## The Romanian constitutional judge – lost in transition

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***Abstract***: *Although democratic transitions do not require constitutional review, most East European countries have reverted to it as an important vector of change. Thus, constitutional courts have come to play an important role in the transformative process of their respective states and societies. While it remains debatable whether judicial activism of constitutional judges can have a beneficial impact upon the democratic outcome of a transition if performed during the initial phase, there is little to support the same conclusion at a more general level. The recently discovered activism of the Romanian Constitutional Court raises questions with regard to its raison d’être and may have consequences on the consolidation of democracy.*

## A little story

Insult and slander have been decriminalised by the Romanian Parliament in 2006[[1]](#footnote-1) as a measure meant to take into account in the domestic legal system the consequences of a constant case law[[2]](#footnote-2) of the European Court of Human Rights (ECHR) which found that condemning journalists to prison[[3]](#footnote-3) for what regular courts found as “insults and slanders by the press” goes far beyond the acceptable limits imposed on freedom of expression in a democratic society as those are provided by (article 10 of) the European Convention for the protection of human rights and fundamental freedoms

Shortly after, the Constitutional Court of Romania (CCR) put insult and slander back in force.[[4]](#footnote-4) In a nutshell, the Constitutional Court argued that, despite decriminalisation being decided by Parliament and taking into account the procedure used by the claimants who brought this issue in front of it[[5]](#footnote-5) the Court cannot accept that human dignity is left only with the protection offered by potential financial damages that might be asked by the injured person. It also found that such an abrogation would infringe upon the constitutional right of free access to justice. Therefore, the Court has found that the abrogative law is unconstitutional and, instead of confronting the legislator with a situation where a *vacuum legis* would have imperatively required its intervention - eventually in line with specific indications that the Court itself could have provided -, it reasoned that, as a result of the demise of the abrogative law from the books, the previously in force provisions would come back to life; *id est* insult and slander are again criminal deeds.

Commentators of that decision have taken issue not with the Court’s attempt to better protect human dignity or free access to justice, which they found it is its constitutional and moral duty, but with the manner in which it has dealt with the matter[[6]](#footnote-6) and with the bizarre legal consequences it had drawn from the unconstitutionality of an abrogative legal act,[[7]](#footnote-7) despite explicit contrary provisions of the Constitution[[8]](#footnote-8) and of the law pertaining to the legislative technique[[9]](#footnote-9), as well as with the fact that, in its substance, the decision starkly contradicts a constant case law of the ECHR against Romania.[[10]](#footnote-10)

Following this rather innovative decision of the Constitutional Court regular courts were facing two possibilities: either they followed Parliament – among others also in order to prevent further condemnations of Romania by the ECHR – and they considered insult and slander as no longer criminal, or they adopted the line imposed by the Constitutional Court and continued to condemn offenders on the basis of recriminalised insult and slander. This is exactly what happened, meaning a divergent practise started, which was an even worse situation than before.

Under these circumstances, the supreme court of the land – the High Court of Cassation and Justice (HCCJ) – has been notified in order to unify practise in full accordance with its jurisdiction as provided by the law. In its decision n°8/2010 the HCCJ ruled that no other body than Parliament can adopt or abrogate laws and a decision of the Constitutional Court which declares a piece of legislation unconstitutional cannot be mistaken for a normative act that would create new legal standards because that Court is defined as a mere “negative legislator”; such a decision can only prevent already existing legal standards from taking unconstitutional paths. In other words, the HCCJ imposed on all courts of the land the interpretation in accordance with which insult and slander had been decriminalised by Parliament. In subsequent case law however, the HCCJ underlined that decisions of the Constitutional Court must be obeyed and enforced, and specifically mentioned decision n°62/2007 as one of them.[[11]](#footnote-11)

However, in a move of power politics with a vengeance, after long waiting for the appropriate moment, in 2013 the Constitutional Court ruled to the contrary (decision n°206/2013). In fact, going far beyond what the Constitution has defined as its jurisdiction[[12]](#footnote-12), the Constitutional Court declared unconstitutional the decision n°8/2010 of the HCCJ (and not the law which allows HCCJ to adopt decisions meant to unify the case-law of lower courts as the claimant had asked) because the highest court of the land cannot and should not interfere with constitutional review and should limit itself to the mere implementation of the legislation, without attempting to influence the rest of the judicial system. The outcome of all this, according to the CCR, is that insult and slander are criminal actions and must be so punished.

But Parliament did not repent. Already in a draft Criminal Code adopted in June 2004 and meant to come into force in June 2005 insult and slander were no longer criminal offences; however, during 2005 the coming into force of that draft had been delayed for 2006 and then, meanwhile, the decriminalising law had been adopted. Later that year the draft Criminal Code of 2004 has been officially abandoned and the work for a new one started. A new draft Criminal Code (law n°286) has been adopted in 2009, but it is only in 2012 that Parliament has managed to finalise all necessary legal preparation for its coming into force, which finally happened in February 2014. The new Criminal Code does not provide insult and slander as criminal offences.

The above story seems to testify of a long and tenuous fight of the Constitutional Court - favourable to the full and complete protection of fundamental rights - with both Parliament and the judicial system, a situation which has growingly become common[[13]](#footnote-13) and seems appropriate in any democratic transition.[[14]](#footnote-14) Moreover, on the substance of it, the Constitutional Court seems to be right in arguing that human dignity should benefit of both criminal and civil law means for protection ; if this was the situation before 2006, diminishing the level of protection of human dignity could be considered as infringing upon the constitutional clause (article 152 of the Romanian Constitution) which requires that even when revising the Constitution guarantees offered to fundamental rights cannot be supressed ; *a fortiori*, if it is not the constituent power who intends to diminish guarantees of fundamental rights, but the regular legislative one, the limiting intervention of the Constitutional Court against such an action is all the more justified. Preventing the representative body of the people from harming those who have elected it stands as the main function of judicial[[15]](#footnote-15) or constitutional review,[[16]](#footnote-16) despite the “countermajoritarian argument”[[17]](#footnote-17) or any other positions held by detractors.[[18]](#footnote-18)

However, is this approach towards the situation above-described appropriate? Does it underline the role that constitutional courts have to play in democratic transitions from the perspective of the classical debate on the legitimacy of constitutional review? Is it really just a matter of the delicate balance than needs to exist in any democracy between judges and representatives of the people or is it a matter of judicial activism?

## On democratic transitions and constitutional review

Democratic transition[[19]](#footnote-19) is a vague concept, lacking a generally accepted definition. Subject to debate[[20]](#footnote-20) and contested mainly for its implicit teleology that neglects the inherent uncertainty of the process[[21]](#footnote-21), in a nutshell, the concept of democratic transition refers to processes of transformation of authoritarian or totalitarian regimes into democratic ones. It deals with a rather ambiguous period of change where democratic standards are gaining the position of criterion for legitimacy and start to inform and orient perceptions and behaviours of the majority of those involved in the process and of observers. During that process the people need to view the change as satisfactory for them, while other actors need to consider it skilful (e.g. representatives of the new government) or relevant (e.g. international community) for a very broad range of theoretical and practical issues, inherent to the daily-life reality but which remain specific to each individual historical situation. In that sense there is not because there cannot be a universal recipe for democratic transitions[[22]](#footnote-22) despite common features they all display.

According to the dominant theory on democratic transitions[[23]](#footnote-23) there are broadly two stages in any such process: the first one encompasses the *transformation* of the society and the second one pertains to the *consolidation* of changes thus achieved. However, each transition has its own way and transitions in Eastern Europe had their specificities from those happened in other parts of the world as well as peculiar characteristics that made each of them unique. In some of them, negotiations paved the way towards consolidation (Poland, Hungary, Czechoslovakia), in others there were violent revolutions (Romania). In some, the transformative phase lasted longer (Hungary, Poland), in others it was ended after only two years (Bulgaria, Czeck Republic, Slovakia, Romania). In some, the new Constitution meant social peace and a new beginning (Romania), in others a new Constitution seems to be challenging at least some of the *acquis* of the democratic transition (Hungary).[[24]](#footnote-24)

In this context is has to be noticed that judicial or constitutional review is not a definitional element of democracy[[25]](#footnote-25) although it is safe to assert that most liberal democracies nowadays do display some form of external review of their legislation. A functional and/or efficient judicial or constitutional review is therefore not an ontological landmark for the accomplishment of a democratic transition. Likewise, transition status alone will not bring about the development of serious constitutional review.[[26]](#footnote-26) However, transitions in Eastern Europe have all put in place constitutional[[27]](#footnote-27) and not judicial[[28]](#footnote-28) review of legislation as an important feature of a long dreamed-of rule of law.[[29]](#footnote-29) To what extent constitutional review has been a fully conscious and conceptually internal construct of the actors involved in those very transitions, a mere borrow[[30]](#footnote-30) from Western democracies[[31]](#footnote-31) or rather imposed by international actors[[32]](#footnote-32) it is not clear even now.[[33]](#footnote-33)

I have argued elsewhere[[34]](#footnote-34) that the role and impact of constitutional review can only be adapted to the various types and particular cases of democratic transition.

