12 *Non sequiturs* in constitutional adjudication

Populism or epistemic deficit?

Alexandra Mercescu

12.1 Introduction

One of the core elements of the so-called 'New Constitutionalism' is centred around the idea of an efficient control of the political by the law.[1] In general, judicial review is perceived to be an institution sufficiently apt to successfully fulfil this ambitious task, at least under non-exceptional circumstances, being now advocated even in countries traditionally reluctant to recognize the power of judges to interfere with the imagined legislative will.[2] However, judicial review across legal cultures is not uniform. For some countries, parliamentary sovereignty, while protecting democracy but possibly endangering rights, remains a valid model of constitutionalism. As Jeffrey Goldsworthy notes,

> [t]he constitutional traditions of different countries reflect different views as to which of those dangers is to be feared more, a question that continues to engage legal and political theorists. It is surely possible that the answer varies from one country to another, depending on their different political, social, and cultural circumstances.[3]

Moreover, countries that evaluate differently the priority of threats and prefer therefore to adopt judicial review differ nonetheless in their understanding of the tools, such as proportionality, that are employed to realize the aims of judicial review.[4]

Judicial review is yet to become the universal weapon against the fight of political unruliness. Moreover, it is yet to achieve a configuration which

1 Tamas Győrfi, *Against the New Constitutionalism* (Edward Elgar 2016) 8.

2 Travor Allan, *Constitutional Justice, a Liberal Theory of the Rule of Law* (Oxford University Press 2001).

3 Jeffrey Goldsworthy, 'Homogenizing Constitutions' (2003) 23 Oxford Journal of Legal Studies 483, 505.

4 Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 Hastings International & Comparative Law Review 555. For a more comprehensive analysis, see Jacco Bomhoff, *Balancing Constitutional Rights* (Cambridge University Press 2013) 190–234.

dispenses with the interpreter's discretion. It was and continues to be hailed as a mechanism ensuring a fair amount of control over what would otherwise constitute unbridled and therefore dangerous politics. However, as soon as theoreticians realized that, realistically speaking, and crudely put, it is not so much about politicians being constrained by the law but about some people (politicians) being constrained by other people (judges), unsurprisingly, they became preoccupied with finding solutions meant to supposedly render the whole review process more objective, by including interpretative[5] or eternity clauses, for instance, in the fundamental text. Under this ideal, if politics is to be constrained by law, law is to be constrained by language (as if language were to be automatically applied). In any case, for countries that by and large do believe in its benefits, the question arises whether judicial review remains efficient in the face of problematic political agendas such as the recent waves of populism. Does constitutional interpretation differ radically when applied by courts that are more or less overtly endorsing populist regimes? I wish to answer this question by looking in particular at a decision of the Constitutional Court of Romania that has been severely criticized as infringing on the rule of law. Essentially, I will seek to determine whether its language and reasoning are any different from those displayed in the more 'regular' decisions of the Court, but not before discussing the particular background of Romanian politics and constitutionalism.

12.2 Romania's political landscape: populist or not?

From a comparative perspective, unlike Hungary, whose constitutional judges are now to interpret at least in part an overtly non-liberal new constitution,[6] and Poland, whose Constitutional Court 'realizes the politics of the ruling majority', 'effectively desisting from protecting the constitutional order against unconstitutional measures',[7] Romania's constitutionalism has been quite unspectacular. By contrast, when looked at from the perspective of its evolution, it is clear that the recent years have brought some spectacular interventions of the Constitutional

5 See Anna Gamper, 'Constitutional Courts, Constitutional Interpretation, and Subnational Constitutionalism Perspectives on Federalism' (2014) 6 Perspectives on Federalism E-28.

6 Gábor Halmai, 'A Coup Against Constitutional Democracy: The Case of Hungary' in Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Zoltán Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 Constitutional Studies 123.

7 See Przemysław Tacik, 'Polish Constitutional Identity under the Illiberal Turn' in Alexandra Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe* (Peter Lang 2020), 167. At the date of this writing both countries continue to engage in authoritarian politics as they exploit the emergency related to the Covid-19 pandemic crisis. See Gábor Halmai, 'Don't Be Fooled by Autocrats', (*Verfassungsblog*, 22 April 2020), https://verfassungsblog.de/dont-be-fooled-by-autocrats/ accessed 23 April 2020; Wojciech Sadurski, 'The Polish Presidential Campaign in the Shadow of the Pandemic' (*Verfassungsblog*, 18 March 2020), https://verfassungsblog.de/the-polish-presidential-campaign-in-the-shadow-of-the-pandemic/ accessed 23 March 2020.

Court in the Romanian political life, some of which are highly controversial. Indeed, since the constitutional revision of 2003, when it was granted the power to adjudicate on conflicts of a juridical nature between public authorities, the Court gained great visibility and is now a major player in the organization of the polis,[8] constantly invoked by politicians and extensively covered by the media.

The country has witnessed in recent times a series of political initiatives which were problematic from a rule of law point of view, the most worrisome of which were the attacks on the judiciary.[9] Whether these are to be called populist, however, is a question open to debate. The existing literature speaks in fact to this incertitude regarding labelling. Several authors seem to point to the presence of some signs of illiberalism in Romania as well, but barely take the discussion further and, in any case, it is rather unclear to what extent the disturbing elements are not expressions of institutional failures and impoverished political and civic life typical of the region rather than manifestations of a broader populist agenda. For instance, Silvia Suteu notes that '[i]n countries such as Romania, endemic corruption and weak institutions have long coexisted with populist discourse which may yet develop into populist state capture'.[10] For his part, in 2015, Paul Blokker expressed preoccupation with the direction in which Romania was heading but he did so rather hesitatingly:

> The troublesome Hungarian, and possibly Romanian, developments regarding democracy, constitutionalism and the rule of law call for the attention of the European Union and its Member States.[11]

In the same year, Bugarič relied on the *Nations in Transit* 2012 report – *Fragile Frontier: Democracy's Growing Vulnerability in Central and Southeastern Europe* – to draw some alarming conclusions concerning Romania as well:

> Six of the ten EU member states in the region (Hungary, Bulgaria, the Czech Republic, Lithuania, Romania, and Slovakia) have experienced net declines [in key governance institutions] over the past five years.[12]

8 Paul Blokker, 'The Evolution of Constitutionalism in Post-Communist Countries' in Peter Van Elsuwege and Roman Petrov (eds.), *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects* (Routledge 2017) 3.

9 For an overview of this problematic initiatives, see Bianca Selejan-Guțan, 'New Challenges Against the Judiciary in Romania', (*Verfassungsblog*, 22 February 2019) https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/ accessed 12 February 2020.

10 Silvia Suteu, 'The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?' (2019) 15 European Constitutional Law Review 488.

11 Paul Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections' in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2015).

