power, it is close to impossible to gather the required majority to overrule the decisions of the Court. Thus, the 'backdoor procedure' could play the role of a balancing mechanism for both Court and Parliament.\(^{30}\) Unfortunately, it also preys the Constitutional Court on the altar of political controversy.

The political exposure of the Constitutional Court transpires from some of its other powers, besides preventive review. The Court also guards the election of the President of Romania, the interim of the Presidential office,\(^{31}\) and gives advisory opinions on the suspension of the President.\(^{32}\) Additional functions include checking referendums and the legislative initiative of citizens, as well as the constitutionality of political parties.

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\(^{29}\) This procedure has been labeled the “backdoor procedure for amending the Constitution” because it does not observe the constitutional procedure for revision established by arts.146-148 of the Constitution. Nevertheless, it achieves something close to a constitutional amendment. The procedure hasn't been used in Romania yet.

\(^{30}\) However, a law once reexamined and adopted by Parliament against the decision of the Constitutional Court remains outside the scope of constitutional review, on the same level with the Constitution. This situation might give rise to the paradoxical situation that a law is constitutional for the Parliament, but unconstitutional for the Court.

\(^{31}\) The Court must ascertain the circumstances that justify the interim in the exercise of office of the President of Romania, and report its findings to Parliament and Government. This decision cannot be overruled by Parliament. It is a legal decision, not a political one, argue *IOAN MURARU & MIHAI CONSTANTINESCU, CURTEA CONSTITUTIONALA A ROMÂNIEI [CONSTITUTIONAL COURT OF ROMANIA] 179* (Bucuresti: Ed. Albatros, 1997).

\(^{32}\) The suspension of the President implies a distinction between cases of 'high treason', where the Supreme Court of Justice is competent, and other cases.
The main weaknesses connected with the Court's powers include Parliament's possibility to override the Court's decisions in preventive review and no possibility for an expansion of competencies unless the Constitution is amended. The competence of the Romanian Constitutional Court has been closely modeled after that of the French Conseil Constitutionnel. Consequently, its powers are among the weakest in Europe. They are wider, though, than the powers of the French Council. The major distinctions between the two systems are the existence of the ‘backdoor procedure’ in Romania (art.145 of the Constitution), and the lack of a posteriori review in France.

The Constitutional Court has rarely had the opportunity to exercise all its powers. It gained political capital on its decisions on constitutional amendments, but it lost a lot of prestige and opened itself to charges of political influence in the decisions on the suspension of the President of Romania.

The politicization of the Court is further enhanced by rules of standing. Specifically, with the exception of a posteriori review, standing is restricted to a handful of political actors: parliament, its two presidents, parliamentary groups, the government, the president of Romania, and the Supreme Court of Justice.

5. Legal positivism and its consequences for the Romanian Constitutional Court

The doctrine of legal positivism is the most important influence in the activity of the Romanian Constitutional Court. This influence transpires in how the Court perceives

33 The Court was asked, twice, to check whether the constitutional conditions for the exercise of citizens’ legislative initiative were fulfilled. The Court held that the lack of a law regulating the exercise of legislative initiative by citizens could not prevent the exercise of such an initiative, and that a legislative omission could not be imputed to citizens. Judgment of the plenum of the Constitutional Court 1/July 27, 1995, Official Gazette 172/August 3, 1995. Judgment of the plenum of the Constitutional Court 2/July 27, 1994, Official Gazette 172/August 3, 1994.

34 The Court was asked to give such an opinion in 1994 - Advisory opinion 1/July 5, 1994 on the proposal to suspend the President of Romania, COLLECTED DECISIONS OF THE CONSTITUTIONAL COURT 1994 at 359-64.

35 Only courts of law can petition the Court in this case. The Court itself further restricted these rules, thus making access to the Court more difficult.

36 CONSTITUŢIA ROMÂNIEI [CONSTITUTION OF ROMANIA] art. 144.
its role in the constitutional and political system, and in how it deals with “political questions.”

5.1. The Self-Perception of the Romanian Court

The constitutional legacy of the past hundred years, the state of transition and the powers of the Court are only partially to blame for the minimal role and perceived politicization of the Romanian Constitutional Court. Perhaps more important has been the way the Court understands its role in the constitutional system. Two points must be stressed here. First, the Constitutional Court has been a construct of the major Romanian contemporary constitutional scholars, who played essential parts in drafting the 1991 Constitution and later served as constitutional judges. The existence and jurisprudence of the Constitutional Court has been a well thought-out enterprise, directed by a handful of judges. Consequently, the Court started from a clear position, and further evolved on relatively determined lines. Thus, its jurisprudence has been quite uniform.

