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## In Courts We Trust?

**Abstract:** After the fall of authoritarian communist regimes and emergence of constitutional governments, constitutional review systems were designed in Central and Eastern Europe. Post-communist systems mostly followed the French and German models of abstract and concentrated review, with courts' powers stemming from the Constitution and determined by the legislator. How can constitutional courts limit governmental power, and to what degree can they resist political attempts to alter their competence—these are the questions to which answer are sought referencing two recent Hungarian and Romanian constitutional court decisions. The two courts had to face different challenges and go down different paths—significantly departing even from their respective “traditional” stances—and they both arrived at controversial findings. This paper argues that it has not been primarily a problem of constitutional design, but rather contextual factors that have amplified the weaknesses of the system and consequently led to growing disenchantment and diminishing trust in the guardians of constitution.

**Keywords:** constitutional court, review powers, constitutionalization, politicization

This paper analyzes political attempts to limit constitutional review powers citing examples from Romania and Hungary, where the constitutional courts were recently faced with legislative attempts to restrict their jurisdiction. The main argument is that the courts' incapacity to offer unequivocal answers to these challenges is not due as much to systemic shortcomings, but rather contextual factors. However, this does not help the cause of constitutional adjudication, because disenchantment grows, and public trust diminishes in the guardians of the constitution.

It took the horrors of World War II, as well as the excesses of unconstrained governments, to engender in continental legal theory the idea of enforceable, rights-setting, legal constitutions, which also led to the emergence of powerful constitutional courts, such as the *Conseil Constitutionnel* and the *Bundesverfassungsgericht*. After the fall of authoritarian communist regimes and establishment of constitutional governments, the adoption of a constitutional review system was already an obvious consequence in Central and Eastern Europe. It was also a somewhat natural development, that post-communist systems mostly followed the French and German models of abstract and concentrated review.

Unlike the case of the Supreme Court of the United States, which practically carved out federal courts' power to interpret the Constitution and impose their interpretation upon the legislator, even if such powers were never expressly conferred by the Constitution,<sup>1</sup> post-communist constitutional courts' powers stemmed from the Constitution and were determined by the legislator.

Under these circumstances, it is fascinating to see whether, how, and to what extent constitutional courts can resist political attempts to alter their established competence.

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<sup>1</sup> In Chief Justice Marshall's famous words: “It is, emphatically, the province and duty of the judicial department, to say what the law is.” *Marbury v Madison*, 5 U.S. (1 Cranch) 137(1803).

In two very recent cases, the Hungarian and Romanian constitutional courts had to deal with legislative attempts to limit their powers.

In Romania, attempts to limit the Constitutional Court's jurisdiction were made through two bills<sup>2</sup> and an emergency ordinance,<sup>3</sup> which aimed to restrict the Court's review powers to those acts of Parliament, which have either a normative character, or affect constitutional values, rules or principles.

In Hungary, the Constitutional Court's review powers were limited to constitutional amendments as well as modifications to the law with respect to the Constitutional Court,<sup>4</sup> so as to restrict scrutiny on certain taxation and state budgetary matters in respect of only those situations where fundamental human rights are infringed.

## 1.

It must be noted that the Romanian Constitutional Court has the power to adjudicate *ex-ante* with respect to the constitutionality of laws. This is not an unknown practice in Europe, for instance the French, Portuguese, – and in certain circumstances – Hungarian and Polish constitutions also create the possibility of reviewing the constitutionality of laws before their entry into force.