12 Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-between" Democracy and Authoritarianism' (2015) 13 International Journal of Constitutional Law 219, 220.

The author recalled that the international press saw in the new Romanian government's actions to consolidate its power a constitutional crisis amounting to nothing less than a '"quiet coup d'état"'.[13] In fact, as other commentators have underlined, '[i]n Romania, political will to tackle domestic institutional reform has been uneven since 2007', the year of its EU accession.[14] If prior to the accession the pressure to effectively fight endemic corruption was important, the will to reform 'petered out after accession thanks to collusion among much of the political elite, which closed ranks in order to roll back reform'.[15] All in all, four years into the European Union, Romania was displaying a 'mixed record in corruption control and judicial reform'.[16] The last decades have surely registered important progress, especially that Romania continued to be monitored under the Cooperation and Verification Mechanism, but given the various ups and downs of constitutionalism, it is definitively fair to say, even today, that 'gains appear vulnerable to reversal'.[17]

As of the time of my writing, *Partidul Social Democrat* (PSD), the continuator of the communist legacy and the party most associated with ethno-nationalistic and populist discourses, was ousted after it lost a vote of confidence, and while it still retains a majority of seats in Parliament, the threat of populism does not seem nearby.[18] Several interpretations of this state of affairs can be offered. One is to say that, despite scholars' tendencies to read populism into Romanian politics, in fact, populism, as understood by Jan-Werner Müller,[19] never really caught up in Romanian society. Another perspective is to suggest that those populist moments that certainly took place in Romania in recent years have been successfully overcome. Yet another interpretation could point to the inherent populist character of politics, with Romania experiencing, rather inevitably, populist moments every now and then. Given Romania's ethnonationalism, there are reasons to believe that a more or less 'mild' form of populism is a recurring feature of Romanian politics.

12.3 Discourses of constitutionalism in the Romanian context

Undoubtedly, the social imaginary that was being built after the collapse of communism in Romania rested on the notion of legality. As Cosmin Cercel argues:

13 Ibid. 221.

14 Aneta B. Spendzharova and Milada Anna Vachudova, 'Catching Up? Consolidating Liberal Democracy in Bulgaria and Romania after EU Accession' (2012) 35(1) West European Politics 51.

15 Ibid. 41.

16 Ibid. 55.

17 Suteu (n 10) 494.

18 Although the Covid-19 crisis has revealed signs of yet another type of populism, namely penal (or military) populism: Alexandra Mercescu, 'The COVID-19 Crisis in Romania, or on How One Cannot Escape (Bad, Legal) Culture', http://exceptions.eu/2020/05/11/the-covid-19-crisis-in-romania-or-on-how-one-cannot-escape-bad-legal-culture/ 11 May 2020.

19 Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016).

> This dispositive of legality was indeed not only the prevailing language of transitional constitutionalism and transitional justice, but also that of the prevalent constitutional theory, spilling later into the ideology of institutional and political actors and even going beyond the formal borders of the polities. In short, it was the politico-legal theory of the lawyers and officials in Central and Eastern Europe determined to break with the past and to pave the way to a new form of constitutional patriotism.[20]

In scholarship as in practice, constitutionalism was understood in a technical manner, through the prism of a hierarchy of laws and as placed exclusively in the hands of the constitutional judiciary who were to act as a neutral arbiter between state powers on the one hand and the state and its citizens on the other. In the first decade after 1989, the language of legal constitutionalism, while present, mattered little in practice insofar as the role of the Constitutional Court was limited even on paper (note that before the 2003 revision, it was possible for the Parliament to override the Court's decisions by a supermajority). With the rise of the Court in the years after 2000, legal constitutionalism became entrenched as the ultimate language for the defence of the rule of law and kept being propagated as such in everyday discourses that presented the Court as the neutral 'guardian of the Constitution'. In law schools, students were (and are still being) taught that while the Constitutional Court constitutes a political body, it does not rank among the different state powers. This has not been without consequences. As Blokker maintains, 'an intrinsic problem of legal constitutionalism in the post-communist transformations has been its tendency to isolate constitutional questions from the wider public',[21] an observation in line with the assessment of Gábor Halmai and Wojciech Sadurski, who also 'argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society'.[22]

After 2003, in any case, when the Romanian Constitutional Court (RCC) started to consolidate its power, political constitutionalism emphasizing the importance of legislatures over courts did not emerge in scholarship. The latter continued to display its strong 'ideological attachment to the belief in law as foundational for polities … reminiscent of an unavowed, and for that matter, an unarticulated version of legal formalism that ultimately turns around

20 Cosmin Cercel, 'The Destruction of Legal Reason: Lessons from the Past', (2019) 89 Acta Universitatis Lodziensis Folia Iuridica 15, 25.

21 Paul Blokker, 'From Legal to Political Constitutionalism', (*Verfassungsblog*, 4 June 2017) https://verfassungsblog.de/from-legal-to-political-constitutionalism/ accessed 20 January 2020.

22 Gábor Halmai, 'Illiberalism in East-Central Europe', (2019) European University Institute Working Paper 5/2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486420 accessed 15 March 2020; Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds.), *Rethinking the Rule of Law after Communism* (CEU Press 2005) 9–24.

the conundrum of liberal legality in times of crisis'.[23] Political constitutionalism was equally absent from public discourses with a recent exception on the occasion of which one of the newly established parties in Romania (*Uniunea Salvați România* – USR) launched a warning about the need to reconsider the Court's role in the face of what they claimed to be its obvious politicization as a result of a series of cases that involved public authorities.

In addition, the notion of 'constitutional identity' would have had the potential to be a channel through which political constitutionalism could have entered the legal and political stage insofar as it begs the question of who should determine its content, and it allows for an answer in the direction of actors other than the courts. In the Romanian context, however, the notion was rather ignored not only by politicians but also by the courts themselves. Thus, in a 2012 decision, the Romanian Constitutional Court employed, for the first time, the concept of 'constitutional identity' in an argumentation in favour of the president's right and obligation to attend the meetings of the European Union Council.[24] No populist or abusive usage of the notion can be detected (at the time, the President was rather unpopular). On the other hand, it is true that the mention was made in passing; consequently, it is hard to ascertain what exactly the judges wanted to obtain by its use. All in all, scholars deplore the precarious state of the notion in Romanian constitutional case law:

> The constitutional judges used the phrase constitutional identity only formally, in the context of a preamble meant to recapitulate the sharing of competences between the European institutions and the EU member states, by virtue of the basic treaties of the Union. No further reference is made to the Romanian constitutional identity in the Court's argument. Beyond the rhetoric of legal argumentation, nothing makes us believe that the RCC would take seriously the capacity of national constitutional identity to act as a shield/defense.[25]

While legal constitutionalism has never had a serious contender in the Romanian political or academic landscape, the recent waves of protests – the biggest ever since the fall of communism – point to the rise of a new form of constitutionalism in Romanian society, namely civic constitutionalism.[26] Traditionally, Romania was seen as unable to engage its citizens with the language of constitutionalism. Thus, it was first noted that the process of

23 Cercel (n 20) 24.

24 Decision no. 683 of 27 June 2012.

25 Manuel Guțan, 'Identitatea constituțională românească între pozitivism juridic și abordare interdisciplinară' in Raluca Bercea (ed.), *Comparația în științele sociale. Mizele interdisciplinarității* (Universul Juridic 2015) 182.