If the transformative phase of the transition takes time and already enjoys the existence of a Constitutional Court, as it was the case in Poland[[35]](#footnote-35) or Hungary[[36]](#footnote-36), constitutional review becomes an active promoter of the culture of change. Such a Constitutional Court does not owe its existence to the Constitution, as in the classical theory of Hans Kelsen[[37]](#footnote-37); its legitimacy lays rather in the output of its own activity which paves the way for the future Constitution. Despite critiques that may be brought to its legitimacy[[38]](#footnote-38), it does have the positive effect that it allows for a broad consensus to be built within the concerned society - not only between the main (political) actors, but at a more inclusive level within the entire society - with regard to values, norms, institutions and procedures and thus paves the way for the writing of a new Constitution. Such piecemeal Constitution-making processes generally manage to further lay the foundations for a peaceful and consensual consolidation of the democratic transition, as it could be noticed in the Czech Republic and Poland, with the notable exception of Hungary which only lately seems to have embarked on a somewhat different path[[39]](#footnote-39).

But if the transformative phase of the transition is violent and rushed, as it was the case in Romania, constitutional review might not be the appropriate instrument to promote democracy during the early stages of the transition. Rather, following the adoption of a legitimate Constitution, a Constitutional Court can start its transformative function based on that text and impose to all public authorities and to the society at large those values and normative standards that have already received the avail of the people through a referendum.[[40]](#footnote-40) Such a constitutional review exists because the Constitution exists, much in accordance with the classical theory of Hans Kelsen. Challenging its legitimacy means challenging the legitimacy of the foundational document on which lies the democracy established through that transition. In an ideal world, this should create the preconditions for an even quieter or tranquil consolidation phase than in the previously described case. However, such consolidations too may meet challenges and the events that succeeded during the summer of 2012 in Romania could be a good example for a hasted consolidation that did not have time to provide appropriate answers to inevitable problems of institutional design.

In a nutshell, 2012 has been the first year when the Romanian political system was faced with a dramatic change in the balance of powers which took place not as an outcome of electoral procedures but through political fights and arrangements.[[41]](#footnote-41) The general political ambiance, which has never been appeased in recent years, became electric during the summer of 2012, when a new parliamentary majority decided not only to meet with the same currency all (perceived) humiliations of the previous parliamentary majority that supported Romania’s President, but also to immediately remove him from office. All along 2012 the skirmishes on the Romanian political scene concerned two legal issues with strong political impact that served as triggers for a political crisis almost inherent to the rough cohabitation that had barely started (a revision of electoral rules[[42]](#footnote-42) and the representation of Romania to the European Council[[43]](#footnote-43)) and two political issues with important legal consequences (the impeachment of the President and the quorum needed in order to validate a referendum[[44]](#footnote-44)). However, it was the jurisdiction of the Constitutional Court or rather the way in which this last one resolved to interpret and enforce it that triggered most criticism: in decisions n°727/2012[[45]](#footnote-45) and n°783/2012[[46]](#footnote-46) the Constitutional Court took it upon itself to considerably enlarge its scope of action by reviewing all parliamentary decisions, irrespective of their nature or object, and by doing so against not only the constitutional standard, but also against infra-constitutional ones. While it is true that during the summer of 2012 the Romanian Constitutional Court appears rather as a victim of political in-fights, the question of its legitimacy would not have risen so sharp was it not - partly - for its own attitude.

## On the legitimacy of constitutional review

Controversies on the legitimacy of *judicial review* are not new. Starting with the legitimacy of judges in general[[47]](#footnote-47) and continuing with the legitimacy of those who are performing judicial review[[48]](#footnote-48) the topic has already received a significant amount of attention in the academic world, including recently[[49]](#footnote-49), so we no longer need to enter the theoretical debate.

However, not all these arguments are entirely transposable to *constitutional review* as the institutional arrangements and procedures used in the latter case are different and end up with specific effects. Hans Kelsen wanted precisely to prevent some of the criticism (particularly the counter-majoritarian argument) recurrently made with regard to the legitimacy of judicial review.[[50]](#footnote-50) He therefore legitimised Parliament and the Constitutional Court through the *pouvoir constituant*, thus putting them on an equal footing in terms of origin and goals. He also enshrined both Parliament and the Constitutional Court in the Constitution thus making possible that the fundamental law is the unique source of all their power and the ultimate reference for their entire activity. And he argued that they both perform their activity pertaining to law creatively, albeit in opposite ways, meaning that they both have to interpret and implement the Constitution, while at the same time being subject to it. But even he concluded that “judicial review of legislation is a legislative and not a purely judicial function”.[[51]](#footnote-51)

And indeed, despite theoretical and conceptual precautions, once implemented and lived, the outcome does not seem to fall too far from judicial review, at least not with regard to the issue of its legitimacy or impact, as constitutional courts are often accused of accomplishing judicial politics.[[52]](#footnote-52) In fact, most of the criticism made with regard to the political nature of judicial review does not distinguish it from constitutional review. Despite attempts to find a middle way and simply compromise democratic decision-making with external review of legislation[[53]](#footnote-53) the issue of the legitimacy of judicial or constitutional review remains a recurrent one in legal and political science.

It was therefore almost inevitable that the controversy spills over to democratic transitions.[[54]](#footnote-54) The latest waves of democratisations, including the one currently unfolding in the Arab countries, have shown that judicial/constitutional review and democracy can and do develop together, although neither is indispensable or even necessary for the other one. However, they can mutually be useful and, at times, even reinforce each other, particularly in times of transition.[[55]](#footnote-55)

Indeed, transitions imply paradigm shifts in the conception of legal instruments: while in its ordinary function law and its enforcement (including judicial enforcement) provides order and stability, during transitional times law and its (judicial) enforcement have both to maintain order and enable transformation. But does this imply the need for judicial activism[[56]](#footnote-56) ?

Some East European constitutional courts have struggled not only to enable transformation, but even to impose it, rather sooner than later and at the widest and deepest level possible in their respective societies. In other words, notwithstanding questions related to their legitimacy, some East European constitutional courts, particularly those in the Czech Republic, Hungary and Poland, have embraced an activist attitude very early during the democratic transition in order to make it happen. The logical consequence of this should have been that, once transformation accomplished, consolidation should have started and be pursued according to the broad lines defined by the case-law of those constitutional courts since that case-law had meanwhile become the Constitution of the land. Hence, the activist stance of those constitutional courts should, in time, diminish with regard to the definition of basic values of concerned communities and subsist only as subsidiary element, with regard to their practical implementation. To a great extent this is what happened in the Czech Republic, Hungary, Poland and Slovakia: constitutional courts there have evolved from "juristocracy"[[57]](#footnote-57) to "regular" constitutional review, meaning they make sure that values and not mere texts enshrined in the Constitution represent the yardstick for legislative, executive and judicial action.[[58]](#footnote-58)

Other East European constitutional courts have decided to follow a different path. In Romania, according to both judges[[59]](#footnote-59) and clerks[[60]](#footnote-60) of the Constitutional Court, judicial activism has been discovered recently and embraced enthusiastically, at least at declaratory level. While a deeper introspection of the latest case-law of the Romanian Constitutional Court may end up with somewhat different conclusions, the approach recently taken by the jurisdiction risks to bare consequences on the consolidation of the democratic transition.

## Constitutional review or judicial activism ?

If controversies on the legitimacy of judicial or constitutional review are a regular feature of doctrinal analysis, they are much less so cause for social or political unrest. According to some observers[[61]](#footnote-61), the events which unfolded in Romania during 2012 have threatened democracy and raised again the “mighty problem of judicial review”[[62]](#footnote-62). With all due respect, a closer analysis seems to point in a different direction. The issue at stake was not so much the obvious question of how can an appointed body check upon an elected body against its very own constitutive document, but rather how is the review performed and what are its consequences. In other words, the political (and not so much legal) debate that developed around and about the Constitutional Court of Romania particularly during the summer of 2012 had more to do sometimes with judicial activism but more often with incoherent or even obviously politically motivated judgements. In order to understand the deeper causes of that broad dissatisfaction of the Romanian society and polity with their Constitutional Court an incursion in the recent past might prove useful since, in Romania, constitutional review is a relatively new instrument of the rule of law, which only recently declared to have adopted an activist approach to its mission. How did it all start and what might be the consequences?