As constitutional scholars observed: the *ex-ante* approach might bring stability to the legal system, strengthening the law and protecting it from future challenges. However, when *ex-post* review is also made possible within the same system, the stability-feature diminishes, and the *ex-ante* review becomes more or less a political tool for obstructing the legislative procedure.<sup>5</sup> Interestingly, even though the Court recently came under severe criticism, being depicted as intensely politicized and unable to transcend political disputes,<sup>6,7</sup> the problematic coexistence of *ex-post* and *ex-ante* review was not really questioned. However, a commission for the analysis of the political and constitutional regime, set up by the Presidency, came up with an exciting proposal, recommending a possible solution for the rationalization of constitutional justice. The commission envisaged a system of dual competence, in which the Constitutional Court retains the power to adjudicate *ex-ante*, while regular courts exercise *ex-post* review powers over the constitutionality of laws.<sup>8</sup>

<sup>2</sup> PL-x nr. 134/2012, available at [http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?idp=12702](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12702)  
PL-x nr. 283/2012 available at [http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?idp=12794](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12794)

<sup>3</sup> Emergency Ordinance no. 38/2012, Official Gazette no. 445/2012.

<sup>4</sup> Law CXIX of 2010 for the modification of Law XX of 1949 on the Constitution of the Hungarian Republic. Law CXX of 2010 for the modification of Law XXXII of 1989 on the Constitutional Court.

<sup>5</sup> Sadurski, W.: Constitutional Review in Europe and in the United States: Influences, Paradoxes and Convergences. *Sydney Law School Legal Studies Research Paper*, (2011) 11/15, available at <http://ssrn.com/abstract=1754209>

<sup>6</sup> I will return to this aspect later on.

<sup>7</sup> Gilia, C.: Curtea Constitutională sub imperiul reformei. *Sfera Politicii*, (2012) 6, 23–25 and Perju, V.: A sosit timpul pentru reformarea Curtii Constitutionale? available at: <http://www.contributors.ro/idei-si-solutii/a-sosit-timpul-pentru-reformarea-curtii-constitutionale-partea-i>

<sup>8</sup> Report of the Presidential Commission for the analysis of the political and constitutional regime – To consolidate the rule of law, 2008, available at: [http://www.presidency.ro/static/ordine/CPARPCR/Raport\\_CPARPCR.pdf](http://www.presidency.ro/static/ordine/CPARPCR/Raport_CPARPCR.pdf)

Beyond these, one more specific feature of Romanian constitutionalism needs some explanation. In this system, Parliament is named as the sole legislative authority of the state, albeit the Constitution creates significant exceptions from this rule.

Firstly, the government<sup>9</sup> has the option of engaging its responsibility in respect of a program, a political declaration, or a bill. In this case, if the government is not dismissed via a vote of no confidence within three days time, the bill must be considered passed (amendments can only be made if accepted by the government), and the political declaration or program must be treated as mandatory.<sup>10</sup>

Secondly, through the institution of legislative delegation, Parliament can mandate the government to enact ordinances within a specified domain and period of time. Parliament has the option to impose through the delegation act a subsequent approval procedure for these ordinances.

Thirdly, the government also has the possibility of enacting emergency ordinances, in extraordinary and urgent situations, without any parliamentary mandate, but only without affecting the domains reserved for constitutional laws, the fundamental institutions of the state, constitutional rights, liberties and duties, electoral rights and the regime of expropriations. All emergency ordinances must undergo the subsequent parliamentary approval procedure.<sup>11</sup> Alas, governmental lawmaking via emergency ordinances became a common practice, amounting, in the first decade of the new millennium, to 1/3 of the number of laws enacted by Parliament.<sup>12</sup> Taking into consideration the fact that the most important pieces of legislation over the past years, including the Penal Code, the Civil Code, the Codes of Penal and Civil Procedure etc., were forced through the legislature by engaging in responsible procedure, one might speak about a significant erosion of Parliament's powers, but that issue is beyond the scope of the present paper.

The scrap over the Court's jurisdiction started with a bill,<sup>13</sup> which revoked the Court's ability to review the non-legislative decisions of the Chamber of Deputies, decisions of the Senate, and decisions of the united chambers or Parliament. A number of MP's lodged an unconstitutionality complaint and the case was pending, while the government adopted an emergency ordinance,<sup>14</sup> on the same issue, restating word by word the contested provisions of the above-mentioned bill.