26 Lucian Bojin and Alexandra Mercescu, 'Protests in Romania: Civil Society, Populism and Civic Constitutionalism' in Alexandra Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe* (Peter Lang 2020). The discussion on the topic of civic constitutionalism is an adapted excerpt from our co-authored text.

constitution-making immediately after the fall of the communist regime consisted in 'the affirmation of the majority's constitutional view, rather than a genuine pluralist dialogue'.[27] Indeed, 'in the early years of Romanian democratic constitutionalism, citizens' formal possibilities and actual capacities for engagement in constitutional politics have been severely limited'.[28] While the 2003 revision did better in this respect, with civic participation contributing to the process, Blokker could still remark in 2012 the following:

> Not only has a weak culture of constitutionalism emerged, but what seems worse is that a constitutional language is distant from societal interaction, and mostly abused for narrow political purposes. Constitutional values seem to fail to inform wider society in terms of a civic and political orientation to constitutional values and public debate on the foundations of Romanian democracy.[29]

For the last five years, however, this paradigm seems to have been changing as a significant part of the population was ready to engage in 'contentious politics' – a process that involves interactions in which actors make claims bearing on other actors' interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims, or third parties. Contentious politics thus brings together three familiar features of social life: contention, collective action, and politics.[30]

Importantly, on the occasion of the last two protests, people's discontent was not purely a question of policy and ideological preferences but touched upon matters that otherwise could and have been addressed in terms of constitutionality (it was the street's pressure that made the Ombudsman attack the bill before the Constitutional Court). Indeed, as it has been noted by one of the protesters himself: 'the trigger of the # rezist was quite technical, so the protesters had to educate themselves in very niche areas such as justice and public administration'.[31] What is interesting is that many voices among protesters, who were using the rule of law vocabulary, seemed determined to continue to manifest their rage irrespective of the Court's decision. In one particular case, when the decision ran counter to what the people demonstrating would have wanted, they immediately sanctioned the outcome by accusing the Constitutional Court of doing politics (one slogan read: 'the Constitutional Court – PSD's puppet'). In other words, consciously or not,

27 Paul Blokker, 'The Romanian Constitution and Civic Engagement' (2019) 11(3) *Vienna Journal on International Constitutional Law* 437.

28 Ibid.

29 Paul Blokker, 'Romanian Constitutionalism: Form without Content?' (2012), https://ssrn.com/abstract=2146568 accessed 20 January 2020.

30 Charles Tilly and Sidney Tarrow, *Contentious Politics* (Oxford University Press 2015) 7.

31 Cosmin Pojonaru, 'The Unexpected Romanians: Fighting Civic Apathy with Civic Energy' in Ana Adi and Darren Lilleker, *#rezist – Romania's 2017 Anti-Corruption Protests: Causes, Development and Implications* (Quadrigo 2017) 47.

protesters were claiming that they have a role to play in defending the constitutional order, which raises the theoretical questions of popular and civic constitutionalism, as opposed to legal and political constitutionalism (for Mény and Surel, civic or popular constitutionalism would be oxymoronic, for populism should be understood in opposition to constitutionalism, the latter offering a legalistic, procedural or institutional vision of how to best manage the polis).[32]

Were there any signs of a populist constitutionalism in this civic constitutionalism? While some voices accused protesters of being populist in their hostile rhetoric towards the lower classes known to be the supporting base of the ruling party, a closer scrutiny shows that protests were starkly opposed to forms of 'constitutional populism' that

> imply a delegitimization of the pre-existing constitution, which from the populist point of view is part of the enemy sphere of the elite and the status quo, not only aims at the elimination of the foundations of the institutional structure of liberal democracy but also at a new foundation in a hierarchical way, highly dependent on a direct and constant consensus between the leader and the base.[33]

To the contrary, the most recent Romanian protests inscribed themselves from end to end in the logic of liberal democracy. The people's intervention, then, was a move towards correcting liberal democracy gone astray and could hardly be equated with a critique of liberal democracy. Thus, while clearly conveying the message that legal technicalities matter less in times of crisis, the protesters never departed from the constitutional rule of law vocabulary (indeed, the media coverage used the term very frequently during that period), which they openly embraced (Facebook posts being a proof).

12.4 Interpreting the Constitution

Having briefly depicted Romanian constitutionalism, I want to argue that no matter what vision of constitutionalism one wishes to embrace, for constitutional adjudication and thus legal, or rather judicial, constitutionalism to remain credible (alone or alongside other forms of constitutionalism), less formalistic and more open to debate, Constitutional Courts have to be able to boast an important epistemic authority, by which I essentially mean the capacity to do things with language wisely. In particular, I will look at two decisions that could be qualified as populist or at least as problematic from a rule of law point of view. My aim is to see whether there are any significant differences in the language and the reasoning of the Court in these decisions as opposed to the more 'regular' ones, which are usually perceived as purely

32 Yves Mény and Yves Surel, 'The Constitutive Ambiguity of Populism' in Yves Mény and Yves Surel (eds.), *Democracy and the Populist Challenge* (Palgrave 2012) 1–11.

33 Manuel Anselmi, *Populism* (Routledge 2018) 88.

technical interventions, eliciting no special attention from the political point of view. This discussion will further allow me to draw some conclusion on what kind of Constitutional Court the Romanian Court is/should be and what kind of judicial politics it is/should be doing thirty years after the fall of the communist regime.

12.4.1 Decision no. 358/2018 – a problematic constitutional intervention

12.4.1.1 The political background

I should note from the very start the Romanian context of a bicephalous executive: on the one hand, the elected President, whose prerogatives are rather limited and more honorary, and the Prime Minister and their government, on the other. As presidential and parliamentary elections are held at different times, cohabitation is generally the norm in Romanian politics. Hence, the Government and the President exercise a certain amount of control upon each other.

