The Taming of the Court - When Politics Overcome Law in the Romanian Constitutional Court

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06.06.2018 doi: 10.17176/20180606-154920-0

The Romanian Constitutional Court has backstabbed the Romanian President in his efforts to protect the independence of the chief anti-corruption prosecutor. On 30 May 2018, the Constitutional Court ordered the President to dismiss the chief anti-corruption prosecutor via presidential decree. Before, the President had refused the proposed dismissal by the Minister of Justice based on an Advisory Opinion of the Superior Council of Magistracy that stated that the reasons brought forward against the chief prosecutor were not substantiated enough to justify a dismissal.

The forced dismissal of the chief anti-corruption prosecutor is just the latest act in an ongoing drama within the fight against corruption in Romania. Last year, the government proposed changes the legislation on corruption and judicial independence that were heavily criticised by the European Commission, the Council of Europe and civil society. Now, the chief prosecutor of the anti-corruption directorate is personally in the cross-hairs, and with her the President that has been an outspoken critic of the Government's reforms.

The chief prosecutor of the anti-corruption directorate, Laura-Codruța Kövesi, was repeatedly attacked by the media and had faced institutional pressure before. The Minister of Justice – a politically appointed member of Government – filed a complaint before the Judicial Inspection[1], then the same Minister filed a complaint regarding a "legal conflict of a constitutional nature" at the Constitutional Court for the failure of Ms. Kovesi to testify in person before a special parliamentary committee investigating a political situation. Because the issue under investigation was of political nature and because, according to an older decision of the Constitutional Court[2] she could not be compelled to testify in person before such a committee, the chief-prosecutor gave only a a written statement on the matter. Political investigations forcing members of the judiciary to testify could be interpreted as a form of pressure against their independence and impartiality. This time, however, the Constitutional Court sided with the Minister and acknowledged a conflict with her responsibilities.

The Romanian Constitutional Court was given the power to "resolve legal conflicts of a constitutional nature between authorities" by way of a constitutional amendment in 2003.[3] This power was intended to consolidate the constitutional democracy, by ensuring that an independent referee – the Court – corrects the potential abuses of power of one political or constitutional authority against another. In reality, the Constitutional Court did not manage to build a coherent body of jurisprudence with this power and, moreover, especially in the last two years, transformed it into a political tool in favour of the Government party against its opponents: the President and the judiciary.

Over the years, the Court gave relatively few decisions on such conflict resolution (aproximately two dozens) and it had an oscillating position, including its own constitutional role in the matter. From the outset, in its early case law, the Court defined the rather loose constitutional expression "legal conflict of a constitutional nature" as including "acts or concrete measures by which one or more authorities arrogate powers that, according to the Constitution, belong to other public authorities, *or the omission of certain authorities to fulfill their obligations*"[4]. The Court extended its power to a maximum and made it clear that it will not consider 'only' the conflicts of competence, but "any legal conflict of a constitutional nature created between public authorities"[5], but also defined the nature of such conflicts as "directly residing in the

constitutional text".[6] This extremely extensive power is made possible by the Constitution itself, which does not restrict the Court to solving only conflicts of competence, unlike the majority of European countries that give this power to their constitutional jurisdiction (e.g. Austria, Bulgaria, Belgium, Greece, Germany, Hungary, Italy, Spain etc.).

The conflicts that the Court was called to solved were diverse and all authorities designed by the Constitution with locus standi on the matter exercised this right: the President of Romania, the Government, the Presidents of Chambers of the Parliament and the Superior Council of Magistracy.[7] However, although clearly establishing an extended competence over any conflicts residing in the constitutional text – be they of competence or not – the Court has not defined its own role in "resolving" these conflicts. Therefore, an oscillating case law emerged – from situations in which the Court acknowledged the existence of a conflict but did not give any solution to the authorities involved[8], to decisions in which the Court indicated a general measure to be taken – with the concrete measure to be decided by the given authority (e.g. to issue a legal act, but without indicating the actual contents of that act[9]), and finally, to the most recent decision (the motivation is still unpublished, therefore the comments are based only on the public press release that quotes partially the ruling), in which the Court actually ordered the President of Romania to issue a decree (which he is not constitutionally obliged to do) on a particular matter involving the judiciary – i.e. a decree dismissing the chief-prosecutor of the anti-corruption office. This last decision is the main object of my analysis, but, in the absence of the complete Court's reasoning, I will only emphasize some major faults of the Court's ruling, in the context of the latest political events in Romania.

On 23 February 2018, in a widely announced and broadcast press conference, the Minister of Justice proposed to dismiss the chief-prosecutor by virtue of his 'authority' on the prosecutors granted by Article 132 of the Constitution. The Law on judicial organisation, in Article 51, allows the Minister of Justice to propose the dismissal of chief prosecutors. The proposal is then sent to the Superior Council of Magistracy for an Advisory Opinion and the final decision, according to the same law, belongs to the President of Romania (the President is also the decision-making authority in the process of appointing the chief-prosecutors, in a symmetric procedure).