It must be noted that the Court's jurisdiction over the non-legislative decisions of Parliament,<sup>15</sup> which created the possibility for the president of each chamber, a parliamentary group or a number of at least 50 deputies or 25 senators to challenge the constitutionality of such acts has been established only recently, and received immediate criticism, authors invoking an unconstitutional encroachment of the Court upon Parliament's activity, a

<sup>9</sup> In this paper the term "government" is used as synonym for the executive body.

<sup>10</sup> Constitution of Romania, art. 114.

<sup>11</sup> Constitution of Romania, art. 115.

<sup>12</sup> <http://www.cogitus.ro/administratie/prea-multe-ordonante-numarul-initiativeilor-legislative-ale-guvernului-din-ultimii-10-ani>.

<sup>13</sup> PL-x nr. 134/2012, for the modification of article 27 paragraph (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court.

<sup>14</sup> Emergency Ordinance no. 38/2012.

<sup>15</sup> Law no. 177/2010 on the modification and completion of Law no. 47/1992 on the organization and functioning of the Constitutional Court.

curtailing of Parliament's autonomy.<sup>16</sup> It is beyond the scope of this paper to discuss the question of constitutional review of non-legislative acts of parliament, but it must be remarked that it is not an unheard-of practice. For instance, jurisdictional or quasi-jurisdictional acts of parliament (such as verification of credentials, disciplinary measures or matters of parliamentary immunity) can be appealed at the constitutional court in Germany, Spain, Austria, Portugal or Slovenia. As to the extent of the internal regulation of parliaments, a Belgian court declared admissible an action brought by an MP in order to obtain enforcement of such a regulation. Moreover, the constitutional courts' competence to deal with staff-related administrative acts of parliaments is also recognized in several jurisdictions.<sup>17</sup> Regardless of the above discussed however, the attempt to restrict the Constitutional Court's review powers, and the Court's ability to react to such attempts is at the heart of this paper.

The Court struck down the bill in question,<sup>18</sup> but this obviously had no effect on the validity of the emergency ordinance.<sup>19</sup> According to the above described approval procedure, another bill was adopted by the legislature<sup>20</sup> for the modification and approval of the emergency ordinance. The passages in concern were modified, affirming the Court's jurisdiction over those decisions of Parliament, which had either a normative character, or affected constitutional values, rules and principles, with the exception of decisions regarding Parliament's internal autonomy, as well as those decisions of an individual nature. This bill also came under constitutional scrutiny upon the complaint of a number of MP's.

In its first decision,<sup>21</sup> the Court stressed that such a limitation of its powers rested not on the rule of law, which is the fundament of constitutional justice, but rather on considerations of opportunity. Even if art. 146 section 1) of the Constitution leaves wide open the question of the Court's jurisdiction, by stating that it also fulfils other attributions established by the law on the functioning of the Constitutional Court, this can be interpreted exclusively as an opportunity given to the legislature to enhance, and by no means limit the Court's competence.

It must also be noted, that in an earlier decision, the Court even recommended the abrogation of this controversial provision from the Constitution's text. The Court invoked

<sup>16</sup> Vedinas, V.: Cateva consideratii privind neconstitutionalitatea legii nr. 177/2010, adoptata de Senat la 24 august 2010. *Revista de Drept Public*, (2010) 3. 104.

<sup>17</sup> Veys, M (2008): Analysis of the ECPRD correspondents' replies. In: Igot, N.–Rezsohazy, A.–Van Der Hulst, M.: *Parliament & Judiciary*. ECPRD Seminar, Belgian House of Representatives and the Belgian Senate. 2008, 223–233. available at: [http://www.agora-parl.org/sites/default/files/ECPRD\\_UK.pdf](http://www.agora-parl.org/sites/default/files/ECPRD_UK.pdf)

<sup>18</sup> Decision no. 727 of July 9, 2012.