Under the patronage of the European Union which monitors the progress made by the country, in the last ten years, Romania assumed anti-corruption as one of its main goals, and therefore a series of corresponding measures were implemented. Accordingly, the independence of the judiciary became much stronger than in the aftermath of the Revolution, and prosecutors felt encouraged to go after high-profile politicians who were long suspected of crimes involving public money. The chief of the National Anti-Corruption Prosecuting Office (Laura-Codruța Kövesi, who was recently elected head of the newly formed EU Prosecutor's Office) was soon made into a public hero. She posed a problem to the ruling party, many members of which had already been convicted, were being under investigation or simply hoped that once she was no longer to be in office, they would be able to move on with the type of crony capitalism that kept PSD together as a party for thirty years now.

Speculating on some of the rumours about mass surveillance techniques being used by the secret services to target corrupt officials as well as on a couple of proven instances of abuses by prosecutors, some of which started to feel overconfident under Kövesi's direction, the Minister of Justice initiated a procedure for removing her from office. The President interpreted his constitutional and legal (infra-constitutional) prerogatives in the procedure as decisive and refused to confirm her removal from office upon reception of the proposal from the Minister.

12.4.1.2 The legal background

The procedure of removal essentially involves three authorities: the Minister of Justice, the Superior Council of Magistracy (the entity endowed with the responsibility of ensuring judges' and prosecutors' independence) and the President of Romania. While it was clear that the Council plays only a

consultative role (it issues a non-binding recommendation, approving of or disapproving of the Minister's proposal of destitution), it was rather unclear who holds more power between the Minister and the President when it comes to having the final say on the chief prosecutor's removal from office. The relevant provisions read as follows:

Art. 132 (1) of the Romanian Constitution:

> The prosecutors carry out their activity in accordance with the principles of legality, impartiality, and hierarchical control under the authority of the Minister of Justice.

Art. 94 (c) of the Romanian Constitution:

> The President of Romania also has the following powers: … to make appointments to public offices in the conditions defined by the law;

Art. 54 of Law no. 303/2004:

> The President of Romania is to revoke the prosecutors who hold management positions provided in paragraph (1) [namely, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, his deputy and vice-deputy, the general prosecutor of the National Anticorruption Prosecutor's Office, his deputies, the chief prosecutors of these prosecutors' offices, as well as the chief prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism Offenses and their deputies], at the proposal of the Minister of Justice who can take action ex officio, at the request of the general meeting or, as the case may be, of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or of the general prosecutor of the National Anticorruption Directorate, after the opinion of the Superior Council of Magistracy is issued, for the reasons provided for in art. 51 paragraph (2) that apply accordingly.

Art. 146 (e) of the Romanian Constitution:

> The Constitutional Court has the following functions:
> … to solve legal disputes of a constitutional nature between public authorities, upon request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the President of the High Council of the Judiciary.

Against this political and legal background, the conflict between the Minister of Justice and the President was referred to the Constitutional Court (upon request by the Prime Minister). The solution turned on two major technicalities: Does this conflict amount to a legal conflict of a constitutional nature

between public authorities and, if so, does Article 54 of Law no. 303/2004 give the President the power to review the Minister's decision only from a procedural point of view or substantially as well (i.e. to appreciate whether the measure is desirable or not)?

12.4.1.3 A formalist result

The court – by a majority of 6–3 – decided for the Minister of Justice in what was a fiercely contested decision.[34] It was considered at best political, if not an outright attack on the rule of law, for it was seen to impinge on the efficacy of the checks and balances system. Essentially, the Court attributed a purely formal role to the President by depriving him of the possibility to oppose himself to the reasons offered by the Minister for the revocation. If the revocation met the formal criteria established by the law (that is, if it was duly signed by the Minister and motivated, irrespective of the quality of the reasons), the President had no other option than to accept the revocation.

It is certain that the texts themselves did not explicitly stipulate how the competences are to be imparted between the two authorities. Realistically speaking, then, any solution would have been a 'political' solution and not a 'technical' one. However, an analysis of the decision from the standpoint of its language and logical (not necessarily legal) reasoning reveals some problematic aspects.

Thus, the text contains several *non sequiturs*. To give just one example, the majority presupposed that when two public authorities are involved in an appointment procedure, only one has a decisional role while the other retains a merely formal position. It then infers that in the case under scrutiny, it must be the person who proposed the measure. But it certainly does not follow from the fact that a procedure of joint appointment is provided for by the law that one entity needs to play only a ceremonial role. Moreover, the Court has repeatedly invoked in its case law the principle of symmetry (and this irrespective of the fact that in one decision it clearly stated that this principle is a principle of private law and has no bearing on public law matters, even less so of a constitutional order[35]). Thus, where the Constitution endows the President with the power to appoint to a public office, it correlatively provides, though implicitly, for the power to dismiss that person. Also, by virtue of the same principle, the Court decided, in its past case law,

34 See for instance Vlad Perju, 'Analiza constituțională a deciziei CCR 358/2018' (2018), https://www.contributors.ro/analiza-constitutionala-a-deciziei-ccr-3582018/ accessed 20 March 2020. Meanwhile, Ms. Kövesi filed a complaint at the European Court of Human Rights and won the case on grounds of infringements of her right to a fair trial and freedom of expression: see Case of *Kövesi v. Romania*, Application no. 3594/19, decided on 5 May 2020. My analysis will not address the failures that the ECtHR itself identified in respect of the procedure concerning Ms. Kövesi before the RCC but will limit itself to a critique from the perspective of the *language* and *interpretative quality* of the Romanian Constitutional Court's decision.

35 Decision no. 731 of 10 July 2012.

that because the Constitution empowers the President to send the statute back for re-examination only once before signing it into law, it empowers him to act accordingly in similar situations. The Court argued that a joint procedure for the execution of a given constitutional measure amounts to a similar situation. This creative case law notwithstanding, the Court decided that the principle of symmetry does not apply to revocation procedures (but only in relation to appointments). 'The hypothesis under examination does not fall within the coordinates of the [above-mentioned] decision', stated the Court, without further explanation of why this would actually be the case. The reasoning of the majority therefore appears *tautological*.

As far as the methods of interpretation are concerned, while the Minister of Justice, as a party to the dispute, invoked the systematic, the teleological and the grammatical method, the Court preferred to appeal to the historical method to which it conferred, unprecedently, a superior place, thus instituting a hierarchy of sorts between the several existing methods of interpretation:

> The Court must identify the will of the original constituent, together with the motivations underlying it, thus resorting to the historical method of interpretation. To the extent that this will is unambiguous and non-susceptible of interpretations, the Court cannot depart from the will of the original constituent, in the sense that it cannot, by means of other methods of interpretation, give a new/different interpretation to the constitutional text in question, because otherwise it would replace the original constituent's will with its own.[36]

Concretely, the judges examined what models of control for prosecutors the constituent power had in view at the time of the adoption of the Constitution. Studying the various proposals that were made, the Court concluded that the prosecutors were, undeniably, placed under the authority of the Minister of Justice. However, the Court fails to indicate why this constitutional arrangement precludes a veto from the part of another authority, in this case, the President of the Republic. As such, the historical method does not directly uphold the outcome of the case.