1. ***Initial self-restraint***

Romania has joined the wave of democratisation sweeping Eastern Europe in the ’90 with its own specificities regarding both stages of democratic transitions. First, Romania did not have a negotiated initial transformation, but a rather radical one, the first revolution ever to be followed live on TV. Secondly, because of the socially disruptive character of that transformation, there has been a somewhat earlier and hasty passing to the second stage of the transition[[63]](#footnote-63), with the popular ratification on the 8th of December 1991 of a new Constitution.[[64]](#footnote-64) Indeed, after 1991, the mere fact that a Constitution could exist has managed to appease the social unrest and constitutionally frame political debates and the protection of fundamental rights.[[65]](#footnote-65) And thirdly, probably because previous stages have been somewhat rushed, consolidation has been relatively long and tortuous.[[66]](#footnote-66)

Irrespective of all these, it is not at all sure that along the process the urgent need for a Constitutional Court was felt; rather to the contrary. Indeed, although in 1911 Romania discovered judicial review through a precedent, following the US pattern of *Marbury v.Madison* (1803) and with consistent theoretical and practical support from French scholars,[[67]](#footnote-67) in 1991 it shifted to constitutional review and created a Constitutional Court. However, as I have argued elsewhere,[[68]](#footnote-68) that experiment did not seem to have immediate and direct effects neither on the Romanian judicial, nor more generally on the legal culture or the institutional organisation of the state, although an enduring and remnant impact is to be noticed as of lately.

So, when in 1990 the draft Constitution provided for the creation of a Constitutional Court instead of judicial review, reactions have been rather unfriendly: members of the Constituent Assembly thought it was an undemocratic political authority[[69]](#footnote-69) thus echoing the “counter majoritarian argument”, while the judicial system thought it was a device meant to take away power from it.[[70]](#footnote-70) In fact, already in 1990 and in the absence of a Constitution, the judicial system had shyly started to remember its mighty past and proceeded, in only three cases, to judicial review.[[71]](#footnote-71) Unlike in Poland or Hungary, during the transformative phase in Romania there was no Constitutional Court to support democratic transition, and the judicial system only made some timid attempts to adapt to the new values promoted by the revolution. The main vectors and supporters of the Romanian transition were the political actors, unconstrained by any review mechanisms or referential standards, so they felt free to define the main characteristics of the future political system as they deemed appropriate. The revolutionary phase of the Romanian transition allowed for a great margin of manoeuvre to actors active in that period and these did not include the judicial system or indeed any other system of review of the political action. This will bear consequence on the second phase of the democratic transition.

Due to its soothing effects on the social and political unrest, the popular ratification of the Constitution on the 8th of December 1991 is considered to be the beginning of the consolidation phase. However, it was only after that moment that Romania actually began to build, at times from scratch, almost all its democratic institutions. The text provided for what, at that time, seemed to be the standard pattern of design for ‘transitional constitutional review’, allowing for an *a priori* review of laws and initiatives to revise the Constitution, and an *a posteriori* review of laws, standing orders of Parliament and delegated legislation.[[72]](#footnote-72) The jurisdiction of the Romanian Constitutional Court had been drafted as close as possible to the theoretical model designed by Hans Kelsen,[[73]](#footnote-73) but its actual clout was far from that standard since whenever a law was found unconstitutional through an *a priori* review it could be confirmed with the qualified majority of two thirds of the MPs, who were thus rejecting the decision of the Court.[[74]](#footnote-74) Although in practise such a situation never occurred, the mere fact that this was possible seemed to comfort MPs and stress constitutional judges.

Despite this “sword of Damocles”, during its first twelve[[75]](#footnote-75) years of existence, constitutional review has proven to be a rather efficient tool for the transformation of both the normative and the political systems during the Romanian transition. It was precisely through an *a priori* review that already in 1992[[76]](#footnote-76) the Constitutional Court imposed the separation of powers as a constitutional standard, although was the principle was not textually enshrined in the Constitution. The same procedure has been used in 1994 in order to limit the appetite of the governing coalition to overrule the Court’s decisions by trying to get their policies promoted through legislative delegation.[[77]](#footnote-77) It was again *a* *priori* review that prevented parliamentarians from attributing themselves privileges[[78]](#footnote-78) or trying to limit democracy by framing too tightly the popular consultations that the President may initiate[[79]](#footnote-79).

A part this, the *a posteriori* review of legislation has been an important device for filtering pre-constitutional statutes and modernising legal standards up to the requirements of the new Constitution, a task that the Constitutional Court has accomplished despite the fierce resistance of the judicial system.[[80]](#footnote-80) Even more importantly, most of the case-law of that period is dedicated to the protection of fundamental rights as enshrined in the fundamental law[[81]](#footnote-81) and the Constitutional Court went as far as identifying new fundamental rights[[82]](#footnote-82) based on the interpretation of the Constitution. All in all, during its first twelve to fifteen years of existence the Constitutional Court has managed to accomplish its main functions (negative legislator, guarantor of fundamental rights and pedagogue) despite reluctance or even opposition of co-workers (Parliament and Government) or competitors (judicial system).

But it seems safe to say that until roughly 2003 - 2005 the Romanian Constitutional Court has been rather discreet and preferred self-restraint to judicial activism: when having to directly confront the legislator in *a priori* review the Court would rather act through interpretative decisions than through unconstitutionality ones[[83]](#footnote-83) and when daring to be bold its most ‘activist’ decisions were on procedural grounds[[84]](#footnote-84) or made appeal to the legislator not to allow for a *vacuum juris*.[[85]](#footnote-85) It most daring and controversial interventions on the realm of political questions referred to the constitutional legitimacy of the person then occupying the position of President of Romania to run again in the elections[[86]](#footnote-86) and to the immunity of MPs.[[87]](#footnote-87)

This self-effacing attitude of the Constitutional Court attracted criticism from some authors[[88]](#footnote-88) who were comparing Romanian constitutional review with, say, its Hungarian or Polish counterparts, often forgetting that those constitutional courts had lived their most important activist times when the Hungarian or Polish Constitutions were precisely under construction and political forces driving transition were at their weakest, which enabled courts to manifest as main promoters of change. In stark contrast with that situation, in Romania it was the Constitution that ignited the real process of change, and consolidation actually happened in several stages: the adoption of the new Constitution allowed only for the preconditions of further consolidation to be put in place while the effective creation of democratic institutions and their adaptation to the new values and standards followed later. Therefore simply enforcing the Constitution despite (sometimes opposition of) Parliament, Government or the judicial system was progress enough and the Romanian Constitutional Court did not need to be creative with regard to values or arguments as they were already provided by the very text of the fundamental law. The strong democratic legitimacy of the Romanian Constitution was sufficient to legitimise both constitutional review as process and the Constitutional Court as institution. Judicialisation[[89]](#footnote-89) of social and political life happened anyway via the slow but sure construction of the rule of law.[[90]](#footnote-90)

1. ***Expansion of jurisdiction***

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

On one hand the Constitutional Court saw its jurisdiction[[91]](#footnote-91) expanded by the possibility to adjudicate on international treaties prior to their ratification by Parliament, in an attempt to put in line Romanian constitutional review with what seemed a generalised trend in European constitutional review.

On the other hand, noting that the Court had been quite efficient in dealing with political actors and imposing on them the constitutional standards with regard to the repartition of powers, it was also granted the attribution to settle “legal conflicts of constitutional nature” despite contrary advice from the Venice Commission.[[92]](#footnote-92)

And finally, displeased with the fact that in the political negotiations it could no longer have the possibility to overturn decisions of unconstitutionality taken within the *a priori* review, the Parliament decided to get at least some control over the jurisdiction of the Court and appended the respective article of the Constitution with the following sentence: “other duties stipulated by the organic law of the Court”[[93]](#footnote-93). This meant that Parliament would be able to dispose of the Court’s jurisdiction and no longer exclusively the *pouvoir constituant*. Constitutional judges have tried in vain (decision n°148/2003) to warn the *pouvoir constitué* that this would represent a breach of the general framework under which constitutional review functioned so far in Romania and thus alter the delicate balance of legitimacy, functions and purpose between Constitutional Court and Parliament, although nothing explicitly forbade such an action in the “eternity clause”[[94]](#footnote-94) of the Constitution.

Irrespective of all these considerations, the jurisdiction of the Court in this last respect has been altered in 2003 in the Constitution, but the organic law of the Court did not follow. Therefore no effective impact could be noticed in practise, despite the sharpening of the political struggle on the Romanian political arena, particularly after the presidential elections of December 2004, with violent in-fights between Parliament, Government and President often taking the Constitutional Court as hostage. The situation remained as such until 2010, when the political context allowed for a revision of the organic law of the Court to be performed by Parliament.[[95]](#footnote-95) More specifically, in-between two impeachments of the President, the Court saw its jurisdiction expanded by Parliament[[96]](#footnote-96) as it had become possible since the constitutional revision of 2003.