<sup>19</sup> As a telltale of the constitutional tangle caused by the overlap of legislative and executive lawmaking, it has to be remarked, that on the very same day that it found the first bill unconstitutional, the Court ruled upon two complaints lodged against decisions of the Chamber of Deputies and the Senate to revoke their presidents. Awkwardly enough, the Court found that it had no jurisdiction to rule upon the decisions of revocation. The argument rested on the fact that even if the bill that altered its jurisdiction and excluded from its competence non-legislative decisions of Parliament was found unconstitutional, the emergency ordinance, with the same content was still in force, therefore, "in order to maintain a state of constitutionality", it had to reject the complaints. Decisions no. 728 and 729 of July 9, 2012.

<sup>20</sup> PL-x nr. 283/2012

<sup>21</sup> Decision no. 727 of July 9, 2012.

the fact that this provision created the possibility for the legislator to modify (expand) at will the Court's jurisdiction, adding "legal" attributions to its "constitutional" ones. According to the majority opinion, abrogation of this provision could guarantee the Court's independence and preserve the constituent power's original will, regarding the Court's jurisdiction.<sup>22</sup>

In the second decision,<sup>23</sup> arguments relating to the scope of art. 146 section 1) were restated, the Court emphasizing that the legislator's ability to limit the Court's jurisdiction empties the constitutional norm and hijacks it from its original scope (i.e. perfection of constitutional democracy). Moreover, it was argued that legislative provisions defining the Court's jurisdiction<sup>24</sup> had acquired a constitutional status,<sup>25</sup> and therefore could not be altered by subsequent legislation. Alas, this idea is venturing on very shaky ground, and cannot logically explain, why subsequently expanding the Court's jurisdiction is deemed acceptable whilst its limitation is rejected, since both constitute an altering of the original "special status" norm. Here, the Court seriously departs from the traditional continental constitutional review, and by referring to the constituent power's original will and raising ordinary legislation to the constitutional level, it comes very close to the US model of constitutional review. But within the continental method of reasoning, such an approach cannot fit un-problematically. The Court received a number of critiques for "attributing to itself a role of constitutional nature", inevitably leading to the conclusion that "[this] attribution is fundamentally unconstitutional".<sup>26</sup>

Furthermore, the Court made citations from its case law in order to stress the importance of constitutional control over Parliament's decisions, arguing that especially decisions regarding authorities and institutions with a constitutional rank—due to the importance of this domain—need a higher degree of scrutiny.<sup>27</sup> Consequently, the power to review Parliament's decisions that concern constitutional values and principles is not merely a guarantee of a Constitution's supremacy, but also a tool that enables the Court ensure the separation and equilibrium of powers, and this is the reason why in the former decision, attempts to limit the Court's jurisdiction were considered as infringing upon the principles of the rule of law.

Beyond the substantive analysis, the Court also went on to identify formal arguments with respect to the unconstitutionality of the norms under scrutiny.

First of all, art. 115 paragraph (6) of the Constitution states that emergency ordinances cannot alter the fundamental institutions of the state,<sup>28</sup> and the Court is undoubtedly one of these institutions. The reason for such a provision is simple: as it was explained above, the government has the ability to issue emergency ordinances without any prior delegation by Parliament. By restricting the Court's jurisdiction, the Government acted outside its constitutional powers, and the legal status of a fundamental institution was altered in a way

<sup>22</sup> Decision no. 799 of June 17, 2011, on the legislative proposal for the revision of the Constitution of Romania.

<sup>23</sup> Decision no. 738 of September 19, 2012.

<sup>24</sup> Law no. 47/1992 on the organization and functioning of the Constitutional Court.

<sup>25</sup> The Court uses the term "valență" (valence) in its figurative sense: value, significance.

<sup>26</sup> Ionescu, C.: Despre atributia Curtii Constitutionale de a examina constitutionalitatea hotararilor Camerelor legislative si ale Parlamentului. *Curierul Judiciar*, (2012) 8. 467.

<sup>27</sup> Decisions no. 53 and 54 of January 25, 2011.