In the present case, the Minister of Justice's proposal was referred to the Superior Council of Magistracy and, in an unusual way for this institution, the hearings on the proposal were broadcasted live on TV and social media, on 27 February 2018. The Council's opinion, released a few weeks later, argued that the reasons on which the Minister of Justice based his proposal did not amount to deficiencies in the chief-prosecutor's activity and therefore advised against dismissal. On April 16th, the President of Romania announced that, following all these developments, he will not decide the dismissal of Ms. Kövesi as a chief-prosecutor of the DNA. The President based his decision mainly on the Superior Council of Magistracy's negative Advisory Opinion and on allegedly misinterpreted legal documents included in the minister's report. Following the President's answer, the Minister of Justice filed a complaint with the Constitutional Court, on an alleged "legal conflict of a constitutional nature" arisen from this situation. On 10 May, the hearings took place and on 30 May the decision was given by the Constitutional Court. Until the publication of the decision, we can only comment on an excerpt made public via the press release and in which the Court, besides acknowledging the existence of a conflict, actually ordered the President of Romania "to issue the decree of revocation of Ms. Laura-Codruța Kövesi from the position of chief-prosecutor of the national anti-corruption directorate".

The outcome of the case, as it appears from this unprecedented ruling, is flawed from two points of view: firstly, there is no actual constitutional conflict within the meaning of the Constitution and the Court's past case law; secondly, the Court has no competence to dictate the contents of a presidential decree (or of any constitutional authority, including within its constitutional review powers).

The existence of a constitutional conflict is the first problematic issue of the Court's decision. The alleged conflict would have arisen between the President and the Government (the Government being the actual author of the complaint). However, on the one hand, the Government as an institution has no constitutional powers regarding the appointment or dismissal of chief-prosecutors. The Minister of Justice's attribution to propose the dismissal is established by law and not by the Constitution. On the other hand, the President's power to decide on the dismissal is also established by the law on the organisation of the judiciary and is designed as a part of the checks-and-balances against potential abuses of power from the executive against the judiciary. In the present case, both authorities (Minister of Justice and President) have exercised their legal competences and therefore no constitutional conflict of competences should have been pronounced.

As to the contents of the Court's ruling, the analogy with the constitutional review powers of the Court is relevant. Thus, according to the Court's own organic law on organisation and function (Article 2 §3), "the Constitutional Court decides only as regards to the constitutionality of acts on which it has been seized and cannot change or complete the controlled dispositions". *A fortiori*, the Court should have no power to impose a certain content of an act of a political authority. If the Court cannot oblige the Parliament to adopt a certain legal text, it cannot dictate the President to issue a decree with a certain content, as both are elected authorities with high democratic legitimacy.

I also have to point out that, by this highly controversial decision, the Constitutional Courts contradicts its own case law regarding the presidential powers in relation with the judiciary. In 2005, the Court firmly stated that "if the President of Romania had no right to examine and appreciate on the proposals made by the Superior Council of Magistracy for the appointment of judges and prosecutors in leading positions or if he/she had no right to refuse, by motivated decision and at least only once, such appointments, the role of the President according to Articles 94 §c and 125 §1 of the Constitution would be devoid of contents and importance". This is all the more true, I would add, when the dismissal proposal comes from a minister and the Superior Council of Magistracy advises against it. The present decision means, besides devoiding of contents and importance the role of the President, the total overlooking of the role of the Superior Council of Magistracy in a case that is strictly related to the judiciary's internal matters.

To conclude, this ruling of the Romanian Constitutional Court proves, firstly, how easily a Constitutional Court majority (6 to 3 in the present case) can be used as a tool by the political power, by disregarding its own case law and the basic principles of constitutional review in the wider meaning. Secondly, this ruling aims at the heart of the Romanian constitutional system as a whole, by transforming it from a semi-presidential one (a directly elected President with more limited powers than in a presidential system) into a hybrid parliamentary one (a directly elected President with a merely formal role). The potential precedent created by such a decision would mean the devoiding of contents of all powers of the President by future similar decisions, should the President be in conflict with the political majority that controls the Court. This type of political involvement is unacceptable for a Constitutional Court that is considered the guardian of the Constitution and the enforcer of the rule of law in a constitutional democracy.

[1] The Judicial Inspection (hereinafter JI), an internal structure of the Superior Council of Magistracy (see footnote 8) is empowered with bringing and/or investigating the disciplinary actions and sanctions against magistrates. The final decisions on such actions belongs to the Council.

[2] RCC, Decision no. 80/2014 which said that "establishing the obligation for public law persons, other than those provided by Article 111 of the Constitution [*i.e. the Government and the public administration*], of legal and natural persons to be present before parliamentary committees goes against the role and purpose of these committees and, impliedly, against the constitutional role of the Parliament and of the

constitutional principle of the separation and balance of powers".

[3] For more details, see Bianca Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis,* Oxford, Hart Publishing, 2016, p. 179.

[4] RCC, Decision no. 53/2005

[5] RCC, Decision no. 270/2008

[6] RCC, Decision no. 901/2009

[7] The Superior Council of Magistracy is the judicial self-government body, established by the Constitution, designed as the „guarantor of the independence of the judiciary" and with a salient role as regards the magistrates' (judges and prosecutors) career.

[8] RCC, Decision no. 1431/2010

[9] RCC, Decision no. 261/2015

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SUGGESTED CITATION

Selejan-Gutan, Bianca: The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, Verfassungsblog, 06.06.2018, doi: 10.17176/20180606-154920-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20180606-154920-0.