Indeed, following an unsuccessful impeachment[[97]](#footnote-97) of the Romanian President in 2007, when Parliament suspended President but the people refused to remove him from office,[[98]](#footnote-98) both President and Parliament have tried to prevent or, respectively, prepare future political actions. The Constitutional Court has to deliver an advisory opinion on the circumstances that would justify the suspension from office of the President[[99]](#footnote-99), but Parliament can take its decision irrespective of the opinion of the Court, and this is exactly what happened in 2007 and again in 2012.[[100]](#footnote-100) Despite the 2003 revision of the Constitution, in 2007 such parliamentary decisions were not part and parcel of the Court’s jurisdiction, but they became so in 2010 through the revision of the Court’s organic law. More precisely, while during the first impeachment of the President the Constitutional Court had no say with regard to the parliamentary decision to suspend him from office, during the second impeachment it had acquired the possibility to review the validity of such a parliamentary decision, albeit only upon request. And in 2012 the President of Romania took advantage of this new possibility only to have the surprise of a decision of the Constitutional Court that partly confirmed the parliamentary one.[[101]](#footnote-101)

But if with regard to the impeachment of the Romanian President the Constitutional Court gave the impression to somehow agree with Parliament, it displayed a totally different attitude with regard to its own jurisdiction. During the events that unfolded in the summer of 2012 the Romanian Constitutional Court refused to allow its jurisdiction go back to its constitutional (original) dimensions,[[102]](#footnote-102) although not necessarily for the most appropriate arguments: instead of resorting vaguely to the rule of law in order to explain its own vision according to which its jurisdiction is protected by a sort of an unwritten *cliquet arrière retour* principle, the Court could have noticed that it was Government and not Parliament who was trying to alter its jurisdiction and this is definitely not foreseen by the Constitution.[[103]](#footnote-103)

The provision added in 2010 to the organic law which increased the jurisdiction of the Court was idly drafted[[104]](#footnote-104) and the Court, after several attempts to enforce it in ways which it thought were best adapted to the circumstances of the cases,[[105]](#footnote-105) ended up by clarifying it[[106]](#footnote-106) and ruling that it cannot invalidate a parliamentary decision which bears effects with regard to a specific person, be it nomination or dismissal in a public office. However, later it continued with a peculiar type of indiscriminate[[107]](#footnote-107) examination of parliamentary decisions not just invalidating nominations made by MPs, but also introducing a new criterion for distinguishing between parliamentary decisions which pertain to values and norms of constitutional ranking (which can only be reviewed against the high standard of the Constitution itself) and those pertaining to public authorities mentioned in the Constitution (which can be reviewed against legal standards of the Constitution and other relevant laws). Through this original interpretation of its own jurisdiction the Court managed to expand it not only beyond the limits provided by the Constitution, but even beyond the larger ones that had just been settled via its freshly-revised (in 2010) organic law.

Such hesitations and reversals in the case-law of the Court over a relatively short period of time (within only two years) paved the way for doubts with regard to the possibility that, in some cases, judges could have simply replaced the will of MPs with their own political preferences.[[108]](#footnote-108) And, despite claims of the Venice Commission that review of parliamentary decisions exists elsewhere as well (e.g. Germany) and that "judicial control of individual acts of Parliament is not only a rule of law issue but, as the right to vote is affected, even a question of human rights"[[109]](#footnote-109), it is not at all clear whether indeed it was "the procedure, not necessarily the substance of the decision (e.g. which person is appointed to a given post)"[[110]](#footnote-110) that had been controlled. Moreover, neither the Constitution, nor the revised organic law of the Court ever allowed it to review various internal decisions of Parliament against different yardsticks, some of them not even of constitutional ranking, as the trend seems to have developed as of lately, and nothing in the relevant legal framework ever hinted towards such an intensive and proactive involvement of the Constitutional Court in the internal political life of Parliament.

While it is true that the Constitutional Court has stepped onto the political arena and started to address political questions, such as constitutional conflicts of legal nature or the review of all types of parliamentary decisions, in a context which had been created for it mainly by political actors (*pouvoir constituant* or Parliament), it also seems obvious that in the process it started to discover some interest in developing its own powers and expanding its jurisdiction beyond the Constitution. Although the words "judicial activism" were not clearly articulated by any of the concerned actors at that time, not even at the highest of the political struggle, all grievances and complaints against the Constitutional Court pointed rather in that direction for reasons having to do with both the expansion of its jurisdiction and the impudence the Court itself displayed in the process.

In fact, political in-fights contributed to a large extent to the weakening of political actors, which created some room that has been quickly grabbed by the Constitutional Court. Unlike in other East European countries, where political actors had been weak in the beginning of the transition, but once consolidation started they grew stronger and thus balanced the possibilities of self-expansion of constitutional review, in Romania political actors initially led the transformation, but seem to have exhausted their forces on the way and created strong premises for self-promotion of constitutional review.

Judicial activism does not fall from sky; it is politically constructed and it would be unfair to put the entire burden of such an enterprise on the sole shoulders of constitutional judges.[[111]](#footnote-111) As the case of Romania plainly shows, boldness and activism of constitutional judges would not have happened if political actors would not have enabled and even stimulated it. At the same time, extravagances of political actors would not have manifested with such fullness was it not for the incoherent case-law or obviously politically motivated judgements of constitutional judges. However, the consequences of that phenomenon do deserve further attention and critique analysis.

1. ***From political adjudication towards judicial activism***

It may not be entirely by chance that the first time the Romanian Constitutional Court had been faced with accusations of political adjudication was in 2005. In decision n°375/2005 the Constitutional Court validated a massive piece of legislation which was dealing in one shot with both a (full scale) reform of the judiciary and an important reform in the area of the restitution of properties nationalized by the communist regime notwithstanding the fact that the two matters were hardly related and could not be grouped in one legal text. Although the law had been adopted through the exceptional procedure of the engagement of responsibility of the Government precisely in order to prevent parliamentary debates and potential revisions of the text, the Court found nothing unconstitutional in the approach taken by the executive *qua* legislator. However, it declared few provisions unconstitutional as contrary to the principle of non-retroactivity of laws, particularly those lowering the age (from 70 to 65) for the retirement of judges and prosecutors.

Following this somewhat controversial decision of partial unconstitutionality a full scale political storm was unleashed. The executive of the time and MPs supporting it loudly expressed their frustration, at the same time questioning the political independence of members of the Constitutional Court and even the legitimacy of the institution. The *horribile dictu* “political decision” has been used.[[112]](#footnote-112) Journalists suddenly discovered the existence of the Constitutional Court and found it ‘unconstitutional’ because not validated by principles of moral politics valid in the XVIIIth century[[113]](#footnote-113), while magistrates all over the country found the best occasion to remember all the difficulties they ever faced in their relation with the Constitutional Court through the exception of unconstitutionality. The -then- recently elected President of Romania declared he was not surprised with the decision, since it came from a Constitutional Court with a composition established almost entirely under the previous Government by the main political party now in opposition, thus questioning the independence of the Court. There have been a few days in the summer of 2005 when the very fate of the Constitutional Court seemed “doomed” for reasons that had little to do with judicial review or the substance matter of the decision as such.[[114]](#footnote-114)

Indeed, the Constitutional Court had wearily used its clout in that particular stance being aware of the delicacy of the political situation but also resolved to get away with many of the controversial issues raised by the law using interpretive considerations; it only invalidated what, in its own opinion, amounted to threats to the status of magistrates and even there it did not dare to fully use this argument and resorted instead to the more technical cover of the non-retroactivity of some specific provisions. On the face of it, the political forces which came to power towards the end of 2004 were willing to expediently give a “golden shake-hand” to magistrates above a certain threshold of age (70 years) and the Constitutional Court considered this to be a “red thin line”. But irrespective of its will, by merely drawing thin lines not to be crossed, even in the softest possible manner as the Court no doubt considered its decision to be, the Constitutional Court of Romania stepped into the realm of political questions and thus entered the political arena. From that moment on, constitutional review of legislation started to have less to do with constitutional limits and constraints and rather became a mere concealer of political fights.

Then came the political clashes of 2007-2008, when the Prime Minister, who no longer enjoyed presidential confidence since the political storm 2005, decided to replace, one at a time, two ministers of his Cabinet and faced the opposition of President. Asked to settle the legal conflicts of constitutional nature thus generated, the Constitutional Court had to step in and, trying to please both sides, it arrived to different conclusions in two identical cases. In the first one (decision n°356/2007) the Constitutional Court ruled that the President cannot arbitrarily veto the replacement of a minister and may only check if the person suggested for replacement fulfils all necessary requirements. The second time, only one year later (decision n°98/2008), it found that the President may require the Prime Minister to suggest another person than the one already proposed, but he can only do so once because the Constitution allows him to veto laws only once (*sic* !). Of course, all decisions concerning legal conflicts of constitutional nature are political questions in disguise, so the Constitutional Court can hardly be accused of stepping into the realm of politics at its own will since it was the very revision of the Constitution that made it possible. However, it is only the Constitutional Court who masters the consistency of its case-law[[115]](#footnote-115) and discrepancies like the one above do not enhance arguments in favour of constitutional review as a useful corrective for power-sharing between political actors.