<sup>28</sup> According to Decision no. 1257 of October 7, 2009, fundamental institutions of the state are those enumerated by the Constitution.

that infringed the above-cited constitutional provisions.<sup>29</sup> Furthermore, according to a previous decision, an unconstitutional ordinance or emergency ordinance could not be validated by Parliament through the approval procedure: a law that approves an unconstitutional ordinance or emergency ordinance is itself unconstitutional.<sup>30</sup>

## 2.

The Hungarian Constitutional Court struck down a law providing for a special retroactive income tax,<sup>31</sup> but soon after Parliament passed a constitutional amendment that restricted the Court's jurisdiction, rendering it unable to scrutinize laws similar to the one instituting the special tax.

It must be noted, as an essential difference, that while the Romanian legislature modified only the law on the organization and functioning of the constitutional court, the Hungarian Parliament adopted a constitutional amendment and a modification of the law of the Court.<sup>32</sup>

The Hungarian Constitutional Court therefore, faced a much tougher dilemma, having to decide whether it had the power to decide upon the constitutionality of constitutional amendments.<sup>33</sup>

This challenge was not unprecedented, as the Court already had the opportunity to deal with similar questions. Through a previous decision, the Court rejected an application for lack of jurisdiction. Moreover, another decision also excluded from scrutiny the methodological norms for implementing the amending laws.<sup>34</sup> It's worth noting though that László Sólyom, the then acting president of the Constitutional Court admitted that the majority of judges did not vindicate the jurisdiction to scrutinize constitutional amendments, even if principled arguments could be made for carving out this competence.<sup>35</sup>

The majority decision stated that the Constitution did confer upon the Court neither explicitly, nor implicitly such a jurisdiction that would enable it to review the substantive constitutionality of a constitutional amendment. However, the lack of an express provision did not necessarily preclude the review of constitutional amendments. The Supreme Court

<sup>29</sup> Interestingly enough, the Court did not find it necessary to dwell upon the unorthodox practice of legislation through (emergency) ordinances, stating merely en-passant that the act under scrutiny was at odds with the constitutional reasons that could justify the urgent character of the act, constituting, therefore, an abuse.

<sup>30</sup> Decision no. 421 of May 9, 2007. It must be noted that according to the original version of the Constitution (adopted in 1991), decisions of unconstitutionality in the *ex-ante* review procedure could have been overruled by Parliament, through a qualified majority vote. This provision though, was deleted from the 2003, revised, version of the Constitution.

<sup>31</sup> Decison AB 184/2010. The tax was aimed at reclaiming 98% of those severance payments made to public sector workers that were higher than HUF 2 million.

<sup>32</sup> Law no. CXIX of 2010 for the amendment of Law no. XX of 1949 on the Constitution of the Hungarian Republic, and Law CXX of 2010 for the amendment of Law no. XXXII of 1989 on the Constitutional Court.

<sup>33</sup> It must be noted that Hungary recently adopted a new Constitution (Fundamental Law), which has been in force since January 1. 2012.

<sup>34</sup> Decisions AB 23/1994 and AB 1260/B/1997.

<sup>35</sup> Halmi, G.: Alkotmányos alkotmány sértés (Constitutional breach of constitution). *Fundamentum*, (2011) 2, 81–98.

of India, in *Golak Nath v. State Pujab* affirmed that a constitutional amendment could not infringe constitutional rights.<sup>36</sup> Even if this position was later refined, the Supreme Court still held that constitutional amendments may not alter the Constitution's basic structure.<sup>37</sup>

The majority decision went on then, to emphasize that the Constitution contained no unchangeable provisions that could serve as standards for scrutiny.<sup>38</sup> In his dissent, justice Bragyova argued to the contrary, maintaining that since the Constitution recognized fundamental human rights as inalienable and unalterable, these should be considered as unchangeable provisions. Moreover, he also identified as unchangeable provisions the goals listed in the preamble, namely the multi-party system, the rule of law, the parliamentary democracy and the social market economy. Still, the absence of an eternal clause did not stop the Indian Supreme Court in founding its review power on the basic structure-doctrine. Or, even in the presence of such a clause, as is in the case of art. 79 of the German Basic Law, the scope of the jurisdiction on constitutional amendments was fundamentally construed by the Federal Constitutional Court.<sup>39</sup>