Moreover, the Court treated its own case law incoherently. Thus, previous decisions that would have sustained the opposite solution were either totally ignored or simply dismissed in a tautological manner (for instance, a number of relevant decisions were favourable to an interpretation according to which the President was bestowed by the Constitution with a power of appreciation in respect to appointments and not with a mere honorary role[37]). The Court also dismissed the arguments based on the increased legitimacy of the

36 Decision no. 358 of 30 May 2018.

37 Decision no. 375 of 6 June 2005; Decision no. 551 of 9 April 2009; Decision no. 683 of 27 June 2012.

President as a result of him/her being elected by universal suffrage, although it seemed ready to accept them elsewhere.[38]

While the result itself is clearly formalist in the sense in which it understands the control exerted by the President upon the Minister of Justice as a control of legality (formal, procedural) and not one of opportunity (substantial), not all the language of the Court is formalist. In fact, the Court uses extensive and creative interpretations to reach this otherwise formalist result. Thus, the Court has constructed the following argument: in the case of appointments of prosecutors, the law requires the Minister of Justice to take into consideration very few criteria (such as the number of years of expertise); therefore, his margin of appreciation in choosing the right person is considerable and has to be checked by the President. By contrast, in the case of revocation, the law constrains the Minister by allowing him to revoke a prosecutor only when multiple, strict, criteria are met. Therefore, there is no need for extra control on the part of the President, for it must be assumed that the law 'controls' to a large extent the procedure. This argument *per se* is not unreasonable. However, I believe one can make, equally reasonably, the precise opposite case. Indeed, the criteria inscribed in the law for revoking a prosecutor are far from being precise to the point of allowing no interpretation at all (be jurists reminded that to read is to interpret[39]). Thus, there is room for the Minister to act politically in deciding to revoke a prosecutor, even though he will be able to cloak his decision in legal jargon. Consequently, it can be argued, without stretching the legal text, that there is an institutional need for the President to control the Minister's decision.

12.4.2 Other constitutional 'mischiefs'

In this sub-section I wish to provide two brief examples to further uphold the view that the Romanian Constitutional Court suffers from an epistemic deficit. In doing so, I want to also emphasize that there are several ways in which this epistemic deficit can manifest itself.

First, in one decision from 2017, the RCC held, in a procedure that was not provided for by the law, that it is necessary for it to 'regulate' the writing of separate and concurrent opinions at the Constitutional Court.[40] Until the Court's extra-legal intervention, the law provided simply that 'the judge who voted against [the majority's solution] can write a separate opinion' without any specification as to the circumstances under which it should be written or the language thereof.[41] Essentially, the Court established that its President has the right to control the content of separate and concurrent opinions, namely to ask for their rewriting if their tone is deemed inappropriate

38 Decision no. 375 of 6 June 2005.

39 For an excursus on reading in law, see Pierre Legrand, 'What Is That, To Read Foreign Law?' (2019) 14 Journal of Comparative Law 290.

40 Decision no. 1 of 12 January 2017.

41 Art. 59 of Law no. 47/1992.

and, if so, to eventually prohibit their publication in the *Official Gazette* and their attachment to the file. The decision triggered fierce criticism. Quite apart from the criticism related to the legality of the procedure and to the idea of silencing separate opinions (whether to have or not dissenting opinions is certainly a question open to debate), what strikes one immediately is the language employed by the majority which lacks a lot to be desired both as judicial reasoning and as language *tout court*.[42] Many of the RCC's decisions, the one discussed here included, reflect a disturbing legal logorrhoea (including repetitions and purportedly exhaustive enumerations) indicative of the judges' formalism. For the purpose of my argument, it is not important, however, that the court ruled *ultra vires*.[43] What is important is that its formalist reasoning and language betrayed a very shallow understanding of the role of separate opinions, something which threatens the epistemic quality of its decisions.

Second, at a time when several Central and Eastern European constitutional courts started to engage with the language of constitutional identity, for better or for worse, the RCC displayed timidity in assuming this language (and not for reasons having to do with the notion being an empty signifier, prone to abuses as it has been shown[44]). As if to acknowledge the rising importance of the notion and thus to formally recognize that the Court adheres to the European constitutionalist vocabulary, the Court mentioned the notion in passing but failed to do anything significantly with it. Thus, the Court signalled its knowledge and understanding of European constitutionalism but refused to participate in building itself in this direction. This attitude might be symptomatic of what Manuel Guțan has called the 'tendential constitutionalism' of Romania – 'a pattern of constitutional development that perpetually mediates between the need to become "European"

42 For instance, awkwardly enough, the Court states that '[t]he separate or concurring opinion is drafted in relation to the constitutional law problem that the decision of the Constitutional Court examines, comprising the logical, inductive or deductive reasoning on which the Constitutional Court judge relies and which it applies in the formation, development and sustaining of its point of view'. For a critique precisely as regards language, also emphasizing the general intellectual paucity of dissident opinions at the RCC, see Valentin Constantin, 'Sterilizarea opiniilor dizidente și concurente la Curtea Constituțională a României' (*Juridice*, 12 September 2017), https://www.juridice.ro/essentials/1666/sterilizarea-opiniilor-dizidente-si-concurente-la-curtea-constitutionala-a-romaniei accessed 20 January 2020.

43 It is not the first time the Constitutional Court has acted *ultra vires* in a spectacular fashion. In the summer of 2012 during the President's impeachment, one of the Court's judges sent an 'errata' to the *Official Gazette* which 'was inserted retroactively in the … text … [thus] changing the original meaning of the holding': Bogdan Iancu, 'Constitutional-Judicial Culture in Romania – Ambivalence or Possibility' in Manuel Guțan and Bianca Selejan Guțan (eds.), *Europeanization and Judicial Culture in Contemporary Democracies* (C.H. Beck 2014) 146.

44 Zoltán Szente, 'The Constitutional Identity Conundrum' in Alexandra Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe* (Peter Lang 2020).

and the need to remain "Romanian"'.[45] Guțan alludes in his work to the limits of the Romanian society in sustaining constitutional transplantation, invoking Romania's ethnonationalist constitutionalism.[46] While this can certainly constitute a valid explanation for Romania's ambivalent relation with Europeanization, I want to also place the reluctance of constitutional judges to approach 'constitutional identity' in particular on their fear of intellectual (political) engagement. Romanian constitutional judges are simply not trained to produce innovative/political reasoning and one can see this in the often-convoluted explanations which leave the reader with a sense of confusion (if not bemusement).

To summarize, a (constitutional) court's ruling is deficient from an epistemic point of view if:

i. its language and reasoning display a poor argumentative quality, whether or not it is pronounced *ultra vires*.[47]
ii. it fails to engage with new arguments/concepts in spite of the legal community's expectations in this regard.