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

In all fairness it has to be mentioned that judicial corporatism is not necessarily a general policy of the Romanian Constitutional Court. Just like its counterparts in other East European countries, during the first ten to twelve years of its existence the Constitutional Court attempted to convince the judicial system to correctly implement the Constitution,[[116]](#footnote-116) including by calling regular judges its “partners” and specifically urging them to “*directly implement relevant provisions of the Constitution and remove unconstitutional legislative provisions if the legislator has not revised or abrogate them*". (decision n°186/1999) However, over the past seven to eight years it started to prevent regular courts from dealing directly with the Constitution, declaring that “*the supreme court of the land does not have the jurisdiction over legal norms of legislative rank, nor can it adjudicate their constitutionality*” (decision n°838/2009). Following another long staged and complicated power-game which took place between 2008 and 2010 among the highest court of the land and the Constitutional Court with regard to the salaries of regular judges[[117]](#footnote-117) the legislator had to intervene in 2010[[118]](#footnote-118) and decide that the Constitutional Court (and no longer regular judges) can adjudicate the constitutionality of laws which are no longer in force at the time of the review, including pre-constitutional ones that have been abrogated through the coming into force of the Constitution. This contradicted a previously constant case-law of the very Constitutional Court[[119]](#footnote-119) and further expanded its jurisdiction.

This is the description of a process which saw the Constitutional Court of Romania gradually getting involved in political questions while neglectfully displaying incoherencies in its case-law. In the process, the Court seized every opportunity to increase its powers to the expense of its partners or competitors, legislator and judiciary alike, while also showing a propensity to invalidate decisions taken by them in order to enforce its own vision upon the Constitution and, sometimes, its own political vision. This has drawn consequences upon its public image and reputation. There is no causality between the reputation of a constitutional court and the legitimacy of constitutional review. However, the force and clout of a constitutional court lies also on such delicate features, which have played an important role with regard to the Constitutional Court of Romania and may have paved the way for the political contestation it has faced as of lately.

In the abstract and on the presupposition of a healthy constitutional culture, a strong constitutional court might be a guarantee for the supremacy of the rule of law.[[120]](#footnote-120) In the abstract and on the presupposition of an unhealthy socio-political environment, even democracy may degenerate into anarchy or oppression.[[121]](#footnote-121) One of the main functions of constitutional review is to decide on the distribution of powers in accordance with the Constitution and this is ontologically a political question that generally meets relatively few objections. However, when constitutional courts act in order to increase their own powers, at the expense of others, accusations of judicial activism are almost inherent.

Ultimately, although the Court may have not attempted to reach self-entrenched power, the general perception made possible by its own attitude pointed rather in that direction. Progressively, it has reached a point where virtually all political questions have to be sorted out by the Constitutional Court, thus depriving political actors of an important part of their functions, while its decisions in such matters are not always fully compliant with the Constitution or even consistent among themselves.

To take one more example where Parliament seems to be framed more by the wishes of the Constitutional Court than by the Constitution itself: "*when laws have been declared unconstitutional before their promulgation Parliament must reconsider only the provisions concerned in order to bring them in line with the decision of the Constitutional Court.* [...] *Therefore, "other improvements" can only be operated through other laws or ordinances.*"[[122]](#footnote-122) The danger of excessive formalism in legislative procedures looms large behind such positions of the Constitutional Court, although the Court itself seems to fight against it in the name of rule of law.[[123]](#footnote-123)

Furthermore, when the Constitutional Court has stroke down a piece of legislation entirely the legislator is no longer entitled to even attempt to regulate in that area. Thus, through decision n°820/2010, in an *a priori* control, the Constitutional Court invalidated the law on lustration as it came too late in the transition and it would have amounted to a collective sanction for certain persons. When Parliament managed to adopt a new law on the same topic it was faced again with invalidation in *a priori* review. In its decision n°308/2012 the Constitutional Court explained that Parliament had wrongly interpreted the constitutional provision of article 147 according to which it *has to* re-examine invalidated provisions of legislation in order to make them compliant with the decision of the Court, since the Constitution explicitly refers to ‘provisions’ and not to ‘laws’. When a law is “*declared unconstitutional in its entirety Parliament has no other choice than to stop the legislative process*”. It worth mentioning here *en passant* that the fact that Romania has not yet fully dealt with its communist past is not entirely unconnected with the Constitutional Court.

And the little story at the beginning of this paper on insult and slander is revealing not only for the activist stance of the Constitutional Court on substantive grounds, but also on its peculiar vision with regard to its capacity to re-enact laws which had been duly abrogated by the legislator. What is more, once the device of re-enacting legal provisions via constitutional review has been discovered, it has been used at will,[[124]](#footnote-124) despite the theoretical background developed by the 'father' of constitutional review.[[125]](#footnote-125) One of these decisions (n°1039/2012) actually reads "*no other public authority, be it even a regular court, can challenge the reasoning of the Constitutional Court, all of them being obliged to put in practice accordingly the decisions of the Constitutional Court as an essential element of the rule of law*". It looks as if its mere legal reasoning is not enough convincing, and the Constitutional Court feels compelled to constantly remind its authority. Sad and worrying situation for a judge who feels obliged to resort to arguments of authority instead of laying its authority on legal arguments.

1. ***Potential consequences***

Judicialisation of politics being a world-wide phenomenon particularly over the last few decades[[126]](#footnote-126) it was probably inevitable that the Romanian Constitutional Court escapes it. Sometimes confused with a generic form of judicial activism[[127]](#footnote-127) and sometimes equated with a *de facto* transfer of decision-making power from governing bodies to judicial ones, when it is not conceived as a mere by-product of the enhancement of the rule of law, the phenomenon has its obvious detractors and defenders among state powers, while providing an excellent ground for academic debates.

However, the activism recently displayed by the Constitutional Court cannot go without questioning. Openly assumed by members of the Court[[128]](#footnote-128) and clerks alike,[[129]](#footnote-129) this form of activism is described as a transfiguration into a “positive legislator, official interpreter of the Constitution”, “associated to law-making activity” and whose actions are nothing less than “specific forms of ‘impulse’ or ‘coercion’ on the legislator to proceed in a certain way”[[130]](#footnote-130). How does it relate with the on-going democratic transition of Romania?

In the abstract, timing should not be an important factor in itself. After all, judicial review exists in the United States since 1803 and according to some it was the very product of judicial activism, while according to others the Supreme Court turned activist only once it started to challenge the New Deal, *id est* towards the beginning of the XXth century. And judicial activism proved relevant and even beneficial for democratic transitions elsewhere in Eastern Europe, particularly when practised during the early beginning of that transformative process. But then why did this not happen in Romania as well? The brief saga presented above seems to point not so much to causes internal to the Constitutional Court as towards external, political ones.[[131]](#footnote-131) When the political context became permissive, the Constitutional Court started to approach political questions more willingly and when relevant political actors supported it, the Constitutional Court turned activist. This is no proof of courage or European synchronisation as claimed by the Constitutional Court itself,[[132]](#footnote-132) not even a matter of import of foreign concepts or techniques. It is a mere 'collateral damage' of sharpening fights between main political actors, which created a vacuum of power that, in its turn, allowed judges to get in the front row of the scene. It is no coincidence that in-fights between the supreme court of the land and the Constitutional Court started only around 2008-2009, *id est* after the first time the President had been suspended by Parliament and before a new impeachment; given the vagaries of legitimately elected authorities judges considered their duty to step up-front and seize power. And since constitutional and regular judges could not reach an agreement over power-sharing between themselves, the entire political scene became a battlefield.

However, this may raise concerns with regard to the democratic transition. There are numerous ways in which incipient transitions differ from already consolidated ones; consequently judicial activism must be made relative to context. If political actors are still under construction, civil societies are weak and the complexity of a political, economic and moral transition is overwhelming, the protection of fundamental rights can only be ensured by a strong promoter of change such as constitutional courts proved to be in Hungary or Poland.[[133]](#footnote-133) But if the main elements of a democracy are already in place and they have barely started to articulate together, despite inherent difficulties, the 'counter-majoritarian' argument may have a role to play and an activist constitutional review may endanger whatever limited democratic *acquis* there could be, without even fully succeeding to protect fundamental rights.

In the peculiar context of nowadays Romania, with a delicate democratic consolidation still on-going, a constitutional review that grows robust so late in time may even be harmful to the transformative process already accomplished as it could bring back memories of past times when only one version of the truth was valid. Indeed, if the normative substance of the Constitution can no longer be internalised via debates among legitimate actors, be them young and inexperienced or weak and taking sides, the very pluralism that characterises democracy may be in danger. Moreover, those democratic actors will never have a chance to actually grasp the values protected by that Constitution and deal with them as daily practise as the rule of law is substantively requiring.

In addition, simply insisting with arguments of authority on only one interpretation of the Constitution will never equate with convincing based on reasoned and principled arguments that put under scrutiny all possible options. To take the example of the little story from the beginning, even if the Constitutional Court is trying to protect a value as fundamental as human dignity, it still has to explain why other equally fundamental rights as freedom of expression do not deserve careful consideration.

And finally, it pays no service to the rule of law if the Constitutional Court expands its jurisdiction beyond constitutional limits since, although the concept of rule of law is chameleonic and lacks a clear definition,[[134]](#footnote-134) it ultimately means that legal standards are to be taken seriously and not as having an indicative value, particularly for their official interpreter.