Second, judges themselves defined the position of the Court from two perspectives. On the one hand, they argue that the Court is a public authority with political-jurisdictional character. In this context, constitutional adjudication is only one of the tasks of the Court. The political character is due to the nomination procedure and to some of the Court’s functions, while its jurisdictional character results from its principles of organization and operation, as well as its powers and procedures. Nevertheless, the Court insists on its neutrality, impartiality, and independence. On the other hand, the main functions of the Court are seen in terms of separation of powers and defense of

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38 See e.g. IOAN DELEANU, Justiça Constitucional A [CONSTITUTIONAL JUSTICE] 14 (1995) (presenting constitutional justice as an exclusive and concentrated type of adjudication, whose monopoly belongs to the Constitutional Court).
40 Quite often, however, the Court was suspected of taking its decisions under the influence of various political powers. By 1994, the President of Romania had not referred any claim to the Court.
basic rights. Separation of powers issues include the Court’s adjudication of separation of powers issues in general, as well as the role of the Court itself in the system. With respect to the latter, the Court has declared that it does not belong to any of the other three branches, but it is not another power in the state either. Rather, the Court sees it as its duty to make the three powers function within their limits, to assist the three powers in their constitutional relations of separation.

With respect to the adjudication of separation of powers controversies, the Court plays a very important role in balancing the political majorities and minorities, the state and society, and the interests of social groups. The Court moreover understands its position as that of a guardian in the “border wars” between public authorities. Consequently, the Court intends to guard the avoidance of two dangers: either the formation of a stable faction in Parliament, or the opposite—the excessive fragmentation of political representation. In order to avoid the first danger, the Court has to protect the political minority, the fundamental freedoms generally, and especially the freedom of expression and of the press. Against the second danger, the Court has to guard the rationalized parliamentary techniques (motions of censure, vetoes, etc.), as well as referenda and popular initiatives.

The Court’s emphasis on its “political-jurisdictional character,” its role in separation of powers controversies, and its self-perceived role in balancing political and social groups have certainly not allayed any fears of the Court as an active political participant. Moreover, its reluctance to build a consistent, coherent case-law in the defense of constitutional rights has weakened its case for independence and impartiality.

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41 From the very beginning, the Court announced that it would focus on guarding the supremacy of the Constitution, the balance of powers, legality, justice, and public liberties, all of them constitutional values. See Muraru & Constantinescu, supra note 31, at 11, 43-8.
42 The Court stated that it is not part of the ordinary judicial system in Decision No. 21/March 21, 1994 (M.Of. No. 157/July 20, 1995).
43 See Muraru & Constantinescu, supra note 31, at 39-43. The authors follow the approach of French scholars such as Louis Favoreu and Michel Hauriou.
44 Id. at 46-7.
5.2. Law and Politics

From the jurisprudence of the Court so far it clearly transpires that the American ‘political question’ doctrine has found no place in Romania.\textsuperscript{47} The Romanian Constitutional Court is close to the German or French models insofar as the ‘political question doctrine’ is concerned.\textsuperscript{48} However, like in the United States, in both Germany and Romania political issues usually involve separation of powers questions, and cases have a serious political impact.\textsuperscript{49}

The Romanian Constitutional Court can be characterized as a politicized, but not necessarily activist court. The paradox is only apparent. Following legal positivism, the Court tries to reinforce the separation of law and politics when it guards the separation of powers. It tries to decide political issues by legal standards.\textsuperscript{50} Thus, it refrains from any extra-constitutional judgment, and its decisions are decisions of competence (Kelsen, Eisenmann).\textsuperscript{51} This is not to say that, more than other Courts, the Romanian Court can avoid playing an essential role vis-à-vis Parliament or between Parliament and the