Philosophically speaking, in the first case the Court fails to engage in a dialogue with itself, whereas in the second it eschews dialogue with the others (theoreticians or other professionals from the legal community or judges from other jurisdictions). To say it differently, while the first is a problem of language and reasoning, the second is a problem of a complete lack thereof or of silence.

12.5 Populism or epistemic deficit?

Given the charged political climate in which it was pronounced, the decision analysed in Section 12.4.1 can be deemed populist when judged by its result as it leads to a situation where the checks and balances mechanism is curtailed rather than enhanced. Otherwise, in terms of its formal structure, its legal reasoning and its language, one must say that the court's ruling does not differ fundamentally from other 'regular' (less visible political) decisions. An examination of other, less problematic, case law and even of the two dissenting opinions to the Decision no. 315/2018 reveals the same deficiencies: *non sequiturs*, tautologies, contradictions and selective treatment of case law. To a certain extent, it is fair to say that these elements are present in any

45 Manuel Guțan, 'Tendential Constitutionalism and the Limits of European Constitutional Culture' in Martin Belov (ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Hart 2018).

46 For an account of Romania as a 'people-nation', see Claude Karnoouh, *Inventarea poporului-națiune. Cronici din România și Europa Orientală 1973–2007* (Idea 2007).

47 I am aware of course that 'poor argumentative quality' is not a standard to be objectively established. I will nonetheless seek to explain below what I have in mind, without committing in this text to elaborating on how an epistemically meaningful style of reasoning and writing could be brought about in the Romanian context.

constitutional adjudication. However, their systematic presence in Romanian constitutional adjudication, coupled with attitudes that impair debate, encourage passivity or simply refrain from participating in judicial dialogue (as evidenced by the discussion in Section 12.4.2), is a reason for concern. The Constitutional Court should represent a space of public reason (in the Habermasian sense) that sets the (intelligible) tone of the conversation. This is all the more so in the contemporary world when we no longer imagine the language of the constitution as immutable and expressing some historical truths about one country's identity. Rather, we envisage it as a resource put at the society's disposal in order for it to negotiate an always-in-flux identity. As Oliviero Angeli argues, it seems that there has been 'a shift from interpreting the constitution as part of a grand national narrative of "we the people" to continuously justifying as an object of differing and potentially conflicting views'.[48]

It is a matter of epistemic honesty to admit that:

> irrespective of all denial and all desire … judge[s] wield enormous power, including political power, at the very least in the sense in which judicial decisions reveal discretionary determinations, and therefore value-laden decisions, regarding the regulation or the administration of the polis.[49]

Indeed, as soon as we descend from the macro-level of institutional design (which can or cannot facilitate the judicialization of politics) to the micro-level of a text posited before a panel of judges who need to ascribe meaning to it, discretion creeps in and judges

> might have no alternative than to … use as much information as possible, transform it down the road into legal jargon via the code of the legal (autopoietic) sub-system and hope that it will pass as a convincing, legitimate legal decision in the eyes of their legal and social community.[50]

To put it otherwise, then, as long as judges will be called upon to decide cases (and not necessarily constitutional ones), there will be judicialized politics. In fact, as Martin Shapiro reminds us, 'to a very large degree it is not so

48 Oliviero Angeli, 'Global Constitutionalism and Constitutional Imagination' (2017) 6 Global Constitutionalism 359, 375.

49 Pierre Legrand, 'Adjudication as Grammatication: The Case of French Judicial Politics' in Luís Pereira Coutinho, Massimo La Torre, and Steven Smith, *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer 2015) 51.

50 Raluca Bercea and Alexandra Mercescu, 'Ideology Within and Behind the Decisions of European Judges' (2017) 8 Romanian Journal of Comparative Law 149, 185.

much that courts do more [politics] now as that students of politics now see more of what courts do'.[51]

Politics needs not be understood, however, as being exclusively embodied by the daily battles of political life. In his book entitled *The Politics of Dialogue*, Polish sociologist Leszek Koczanowicz convincingly enters a plea for understanding democracy as more than just political institutions. The author does not dismiss the importance of party politics and institutionalized democracy but seeks to supplement them with a view to promoting the universalization of human interactions. Thus, politics, or more specifically political dialogue, should be reconfigured, according to Koczanowicz, as a 'form of life', as 'an exercise in community building'[52] where its primary function lies with understanding, not agreement (compromise). I fully empathize with the author's proposal to embrace the notion of a non-consensual democracy as 'recognition of the impossibility to formulate one, universal viewpoint that extends over our entire society', or as 'an admission of a failure of reason', as Koczanowicz eloquently puts it.[53]

Assessed against this background, law is meritorious to the extent that it lays the ground for infinite human encounters. Nonetheless, the legal realm also strays insofar as it insists that its solutions are neutral, mere expressions of (legal) technique. Therefore, it casts a shadow on how far law can contribute to making the self and the other refine their understanding of themselves and of each other. In fact, the opposite could be the case. In line with Mary Ann Glendon's thesis on the exacerbated proliferation of rights talk,[54] it has been documented that the juridification of society leads people to believe that peers cannot be trusted, for they are presumed to be self-seeking individuals.[55]

Now, if courts are to compete with legislatures for legitimacy as regards rule-making, they already find themselves in a privileged position, for it seems that 'citizens do not expect very much in the way of reasoning from legislatures, at least not as a condition for regarding statutes as binding'.[56] Nonetheless, to the extent that one wishes to respond to concerns related to countermajoritarianism, civil-law courts in particular would be well advised to adopt a more tentative, more dialogical also, less 'apodictic' style,[57] for a deficit of good writing and

51 Martin Shapiro, 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 329.

52 Leszek Koczanowicz, *The Politics of Dialogue* (Edinburgh University Press 2015) 133, 106.

53 Ibid. 162.

54 Mary Ann Glendon, *Rights Talk [:] The Impoverishment of Political Discourse* (The Free Press 1991).

55 Mitchell Callan and Aaron Kay, 'Associations Between Law, Competitiveness, and the Pursuit of Self-Interest' in Jon Hanson (ed.), *Ideology, Psychology, and Law* (Oxford University Press 2012) 193.

56 John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 41, 54.

57 Pierre Legrand, 'Perspectives du dehors sur le civilisme français' in Nicholas Kasirer (ed.), *Le droit civil, avant tout un style?* (Thémis 2003) 178.

convincing argumentation represents a deficit of democracy and representativeness. As contestable as this might seem to the traditional lawyer, judges should, through their language, give up partially on law's 'mulish seriousness' hailing from the belief that 'law involves nothing less lofty than justice'.[58] This means that courts should strive to become, linguistically speaking, as less authoritative as possible even while sovereignly deciding on law's interpretation.