This is not to say that Romania is already an accomplished democracy or fully implements the rule of law, nor that constitutional review stands as a mere hindrance in the way of people's representatives. Like in many other places, in Romania as well Parliament is not necessarily a machine for developing intellectually complex theories that articulate values and evaluate various policies or their impact on fundamental rights; it is merely an assembly of people's representatives and interests, and “people are entitled to govern themselves whether or not they are wise, knowledgeable, prudent or virtuous”[[135]](#footnote-135). At the same time, constitutional judges are not wicked or filled with power greediness; they only try to do their job according to their understanding of their role and this may not always correspond to the Kelsenian theory as academics know it.[[136]](#footnote-136) But constitutional review can only be legitimate when it performs a corrective function for normative processes democratically accomplished and it stops being so when it attempts to replace them: "while courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements and it should not fall to the courts to fill in the details that will render legislative lacunae constitutional".[[137]](#footnote-137) In other words, judicial restraint and not judicial activism should characterise constitutional review if the instrument is to be evaluated against its output. This holds even more truth when a democratic consolidation is at stake.

## Conclusions

Trapped between political evolutions upon which it had no clout and lost in a transition which proved more difficult than others, the Romanian constitutional judge started by approaching political questions with lots of precautions and ended up in clumsy judicial activism. Instead of maintaining a position of neutral observer of the respect granted to democratic rules of government, it took sides in political battles. The burst during the summer of 2012 has been symptomatic for this evolution but it did not question any deeper the legitimacy of constitutional review in Romania.

Although constitutional review is not indispensable for democratic transitions, in most East European countries constitutional courts have been created. They have played an important - albeit sometimes mixed - role for the democratic transformation of their respective societies and for the protection of fundamental rights. Some of those constitutional courts have engaged on an activist stance early in the transition and thus paved the way for a thorough democratic consolidation based on fundamental values and standards developed in their case-law and later codified in Constitutions. Others have restrained themselves to merely enforcing the new Constitutions, which were considered the real and perceived as legitimate triggers of change.

In this context, the recently discovered judicial activism of the Romanian Constitutional Court comes as a bit of a surprise and raises questions with regard to its impact on the consolidation of the democratic transition apparently resembling what popular wisdom used to hold true for communism: 'in theory is seems good, but it is practise which kills it'.

1. *This work was supported by a grant of the Romanian Ministry of Education and Research, CNCS – UEFISCDI, project number PN-II-ID-PCE-2011-3-0115.*