\textsuperscript{46} MURARU & CONSTANTINESCU, \textit{supra} note 31, at 46-7.
\textsuperscript{47} The American Supreme Court developed the so-called ‘political question doctrine’ as a self-restraint. Justice Marshall explicitly rejected the judiciary’s competence in deciding political questions in \textit{Marbury v. Madison}. See CHESTER JAMES ANTIEAU, \textit{ADJUDICATING CONSTITUTIONAL ISSUES} 13-5 (1985).
\textsuperscript{48} Nothing corresponding to this doctrine exists in Germany, because it is considered too vague and arbitrary for the continental legal reasoning, and because the jurisdiction of the German Constitutional Court is more clearly defined than that of the American Supreme Court. See PHILIP M. BLAIR, \textit{FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY} 29-30 (1981); DONALD P. KOMMERS, \textit{THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY} 57-63 (2nd ed., 1997).
\textsuperscript{49} The most controversial cases are those decided on abstract judicial review, at the request of parliamentary minorities. See Joachim Jens Hesse, \textit{Constitutional Policy and Change in Europe: The nature and Extent of the Challenges, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE} 16 (Joachim Jens Hesse & Nevil Johnson eds., 1995).
\textsuperscript{50} However, the Court refused to decide on a petition that claimed that legislative delegation on measures concerning the regime of foreigners was too vast and vague, thus diminishing the role of Parliament. The Court answered that it was not competent, since this was a matter of legislative politics. Decision No. 718/December 29, 1997, in \textit{COLLECTED DECISIONS OF THE CONSTITUTIONAL COURT} 1997, at 83-96. Nevertheless, this is a fairly isolated decision for the Romanian Court, which has not developed yet any minimal standards for legislative delegation.
government.\textsuperscript{52} From this perspective, the protection of constitutional rights and liberties logically follows from a good guardianship of separation of powers and of the Constitution. It is not seen as a bone of contention or an extremely problematic issue.

The Romanian Court does not consider constitutional adjudication an obstacle for democracy, but a necessary instrument that protects minorities and citizens and is a counter-weight for Parliament.\textsuperscript{53} In the Court’s view, the democratic legitimacy of constitutional adjudication follows from the election of constitutional justices directly by Parliament, which in turn is directly elected by the people. It follows that the participation of the Constitutional Court in the legislative process is natural. Nevertheless, the Court is constrained both externally, because it cannot substitute to the legislature, and internally, because it has to justify its decisions by legal arguments.\textsuperscript{54}

The Court sees itself as an expression of a state of rule of law, as the legal qualification of the political phenomenon.\textsuperscript{55} Judges contend that a state under the rule of law cannot function without the oversight of judges, who are a key element in a democratic Rechtsstaat.\textsuperscript{56} If the law was adopted without observing the conditions established by the Constitution, it means that the legislature did not express the general will of the people, but its own particular will, and therefore control is justified.\textsuperscript{57}

Thus, the Romanian Constitutional Court does not acknowledge the existence of the counter-majoritarian difficulty. The troublesome relation between law and politics in


\textsuperscript{53} The possibility of intervention for the Constitutional Court is seen as a guarantee for the parliamentary opposition, and a way of correcting some decisions.

\textsuperscript{54} \textit{See} Decision of the Plenum No. 1/1995 on the obligatory effect of the Constitutional Court’s decisions, M.Of. from January 26, 1995.

\textsuperscript{55} MURARU&CONSTANTINESCU, \textit{supra} note 31, at 96.

\textsuperscript{56} Many constitutional judges have expressed this position. \textit{See} MURARU&CONSTANTINESCU, \textit{supra} note 31, at 23-24; DELEANU, \textit{supra} note 38, at 112; VIOREL MIHAI CIOBANU, \textit{I TRATAT TEORETIC SI PRAC'TIC DE PROCEDURA CIVILA [THEORETICAL AND PRACTICAL TREATY OF CIVIL PROCEDURE]} 17 (1996).

the case of the Romanian Court is determined by its observance of legal positivism. Therefore, law is seen as an independent, self-contained system, with its own reason and deductive system of rules, separated from morality, politics, psychology, or social reality. It is a system without internal contradictions, that understands judging, even at the level of constitutional adjudication, as the mechanical application of law - the Constitution is the supreme law, but still a law. The decisions of the Court try to be clear, faithful to the constitutional provisions, and fairly simple. The Court believes that there is one right decision, which the Court has merely to discover. Thus, the principle of legality is not only a basic principle of the Romanian legal system, but also a cornerstone of the Constitutional Court's activity, inasmuch as the control of constitutionality of laws is a consequence of the principle of legality.

The Romanian framers followed the Kelsenian logic when they opted for a Constitutional Court. Unfortunately, they also imported the problems of this system. In trying to isolate law from politics, Kelsen’s theory allows the political to be free of all legal constraints. Within this system, Carl Schmitt argued that a constitutional court, similarly to the one set up by article 19 of the Weimar Constitution, inevitably would decide political issues, therefore crossing the boundaries of the judicial function.

58 The Court starts from the principle of the unity of the Constitution. This principle, however, neither puts the Court in a leading position, nor does it imply the development of a coherent system through interpretation.

59 See generally HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (1992); EISENMANN, supra note 51.

60 Unlike the German Court, but on the French model, the Romanian Court rarely engages in theoretical excursions or detailed explanations of its position.