Law's authoritativeness can refer to at least two distinct aspects in this context. Firstly, it is noteworthy to mention that judicial decisions can hardly depart from 'the forms legated by law's triumphal and monumental history'.[59] As such, at least in the civil-law world, their line of reasoning as well as their style are patently authoritative. In effect, in putting an end to a conflict, judicial decisions, especially in countries where dissenting opinions are unknown or rarely used, provide little room for conceding that other solutions would have been equally valid. Law is there to end the conversation and to do so trenchantly, which, of course, has the obvious merit of avoiding the exhaustion implied in an endless exchange of ideas. However, this also means that law formulates its dictates in terms of right and wrong, often without providing sufficiently compelling explanations.

Secondly, law is authoritative in that not only does it present power as knowledge, but given its exclusionary ethos, it also forces participants to use a very specific set of arguments for the advancement of their cause. Imagine a conflict between neighbours which stays out of court: in trying to settle the dispute, every party can appeal to any type of argument as long as he or she manages to transmit it in an intelligible manner, irrespective of whether or not it is persuasive for the other party. In other words, anything goes: mercy, economic, moral or philosophical considerations, religious arguments, emotions, analogies, metaphors, comparisons, legal rules, compromises. In a court of law, social complexity is inevitably reduced since parties have to refer to legal materials, which lead them to convert the wide range of available reasons into very specific claims. In rejecting other discourses, law refuses to accept, in theory, that its concepts are 'precarious and pragmatic constructions which can be disarticulated and transformed as a result of the agonistic struggle among the adversaries'.[60] Thus, judicial outcomes are framed in terms that seem immutable. The irony lies with the fact that, in practice, open-ended, extra-normative considerations infiltrate the judges' reasoning. These are, however, rarely exposed to the reader as they usually get cloaked in legal jargon, thus contributing towards completing the tranquil picture of an aseptic legal science.

To call for a less authoritarian legal language, then, one acknowledging that law's meaning depends not only on written texts, is to plead for an increase of courts' legitimacy and representativeness. According to Mattias

58 Günter Frankenberg, 'Down by Law: Irony, Seriousness, and Reason' (2011) 12 German Law Journal 300, 301.

59 Cosmin Cercel, *Towards a Jurisprudence of State Communism* (Routledge 2017) 202.

60 Ibid. 33.

Kumm, a court's democratic legitimacy is given by a series of factors: volitional (how participative and transparent the process of judges' nomination is), identitarian (how diverse the people who sit on the Court are), argumentative (to what extent the court fears engagement with more open forms of practical public reasoning) and vicarious (to what extent legislatures can intervene after the court has decided).[61] The Romanian Constitutional Court scores low on all of them (except maybe in respect of the identitarian one – in any case less relevant in a culturally homogenous society as the Romanian one is[62]).

Or the deficit of argumentative representativeness is especially dangerous in times of populism. At the level of rhetoric, when Courts advance weak reasonings in general, populists or other authoritarian-inclined governments can speculate on this. They can argue, for instance, that when Constitutional Courts uphold their cause, the judges are not doing anything different. To see that they are doing something different, we need to rely on epistemic arguments, as analyses of legality will most often prove inconclusive. Or, epistemic arguments risk being equally inconclusive if deficiencies of language and logic are a pervasive feature of mostly all constitutional rulings. What is more, courts themselves might not be aware that by not rigorously framing their arguments, they provide populists with a dangerous legitimizing tool.

As Rosenfeld shows, 'the precise boundaries between legitimate constitutionalization of politics and illegitimate politicization of the Constitution are undoubtedly hard to draw'.[63] I would argue that this becomes especially so in a context such as the Romanian one where the Court is still to improve on its argumentative skills. To use here Rosenfeld's terminology, the Romanian Constitutional Court does not have a problem in doing *judicial politics in form* (its decisions conform to the legal form to the extent that they refer to statutes, precedents, soft law instruments, known methods of interpretation). However, when it comes to its *judicial politics in substance*, it is not as substantial as one might wish.

In his article 'After the Heroes Have Left the Scene', Mark Tushnet emphasizes the importance of 'attending to temporality in studying who sits on Constitutional Courts and what those courts do'.[64] The Romanian context speaks to this importance. As I see it, the Court is still, almost thirty years after its establishment, a first-generation Court that needs to step in to

61 Mattias Kumm, 'On the Representativeness of Constitutional Courts' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 281–291.

62 Currently, five men and four women sit as justices of the Romanian Constitutional Court, of which one is an ethnic Hungarian.

63 Michel Rosenfeld, 'Judicial Politics versus Ordinary Politics' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 63.

64 Mark Tushnet, 'After the Heroes Have Left the Scene' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 293.

allocate authority to institutions. And, indeed, politicians find it useful and are more and more prepared to allocate important work to the Court (as attested by the increasing number of cases resolved under 'the conflict of competences' clause). As the Court finds itself thus legitimized, it might not feel any particular pressure to accrue the quality of its judicial politics. A brief overview of the judges' biographies suffices to show that most of the judges are not well placed to elaborate sophisticated political decisions in judicial terms. Some of the judges' backgrounds are extremely dubious (denoting opportunistic behaviour in the extreme as in the case of a judge who had no career in law but was a politician who throughout his career belonged to no fewer than five political parties). In addition, some of the Court's more theoretical statements reflect a very simplistic understanding of their own role to the point in which one can cast a serious doubt on how much they are aware of their power. For instance, in one decision the Court stated: 'interpretation is not an activity generating legal norms, it is one of explanation'.[65] The case law of the Court is replete with such naïve statements, and though they might be seen as mere theoretical musings with no real impact on the solutions themselves, they do in fact shape the way judges reason and prevent them from putting forth solid rationales as long as the solution is presented as the obvious truth.

This might change when the Court enters its second-generation phase, as it can be expected to want to establish itself as an important game-changer even in the absence of political calls to that effect. This can mean that constitutional judges will start acknowledging at least a certain margin of discretion on their behalf, which in turn will prompt them to better justify their decisions. As Bogdan Iancu argues, '[t]he fact that … the Romanian Constitutional Court does not appear to have acquired the essential features of a credible judicial culture … cautions skepticism towards the possibility of creating or fostering legal culture solely by institutional or normative design'.[66] It should be expected that the composition of the Court will make room in the future for specialists with more serious credentials who have a broader understanding of constitutional matters. Until then, there are at least two reasons for optimism.

The first is that the Court is on the way to assimilating a human-rights discourse which helps it reach progressive decisions even when these are poorly written. If, according to a study conducted in 2005, between 1994 and 2003 the Constitutional Court invoked the texts of the Convention and the case law of the European Court of Human Rights as grounds for about 380 decisions (out of the total of almost 3,000 issued in that time interval), at present, the Constitutional Court invokes them in such a number in just

65 Decision no. 358 of 30 May 2018.
66 Iancu (n 43) 147.

one year.[67] In time, the vocabulary of the ECtHr might force the Court to adopt itself a more value-orientated, public reasoning speech.