   Through Law n°278/2006 for the revision of the Criminal Code, published in the Official Journal of Romania n°601/12 July 2006 articles pertaining to the criminal punishment of insult (art.205) and slander (art.206) have been simply taken off the law on the books despite the fact that they did not concern only journalists, but every possible form of insult and slander. [↑](#footnote-ref-1)
2. Dalban (ECHR, 25 September 1999) ; Constantinescu, (ECHR, 27 June 2000) ; Cumpănă & Mazăre, (ECHR, 17 December 2004) ; Sabou & Pârcălab, (ECHR, 28 September 2004) ; Boldea (ECHR, 15 February 2007) [↑](#footnote-ref-2)
3. Although in the Romanian legal system courts may also condemn a person to prison but suspend the execution of the penalty, in cases referring to insult and slander courts have systematically put offenders into prison and even added complementary penalties such as forbidding them from practising the profession that leaded to the crime (*id est* journalism) for a specific period of time. The ECHR constantly found that even more than legal standards, judicial practise of this type embodies a repressive attitude of Romanian authorities with regard to freedom of speech, particularly freedom of the press. [↑](#footnote-ref-3)
4. See the decision n°62/2007 of the Constitutional Court of Romania, published in the Official Journal of Romania on 12 February 2007, *id est* only 7 months after the coming into force of the decriminalising law. [↑](#footnote-ref-4)
5. One of the three claimants was herself a prosecutor and she complained in front of a regular court for slander only to discover that this type of conduct could no longer be punished according to criminal law. She then asked the court to formulate a preliminary request to the Constitutional Court in order to find out if such a decriminalisation fully respects human dignity and the right to free access to judicial remedies, as mentioned by article 1 and respectively 21 of the Romanian Constitution. The other two claimants referred to the *vacuum juris* created by this abrogation with regard to slanders in the media. [↑](#footnote-ref-5)
6. D.C.Dănişor, S.Răduleţu, *Competenţa Curţii Constituţionale. Insulta. Calomnia. Controlul normelor de abrogare*, Curierul judiciar n°3/2007, p.4-25. [↑](#footnote-ref-6)
7. E.S. Tănăsescu, *Insulta şi calomnia. Dezincriminare. Demnitate umană. Protecţia valorilor constituţionale. Abrogare parţială. Vid legislativ. Competenţa Curţii Constituţionale. Efectele deciziilor Curţii Constituţionale*, Curierul judiciar n°4/2007, p.1-14. Indeed, when Hans Kelsen concluded that constitutional courts could be given, under specific conditions, the possibility to invalidate a legal norm and infer that, for a limited period of time, previously existing legal standards could be brought back to life, he rather had in mind the technique generally used by the German Constitutional Tribunal consisting in an explicit request for legiferation towards Parliament in order to avoid a *vacuum juris*. See H.Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Wien am 23. Und 24. April 1928, Walter de Gruyter, Berlin und Leipzig, 1929, vol. 5, pp. 80-88. This author has great doubts that from the way in which that conclusion has been formulated by Hans Kelsen one could infer that constitutional courts can simply put back in force legal norms indefinitely. [↑](#footnote-ref-7)
8. According to article 147 of the Romanian Constitution any legal provision found unconstitutional ceases to exist within a delay of 45 days since it has been declared so by the Constitutional Court. During that period the unconstitutional provision is suspended (meaning it can no longer be enforced). [↑](#footnote-ref-8)
9. According to the law n°24/2000 referring to the legislative technique the abrogation of an abrogative act does not lead to the resurrection of the legal act initially abrogated but merely paves the way for a *vacuum juris*. Moreover, the law advices initiators of legal acts to avoid such situations. [↑](#footnote-ref-9)
10. B.Selejan-Guțan, *Spaţiul european al drepturilor omului,* Bucureşti, C.H.Beck, 2008, p. 139. [↑](#footnote-ref-10)
11. See particularly decisions of HCCJ n°3/2011 and n°11/2012. [↑](#footnote-ref-11)
12. According to article 146 of the Constitution, the Romanian Constitutional Court can adjudicate on initiatives for the revision of the Constitution, international treaties as ratified by Parliament, laws, delegated legislation, and standing orders of houses of Parliament and it has to solve legal conflicts of constitutional nature between public authorities, supervise the procedure for the election of the President and of circumstances that justify the vacancy/suspension of that office, supervise the procedure of and ascertain the results of referendums, supervise the procedure for popular legislative initiatives, decide on the constitutionality of political parties. [↑](#footnote-ref-12)
13. For a severe critique of this mere fact see R.Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, Fordham Law Review, vol. 75 (2006-2007), p.721-753. For a comment see T.Ginsburg, *Judicialization of Administrative Governance: Causes, Consequences and Limits*, National Taiwan University Law Review, vol.3 (2008), p.1-29. [↑](#footnote-ref-13)
14. In a premonitory analysis Gerhard Caspar wrote, already in 1991, that in Eastern Europe “Every social issue will become a constitutional issue, and law and its oracles will be severely overtaxed. It will also create the potential for constitutional disappointments on the part of those who will come to believe that constitutional promises have been breached.” (See G.Caspar, *European Convergence*, University of Chicago Law Review, vol.58 (1991), p.445). For the role that constitutional courts were expected to play during the democratic transitions in Eastern Europe also see Z.Kuhn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, American Journal of Comparative Law, vol.52 (2004), p.530-567. It is though interesting that while Caspar considers that democratic transitions in Eastern Europe will be facilitated by the fact that models to be followed (meaning West European examples of constitutions, rule of law, protection of fundamental rights, etc.) are congenial to them “because underlying them is a concept of the state and its role that goes back all the way to the late eighteenth century”, Kuhn argues that it is precisely the fact that judges in Eastern Europe were left with theories and concepts of the nineteenth century they cannot be trusted for fomenting or even efficiently supporting the transitions and that is the reason why constitutional courts need to lead the way. [↑](#footnote-ref-14)
15. A.Hamilton famously argued that “in a government in which they [powers] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution because it will be the least in a capacity to annoy or injure them”. See J.Madison, A.Hamilton, J.Lay, *The Federalism Papers*, n°78, Penguin Books, 1987, p.437 or <http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0078> (last visited 28.03.214). [↑](#footnote-ref-15)
16. See H.Kelsen, *op.cit.*, p.85; M.Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Judicial Review*, Catholic Law Review, vol.35 (1985-1986), p.4. [↑](#footnote-ref-16)
17. A.Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Bobs-Merrill Company, 1962, (Vail-Balou Press, 1986). [↑](#footnote-ref-17)
18. See M.Tushnet, *Taking the Constitution Away from Courts*, Princeton University Press, Princeton, New Jerrsey, 1999; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press, 2004 ; R.Hirschl, *loc.cit.,* p.721-753; M.Tushnet, *Political Power and Judicial Power: Some Observations on their Relation*, Fordham Law Review, vol. 75 (2006-2007), p.755-768; J.Waldron, *The Core of the Case Against Judicial Review*, The Yale Law Journal, vol.115 (2006), p.1346-1406. [↑](#footnote-ref-18)
19. Used for the first time in the ’70 in the Hispanic context in order to describe the transition from authoritarian military regimes to civil democratic ones, the term ‘democratic transition’ has been coined on various other changes once events started to unfold in Latin America, South-East Asia and Eastern Europe towards the end of ’80 and beginning of ’90, and in North Africa towards 2010. [↑](#footnote-ref-19)
20. For a discussion of the concept see J.J.Linz & A.Stepan, *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe*, John Hopkins University Press, Baltimore and London, 1996. For a critique see <http://www.ce-review.org/00/10/tokes10.html> (last visited 1.09.2013) [↑](#footnote-ref-20)
21. V. Bunce, *Should Transitologists Be Grounded?*, Slavic Review, vol.54, Spring 1995, p. 111; J.Elster, C.Offe, U.K.Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*, Cambridge University Press, Cambridge, 1998; A.Czarnota, M.Krygier, W.Sadurski, *Rethinking the Rule of Law after Communism*, Central European University Press, Budapest, New York, 2005. [↑](#footnote-ref-21)
22. C.Gouaud, *Recherches sur le phénomène de transition démocratique,* Revue de Droit Public et de science politique en France et à l’étranger vol.107 (1991), p.37. [↑](#footnote-ref-22)
23. A.Lijphart & C.H. Waisman, *Institutional Design in New Democracies. Eastern*, *Europe and Latin America,* Westview Press, Boulder, 1996; S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1991. [↑](#footnote-ref-23)
24. According to the Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary session, <http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx> (last visited 28.03.2014) and to the Opinion on the fourth amendment to the fundamental law of Hungary adopted by the Venice Commission at its 95th Plenary Session, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e> (last visited 28.03.2014) [↑](#footnote-ref-24)
25. See D.Robertson, *Judge as Political Theorist: - Contemporary Constitutional Review*, Princeton University Press, 2010, p.5; A.Lever, *Democracy and judicial review – are they really incompatible*, Perspectives on politics, vol.7, December 2009, p.805 – 822. [↑](#footnote-ref-25)
26. A mere comparison between initial developments of the Italian and the German Constitutional Courts is illustrative, although they were created at roughly the same time and in similar historical contexts. [↑](#footnote-ref-26)
27. According to Mauro Cappelletti, unlike judicial review, which is performed in a decentralised way by all ordinary courts - as in US - constitutional review refers to the review of legislation as performed in a centralised way by special courts, created specifically for this purpose –like in most of the European countries. See M.Cappelletti, *Judicial Review in Comparative perspective*, *op.cit.*, p.1033 et seq. [↑](#footnote-ref-27)
28. Unlike in Eastern Asia, cf. T.Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, New York, 2003. See also J.Ferejohn, *Constitutional Review in the Global Context*, Legislation and Public Policy vol.6 (2002), p.49. [↑](#footnote-ref-28)
29. One has to acknowledge the important role that the European Commission for Democracy through Law (also known as 'Venice Commission') has played in the uniform implementation of this feature. According to its own presentation, its role consists in providing legal advice to “states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law” and providing “emergency constitutional aid to states in transition”. See <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation> (last visited 28.03.2014) [↑](#footnote-ref-29)
30. In his seminal book *Legal Transplants: An Approach to Comparative Law* (first edition Scottish Academic Press, Edinburgh, 1974; second edition, The University of Georgia Press, Athens and London, 1993) Alan Watson claimed that a legal transplant is simply “moving a rule from one country to another or from one people to another” and that a change in the law is independent from the “social, historical or cultural substrata” of the recipient society up to the level where it does not impinge in any way upon the “transplantability” of rules. For a contrary opinion see P. Legrand, *The Impossibility of Legal Transplants*, Mastricht Journal of European and Comparative Law, vol. 4, Issue 2, 1997, p. 111-124. [↑](#footnote-ref-30)
31. According to Claus Offe the design of new institutions in Eastern Europe has deliberately been presented as merely an imitation of successful models developed in the West. See C.Offe, *Designing Institutions in East European Transitions*, in R.E.Goodin, *The Theory of Institutional Design*, Cambridge University Press, Cambridge, 1996, p.213. Also see, Gerhard Caspar (*European Convergence*, University of Chicago Law Review, vol.58 (1991), p.444) who simply declared “My thesis is a simple one: on the whole, Eastern Europe will follow Western Europe.” [↑](#footnote-ref-31)
32. According to Jon Elster “One hope for the constitution-making process [in Eastern Europe] is that the European Community, the Council of Europe, and the Conference on Security and Cooperation in Europe will exercise a salutary constraining influence.” See J.Elster, *Constitutionalism in Eastern Europe: an Introduction*, University of Chicago Law Review, vol.58 (1991), p.481. According to Gerhard Caspar (*loc.cit.*, p.444), East Europeans were to follow West European models because they found “this path pragmatically desirable and because of their aspirations to join the Council of Europe and the EU”. [↑](#footnote-ref-32)