61 See MURARU, supra note 39, at 78-9. This means that there are two criteria applied by the Court during its control -- formal and material. The formal criterion means that anything below a statute (e.g. governmental acts issued not as part of delegated legislation) is automatically outside the Court’s jurisdiction. The material criterion means that the Court is checking the legislator’s competence. In this sense, again following the positivist tradition, it is not the legislative solution in itself that is unconstitutional, but it becomes unconstitutional because the legislator could not have adopted it (Eisenmann). See MURARU & CONSTANTINESCU, supra note 31, at 108.


63 DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 111-22 (1997).
Ironically, Kelsen’s ultimate argument for a constitutional court in a system that sharply separates law and politics is found at the level of policy, framed in pragmatic terms from the perspective of separation of powers. Herein lies its main weakness, insofar as the constitutional courts would decide disputes between Parliament and the executive, without however getting involved in any way in the exercise of power. It becomes essential to know, as Carl Schmitt noticed from the very beginning, how would such a court deal with political issues. In other words, is the nature of judicial review and of the constitutional court itself inherently political?

5.3. The political nature of constitutional adjudication

Two issues can thus be distinguished. One concerns the political nature of constitutional adjudication, the other the political nature of constitutional courts. On the one hand, constitutional adjudication has the potential of becoming the last battlefield “in a system noticeable for its multiple points of political access.” On the other hand, if we accept that constitutional review is the last step in the legislative process, then the accusation that judges have and apply their own political values becomes pointless. However, constitutional courts cannot avoid politicization simply by refusing to consider their own political views. At a minimum, they must increase the level of control over the other two branches. Thus emerges a direct link between the politicization of justice and judicial activism, or more precisely between the politicization of litigation and activism, from the perspective of potential litigants as well as from the perspective of the range and nature of issues brought to the courts.

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64 A position criticized by Habermas, since Kelsen’s theory reads judicial review in proceduralist terms. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 243 (William Rehg trans., 1998).
The second aspect of politics in constitutional adjudication is related to the image of the constitutional court as a political institution. This political nature is responsible for subjecting the legislature and executive to the judgment of a court, and consequently for the rejection of unrestricted majority rule. In an optimist approach, a constitutional court can play the main role in a deliberative, transformative politics and can engage the other branches in this sort of discourse. Oppositely, a pessimist perspective is to see a constitutional court in purely bureaucratic terms, as a “committee reviewing the decisions of a dispute resolution bureaucracy.”

The positive political theory maintains that, however we want to interpret the performance of constitutional courts, we should never forget that they also want to maintain their authority, independence and legitimacy. Consequently, “the actions of courts are fundamentally political in that they must anticipate the possible reactions of other political actors in order to avoid their intervention.” This self-preservation aspect is extremely important. The simple fact that courts performing constitutional adjudication are part of a political system puts on them considerable, albeit less visible, constraints.

6. Conclusion

The major reason the Romanian Constitutional Court has not been more actively involved in the country’s transition to rule of law is its adherence to legal positivism. From this theoretical standpoint, there are two consequences for the Court. First, the Court understands its role from two perspectives: as the guardian of the separation of powers, an umpire between Parliament and Government, and as a ‘negative legislator’. From the former point of view, the Court is bound to become just another political actor and to advance towards accepting the ‘politicization of justice’ (Schmitt). Together with its role of ‘negative legislator’, the Court can easily become only a minor political player.

69 BLAIR, supra note 48, at 25.
The Court’s narrow powers, especially some of its overtly political functions, enhance this danger. To escape this fate, the Court should not arbitrate between the other branches of government, and should not make prudential judgments on social and economic policies.

Second, legal positivism restricts the Court to guarding the supremacy of the Constitution on procedural grounds (‘external constitutionality’), and does not distinguish between constitutional and statutory interpretation, which means that the Court fails to use the substantive potential of the constitutional provisions. This directly leads to another major reason for the Court’s obscurity: its failure to build a coherent body of principles with regard to constitutional rights, equally opposed to the legislature and the executive.74 Partially because its involvement with rights is relatively sporadic, the Court has been suspected of being interested in becoming merely another political actor. Paradoxically, if it is to become a real power, the Court must develop an articulate approach to constitutional rights.

Compared to constitutional courts in established democracies, a transitional court does not benefit from a settled constitutional and political culture. However, such a transitional court has the chance and the duty to actively contribute to the entrenchment of constitutionalism.

73 Id. at 200-201.
74 The Court has often expressed its opinion that regular courts, and not the Constitutional Court, are the main defenders of rights. E.g. Decisions No. 71 and 75/1996, COLLECTED DECISIONS OF THE CONSTITUTIONAL COURT 1996 at 524-30. The Court considers that the three main guarantees established by the Constitution for the protection of constitutional rights -- its supremacy, its rigid character, and access to the Constitutional Court -- are sufficient.