The second reason for optimism relates to the fact that it takes little to make the Court more relevant intellectually. For instance, it suffices for the Court to welcome a new member, the 'hero' whom Tushnet speaks about in his aforementioned contribution, to alter the dynamic of the Court altogether. Indeed, a refined jurist has the capacity to steer the Court into a different direction in terms of its discursive style and reasoning, legal and general alike. A judge with the appropriate credentials who approaches the Constitution in a cosmopolitan spirit could force the other judges as well at least to strive to raise to the occasions presented to them.

12.6 Conclusions

At least two sets of conclusions can be drawn, I believe, from this case study. The first are more general and they regard legal interpretation in populist times. The second refer, more specifically, to the Romanian constitutional landscape, which provided me with the background for the more theoretical discussions. The two can be connected through a concept that I advanced in this chapter, namely that of 'epistemic deficit'.

My study revealed that it is possible that those decisions one can recognize as populist, mostly because of their outcome, respect the legal form no less than the more regular decisions do. By 'legal form' I mean the classical legal vocabulary, the legal procedures and the typical methods of interpretation. The result might be contestable but legally speaking – that is, formally speaking – the road taken to reach that result is as legal as those followed in cases whose outcomes are not questionable from a rule of law point of view. Now, what appears as a populist decision can be the result of poor argumentation or plain incompetence rather than of the implementation of a populist agenda consciously weakening constitutional guarantees and control mechanisms. Indeed, in contexts where constitutional adjudication lacks in argumentative quality in general, it becomes even more problematic to draw the line between legitimate judicial politics and illegitimate judicial politics, which is something that populist politicians could speculate in their favour. Under such a scenario, the outcome of the case remains almost the exclusive criterion speaking to the decision's populism.

By contrast, in jurisdictions where the legal community is accustomed to being offered highly refined legal reasonings by the courts, it might become possible to identify populist decisions by an analysis of their language as well. Thus, the epistemic community of lawyers might detect possible differences in the language from the one of the 'good old times'. However, the fact remains that the law alone cannot equip us jurists with all the necessary

67 Tudorel Toader and Marieta Safta, *The Dialogue of Constitutional Judges* (Peter Lang 2016).

evaluative tools for unequivocally determining what counts as democratic backsliding in adjudication. Valid (in the legal sense) decisions might still appear problematic from an interpretative standpoint. Or, a verdict of interpretative 'wrongdoing' on the part of the courts could hardly be pronounced without taking into account considerations (sociological, philosophical, political) that exceed the realm of the law. To use Hart's 'rule of recognition' vocabulary, formally recognized as law, such problematic decisions will not be accepted as intellectually compelling. In this case, the rule of recognition operates, paradoxically, both to recognize and to deny the status of law to the very same ruling.

The case study supports the idea that no method of interpretation is more susceptible than others to being 'hijacked' by the populist or to be put to the use of poor political thought. While the historical method has been privileged by the majority of the Court in the first case examined here, grammatical, systematic and teleological interpretations were all proposed to the judges by one of the party in order to uphold the very problematic outcome that was eventually held by the Court itself. Or those methods of interpretation were not manifestly ill-placed. The Court might have as well founded its decision on any or some of them.

Another conclusion that one can draw from this study is that formalist results (in the Romanian case that I scrutinized here, the attribution to the President of a merely formal role in a given procedure with implications for checks and balances) can be achieved through non-formalist means. While no legal method, not even the grammatical one, is inherently formalistic, some methods appear nonetheless more open-ended than others. Thus, one can easily see why the teleological method is less constraining than the grammatical one, and yet there is no correlation between the method's indeterminacy and the outcome of the case. Central and Eastern European legal cultures are often accused of being too formalistic. However, it is important to retain that the mere use of less formalistic methods like the teleological or the historical one to the detriment of the textualist method, for instance, does not necessarily entail desirable results from a rule of law point of view. Strict methods can lead to creative results and vice versa; namely, creative methods can lead to results that entrench or encourage formalistic thinking and all in all weaken constitutional guarantees.

Coming to the Romanian constitutional order, which I took as a background for my theoretical reflections, I have showed that the Constitutional Court is still a first-generation Court with a problematic composition (in terms of its members' professional trajectories, which affects its representativeness) and an argumentative capacity that leaves a lot to be desired. I called this 'epistemic deficit'. Indeed, before we start any political, philosophical or even legal discussion about a ruling's appropriateness, we have to inquire about a ruling's epistemic quality. Does it reflect bad faith, or simply poor argumentation? A decision might conflict with our political preferences. One can find it too 'socialist', for instance. But it should never

be epistemically deficient. The epistemic authority of a constitutional court is not a given. It has to be relentlessly built with each new generation of judges.

Constitutional courts are not insulated from critique. One critique that we hear oftentimes refers to the Court being too politicized. However, as long as constitutional courts exist, they do hold important political power, and one cannot change this. To change this would mean to change language itself, to render it from indeterminate and flexible determinate and still. Now, with power comes responsibility, and the responsibility of constitutional judges takes first and foremost, I have argued, an epistemic form. In other words, one should ask the following question: 'What does one do with the language at his or her disposal?'. There are no correct solutions in the usage of language, but there are certainly authoritarian ways of using language qua judicial language as when the interpreter makes little effort to steer the language towards coherence and persuasiveness. However, epistemic activism should not be taken to mean judicial activism. Courts can be activist while being epistemically dormant. These activist courts that are epistemically 'lazy' entertain the post-political *Zeitgeist* of our time and thus contribute to the accumulation of resentment on the part of those excluded from the process of identity search and eventually to populist claims. A decision of the Constitutional Court cannot generate ideological approval among all the members of a society, but it can and should generate epistemic approval, signalling the writing of a to-be-continued story and the possibility of critique. As the Romanian examples show, when courts display weak epistemic authority and the political environment is fraught with bad intentions (be they populist or other), it becomes hard to say for which values the judiciary stands. It is unsurprising, then, that courts lose their guidance role in the judicial community and, more broadly, in society. If anything, the recent populist attacks on the rule of law reminded us that 'as a minimum, the law is about interpreting texts',[68] that texts are not self-executing and that, therefore, the people who are behind law's curtains (and their background, competences, inclinations, aspirations, political preferences, linguistic abilities, etc.) matter as much as long-standing legal rules, principles and doctrines.

68 Costas Douzinas, 'Law and Justice in Postmodernity' in Steven Connor (ed.), *The Cambridge Companion to Postmodernism* (Cambridge University Press 2006) 200.