In a less-than-consistent manner, the Court went on to identify several perennial standards that could be considered as standing above the Constitution and beyond the will of the constituent power—on the basis of which constitutional amendments could be reviewed—only to conclude that since it had no explicit review powers, it did not have the possibility to set up such standards either. The first, of these ultra-constitutional standards was “the invisible constitution”, a rather cloudy concept, which was elaborated by the Court in its earlier case law, and largely conceived as representing the Court's coherent system of interpreting fundamental constitutional rights.<sup>40</sup> Secondly, reference was made to the “fundamental values of the Constitution”, as the sum of the core provisions related to the rule of law. Thirdly, the “essential core” of the Constitution was identified as those fundamental rights – the essential content there of – that can be found in the documents of the EU and the Council of Europe. Finally, *ius cogens* norms of international law, together with those international treaties to which Hungary is a party, were also considered to be unalterable parts of the Constitution. It must be noted, that some authors invoke inconsistency with transnational constitutional principles as a compelling argument for striking down constitutional amendments on substantive review.<sup>41</sup>

In their dissenting opinions, several justices adhered to one the above enumerated standards. Arguments have been made for the necessity of establishing jurisdiction over those constitutional amendments that are obviously contrary to international obligations of prominent importance, without explaining the criteria for establishing prominence. Other arguments rested on the “essential core” of the Constitution, which was considered to comprise of the rule of law, human rights, the most important electoral principles etc. Unfortunately none of the dissenters, who claimed that they had found a standard for scrutiny, did actually measure the amendments in question against those standards.

<sup>36</sup> *L.C. Golak Nath and Others v State of Punjab AIR*, 1967 SC 1643.

<sup>37</sup> *Kesvananda Bharati v Statel of Kerala*, 1973 SC 1961.

<sup>38</sup> Decision AB 61/2011.

<sup>39</sup> Halmaj, G.: *op. cit.*

<sup>40</sup> Rooted in Decision AB 239/B/1994

<sup>41</sup> Dixon, R.: Transnational Constitutionalism and Unconstitutional Amendments. *The University of Chicago Public Law and Legal Theory Working Paper*, (2011) 349, 12–15, available at: <http://ssrn.com/abstract=1840963>

Finally, even if it was unable to “find” jurisdiction over constitutional amendments, the Court considered it necessary to signal its concerns about the amendments. In this context, it stated that the existing level of rights protection and its system of safeguards could not be reduced, as this would be contrary to the requirements of the rule of law. Moreover, it could amount to a serious breach of fundamental constitutional rights, if the constituent power introduced in the text of the Constitution those provisions of a law that had previously been found unconstitutional by the Court, thereby exempting them from the Court’s review powers.

Albeit this reasoning is in serious contradiction to the arguments used for demonstrating a lack of jurisdiction in respect of constitutional amendments. On the one hand, the Constitution did not contain any express definition of the Court’s right or duty to signal such tensions between various provisions of the Constitution. On the other hand, the Constitution offered no standard of scrutiny on the basis of which this signaling competence could have been exercised. Consequently, it seems that while the review of constitutional amendments could not have been carried out due to the lack of a normative jurisdiction, a tension between the amendments and the original text could have been established and signaled even in the absence of any such jurisdiction.<sup>42</sup>

Approaching this issue from a different perspective, other authors emphasize that in the absence of any possibilities for enforcement, a frequent use of the signalization attribute runs the risk of making the Court imponderable.<sup>43</sup> A similar concern was voiced in the dissenting opinion of justice Kiss, who argued that signalization is insufficient in the case of amendments that consciously target immediate political goals, as at most it encourages the constituent power to use constitutional amendments to achieve its most important targets.

### 3.

Lecturing the above decisions, the contrast in their approach appears striking. Both courts are civil law courts, fitting in with the patterns represented by civil law constitutional adjudication, but alike their entire respective domestic legal systems, which historically followed different civil law traditions, the Hungarian Court is arguably closer in its approach to the German *Bundesverfassungsgericht*, while the Romanian Court appears more related to the French *Conseil Constitutionnel*. Intriguingly, the already mentioned presidential commission’s report recommended the Romanian Constitutional Court to shift towards the German and, potentially, the South African model of constitutional adjudication.

The Hungarian Court, especially in its early years, was at the forefront of the transition process, passing judgments on virtually all the fundamental issues of transition. Hungary was rightly described as arena, and “courtocracy”.<sup>44</sup> Its expansive Court, constitutionalizing the political arena, and attempting to impose an “invisible constitution”, as the ultimate standard for shaping the legal order.

<sup>42</sup> Halmay: *op. cit.* 81–98.

<sup>43</sup> Drinoczi, T.–Kocsis, M.: A jogalkotási eljárás materiális feltételeiről (About the material aspects of the lawmaking procedure). *Scientia Iuris*, (2012) 1–2, 58–59.

<sup>44</sup> Scheppele, K. L.: Democracy by Judiciary. Or, Why Courts Can be More Democratic than Parliaments. In: Czarnota, A.–Krygier, M.–Sadurski, W. (eds): *Rethinking the Rule of Law after Communism*. CEU Press, (2005), 25–61.

The Romanian Court did not take away politics from the legislator, but attempted to act as a guardian of the rules an arbitrator ensuring that the bounds of lawmaking set by the constitution were respected. It must be noted that, until its 2003 revision, the Romanian constitution allowed for a legislative overrule of the Court's decisions taken in the *ex-ante* review procedure.<sup>45</sup>

The "arbitrator"-approach could arguably be due also to the fact that in the Romanian mixed, semi-presidential system institutional conflicts between political bodies are more frequent, and must be subjected to the Court's decision.

However, in the decisions discussed, the courts depart from their traditional stance: the Hungarian Court's main concern became respect for the bounds of lawmaking, while its Romanian counterpart walked right through the lawn of politics, asserting jurisdiction over Parliament's decisions. Commentators noted that recently all decisions concerning delicate and socially important issues were taken by the Romanian Constitutional Court with a minimal, 5 to 4 majority, where the majority was made up of justices appointed by the governing power.<sup>46</sup> A similar criticism was brought against the Hungarian Constitutional Court, too, accused of doing away with the ideal of constitutionalism.<sup>47</sup>

It would be far-fetched to conclude that the court decisions discussed signal a turn of tides: a constitutionalization of the political environment in Romania, and a politicization of the constitution in Hungary. The explanation is more likely to rest on the contextual factors. As Rosenfeld notes, each system of adjudication has its own weaknesses and problems arise when contextual factors exacerbate these weaknesses.<sup>48</sup>

Intriguingly, while in the case of Germany traditional disenchantment with politics is deemed to be an argument for the enhanced legitimacy of the *Bundesfervassungsgericht*, in the arguably at least similarly paternalistic Hungary and Romania, this disenchantment is projected over the Constitutional Court, too, which is perceived more as an extension of the political environment. In this context, through such firm departures from their regular approach, the Constitutional Courts of Hungary and Romania are less likely to improve their capital of legitimacy.

<sup>45</sup> Former art. 145 para. 1 of the Constitution required a 2/3 majority in both chambers of the Parliament to override a decision of the Court

<sup>46</sup> Gilia: *op. cit.*

<sup>47</sup> Halmai: *op. cit.*

<sup>48</sup> Rosenfeld, M.: Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast (working paper). *International Journal of Constitutional Law*, 2 (2004) 4, available at <http://ssrn.com/abstract=577003>