33. This is not to say that traditions did not play any role at all; on the contrary, a blending of borrowing and revalorisation of past experiences could be noticed all across Eastern Europe. See Jon Elster, *loc.cit.*, p.449, J.Přibáň, *Dissidents of Law*, Ashgate Publishing, Aldershot, 2002, p. 88–119. [↑](#footnote-ref-33)
34. E.S.Tănăsescu, *La juridiction constitutionnelle, gardienne des droits dans la transition démocratique*, <http://www.venice.coe.int/files/2012_03_29_MAR/2012_03_29_MAR_Marrakech_atelier_interculturel.asp> (last visited 28.03.2014) [↑](#footnote-ref-34)
35. M.F. Brzezinski & L.Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a* Rechtstaat*?*, Stanford Journal of International Law, vol.35 (1995), p.13-59. [↑](#footnote-ref-35)
36. K.L. Scheppelle, *Democracy by Judiciary. Or why Courts Can Be More Democratic than Parliaments*, in A.Czarnota, M.Krygier, W.Sadurski, *op.cit.,* p.39-54. [↑](#footnote-ref-36)
37. H.Kelsen, *La garantie juridictionnelle de la Constitution (la justice constitutionnelle)*, RDP, vol.35 (1928), p.197-259 ; H.Kelsen, *Judicial Review of Legislation : A Comparative Study on the Austrian and the American Constitution*, The Journal of Politics, vol.4 (1942), p.183-200. [↑](#footnote-ref-37)
38. The main concern of Hans Kelsen (*loc.cit.)* has been the legitimacy of the constitutional court, which he grounded in the constitution. This implied the need to democratically legitimize the constitution, particularly if the fundamental law was to be considered binding for the democratically elected Parliament. So he created a system where constitutional court and parliament are equally legitimized by the *pouvoir constituant*. A constitutional court that lays the foundations for a future *pouvoir constituant* is an obvious contradiction of the classical theory and raises sharply the question of its own democratic legitimacy. [↑](#footnote-ref-38)
39. According to Kim Lane Schapelle’s Testimony on the 19th of March 2013 in front of the US Commission on Security and Cooperation in Europe in the hearing “The Trajectory of Democracy – Why Hungary Matters”, available at <http://hungarianspectrum.wordpress.com/2013/03/19/kim-lane-scheppeles-testimony-at-the-helsinki-commission-hearing-on-hungary-full-text/> (last visited 28.03.2014) Also see the Opinions expressed by the Venice Commission between 2011 and 2013 with respect to the frequent constitutional, legislative and institutional changes in Hungary <http://www.venice.coe.int/WebForms/documents/by_opinion.aspx> (last visited 28.03.2014) [↑](#footnote-ref-39)
40. "The moment and the way in which a new Constitution is adopted matters a lot for the perceived legitimacy of future institutions.", J.Elster, *op.cit.*, p.472. [↑](#footnote-ref-40)
41. The strong parliamentary support that the Romanian President enjoyed immediately after the elections of December 2004 was eroded at the beginning of his second term (2009-2014) and diminished abruptly towards the beginning of 2012. This led to the deposition of the mandate on the 9th of February 2012 by a Government which was highly favourable to the President. A second Prime Minister proposed by the President and selected among political forces that supported him in Parliament lasted only until the 27th of April 2012, when a motion of censure forced the President to deal with what was increasingly looking as a new majority in Parliament. Finally, on the 7th of May 2012, the President had to resolve and appoint as Prime Minister the leader of a political party which had been in opposition during the last two parliamentary mandates (2004-2008-2012). [↑](#footnote-ref-41)
42. During early 2012, an attempt to make coincide local elections with parliamentary elections has been struck down by the Constitutional Court (decision n°51/2012) because it would have prolonged the mandate of local authorities beyond the limits provided by the Constitution. [↑](#footnote-ref-42)
43. In decision n°683/2012 (adopted with 5 votes against 4, and containing 3 separate opinions out of which one was in fact concurrent) the Constitutional Court declared that a legal conflict of constitutional nature did occur between the President and the Prime Minister, who both wanted to attend the European Council of June 2012, and it could only be solved if the President agreed to give a constitutional mandate to the Prime Minister to lawfully represent Romania in that specific case. Through decision n°784/2012 the Constitutional Court invalidated a law which attempted to regulate the delicate issue of Romania’s representation to European Councils because it shifted the power to decide upon this matter from the President to Parliament (as equally legitimate authorities since both are directly elected by the people). [↑](#footnote-ref-43)
44. In decision n°731/2012 the Constitutional Court declared unconstitutional a law that attempted to make possible the validation of referenda based on a participation quorum equal to the simple majority of votes expressed. [↑](#footnote-ref-44)
45. In decision n°727/2012 the Constitutional Court ruled that a revision of its own organic law that would end up in removing one of its attributions, namely the only one provided by the law and not by the Constitution, would be unconstitutional as contrary to the principle of the state governed by the rule of law. More specifically, the CCR ruled that the constitutional review of decisions adopted by Parliament (which had been appended by the legislator as a new attribution of the Constitutional Court in 2010) cannot be eliminated from the jurisdiction of the Court irrespective of the nature (legal or political) or content (normative or individual) of parliamentary decisions thus reviewed. [↑](#footnote-ref-45)
46. In decision n°783/2012 the Constitutional Court invalidated nominations made by MPs for the Council of Administration of the national television and decided to review all decisions adopted by Parliament but according to different referentials, namely parliamentary decisions which pertain to values and norms of constitutional ranking can only be reviewed against the high standard of the Constitution itself, while those pertaining to public authorities mentioned in the Constitution can be reviewed against legal standards of the Constitution and other relevant laws. [↑](#footnote-ref-46)
47. A. Levasseur, *Legitimacy of Judges*, The American Journal of Comparative Law, vol. 50 (2002), p.43-85. [↑](#footnote-ref-47)
48. See the “unstaged debate of 1788 between Robert Yates and Alexander Hamilton” cf. A.T.Mason, D.G.Stephenson, *American Constitutional Law – Introductory Essays and Selected Cases*, 11th edition, Prentice Hall, 1996, cases n°59-61. [↑](#footnote-ref-48)
49. For recent analysis in favour of the legitimacy of judicial review see C.L.Eisgrubber, Constitutional Self-Government, Harvard University Press, Harvard, 2001; Y.Eylon, A.Harel, *The Right to Judicial Review*, Virginia Law Review, vol.92 (2006), p.1-43; C.Brettschneider, *Democratic rights and the Substance of Self-Government*, Princeton University Press, Princeton, 2007. For recent arguments against see M.Tushnet, *Taking the Constitution Away from Courts*, Princeton University Press, Princeton, New Jerrsey, 1999; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press, 2004; M.Tushnet, *Political Power and Judicial Power: Some Observations on their Relation*, Fordham Law Review, vol. 75 (2006-2007), p.755-768; J.Waldron, *The Core of the Case Against Judicial Review*, The Yale Law Journal, vol.115 (2006), p.1346-1406. [↑](#footnote-ref-49)
50. H.Kelsen, *La garantie juridictionnelle de la Constitution (la justice constitutionnelle)*, RDP, vol.35 (1928), p.197-259 ; H.Kelsen, *Judicial Review of Legislation : A Comparative Study on the Austrian and the American Constitution*, The Journal of Politics, vol.4 (1942), p.183-200. [↑](#footnote-ref-50)
51. H.Kelsen, *Judicial Review of Legislation*, *loc.cit.*, p.200. [↑](#footnote-ref-51)
52. See, among others, A.S.Stone, *Governing with Judges,* Oxford University Press, 2000. [↑](#footnote-ref-52)
53. See M.Cappelletti, *The “Mighty Problem” of Judicial Review and the Contribution of Comparative Analysis*, California Law Review, vol.53 (1979-1980), p.409-445; A.Lever, *op.cit.*, p.805 – 822; D.Robertson, *Judge as Political Theorist: - Contemporary Constitutional Review*, Princeton University Press, 2010. [↑](#footnote-ref-53)
54. For the particular situation of Eastern Europe see, among others, Mark F. Brzezinski & Leszek Garlicki, *op.cit.*, p.13-59; W.Sadurski, *Constitutional Justice East and West: Democratic Legitimacy and Constitutional Court in Post-Communist Europe in a Comparative Perspective*, Kluwer Law International, 2002; Z.Kuhn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, American Journal of Comparative Law, vol.52 (2004), p.530-567; A.Czarnota, M.Krygier,W.Sadurski (eds.), *op.cit.*, 2005. [↑](#footnote-ref-54)
55. T.Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, New York, 2003, p.261-262. [↑](#footnote-ref-55)
56. In this context activism refers to the readiness of judges to invalidate decisions taken by other legitimate actors in order to enforce their own vision of the Constitution. This approach of activism is opposed to restraint and involves no evaluation of the positive or negative character thereof. [↑](#footnote-ref-56)
57. For the definition of juristocracy as "transfer to the courts of matters of an outright political nature and significance including core regime legitimacy and collective identity questions that define (and often divide) whole polities” see R.Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, Fordham Law Review, vol.75 (2006-2007), p.723. [↑](#footnote-ref-57)
58. See Z.Kuhn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, American Journal of Comparative Law, vol.52 (2004), p.530-567. [↑](#footnote-ref-58)
59. A.Zegrean, T.Toader, *La Cour Constitutionnelle de Roumanie*, Les nouveaux Cahiers du Conseil Constitutionnel n°38/2013, p.259. [↑](#footnote-ref-59)
60. M.Safta, *Developments in the Constitutional Review: Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator*, Perspectives of Business Law Journal vol. I (2012), p.1-17. [↑](#footnote-ref-60)
61. The European Commission expressed worries with regard to the authority and scope of the Romanian Constitutional Court in its eleventh Report to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2012) 410 final, 18.7.2012) while Venice Commission voiced concerns regarding pressures put on the Romanian Constitutional Court, <http://www.venice.coe.int/webforms/events/?id=1544> (last visited on 28.03.2014) [↑](#footnote-ref-61)
62. M.Cappelletti, *The “Mighty Problem” of Judicial Review and the Contribution of Comparative Analysis*, California Law Review, *op.cit.*, p.409-445. [↑](#footnote-ref-62)
63. Jon Elster even considered that there was “a general impression that Romania forms the rear guard in the transition towards democracy and that a ‘second transition’ may be needed”. See J.Elster, *Constitutionalism in Eastern Europe: an Introduction*, University of Chicago Law Review, vol.58 (1991), p.463. [↑](#footnote-ref-63)
64. E.S.Tănăsescu, *L’élaboration de la Constitution dans le processus de la démocratisation*, Revue turque de droit constitutionnel, vol.1 (2012), p.475-492. [↑](#footnote-ref-64)
65. B. Selejan-Guțan, *Transitional Constitutionalism and Transitional Justice in Post-Communist States - The Romanian Case*, Romanian Journal of Comparative Law vol.1 (2010) , p.286. [↑](#footnote-ref-65)
66. One of the indicators that doubts still persist with regard to the soundness of the democratic transition in Romania is the mere existence of the European Commission's Mechanism for Cooperation and Verification assessing on-going progress. See <http://ec.europa.eu/cvm/> [↑](#footnote-ref-66)
67. Gaston Jèze, *Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l’occasion des procès portés devant eux*, Revue de Droit Public et de science politique en France et à l’étranger, tome XIX (1912), p.140. At footnote n°1 of this contribution mention is made of a *Mémoire sur le caractère inconstitutionnel de la loi roumaine du 18 décembre 1911, relative à la Société communale des tramways de Bucarest* that several French law professors (« *Messieurs Henri Bathélemy et Gaston Jèze, professeurs à la Faculté de droit de l’Université de Paris, avec l’adhésion de MM. P.Beauregard, A.Esmein, F.Larnaude, A.Pillet, A.Colin, A.Wahl, N.Politis, tous professeurs à la Faculté de droit de Paris* ») have put with the local court of Bucharest arguing in favour of judicial review. [↑](#footnote-ref-67)
68. E.S.Tănăsescu, *L’exception d’inconstitutionnalité qui ne dit pas son nom ou la nouvelle sémantique constitutionnelle roumaine*, Revue internationale de droit comparé, n°4/2013, p.905-939. [↑](#footnote-ref-68)
69. Qualified as "super-parliament" or "the fourth power in the state". See, \*\*\*, *Geneza Constituției României*, Regia Autonomă "Monitorul Oficial", București, 1999, p.954-876. [↑](#footnote-ref-69)
70. An ex-president of the supreme court of the land was justifying the preference of the Romanian judicial system for judicial review in the following terms : "Case-law has the power of prestige and not the prestige of power. The supreme court of the land considered itself able to adjudicate on the constitutionality of law on the basis of two principles : the supremacy of the Constitution and the separation of powers. The fundamental law declared that courts have the jurisdiction to resolve controversies and no other legal norm forbids the judicial power to review legislation. *Per a contrario*, the judicial system can only prove itself useful by doing so." (See Teofil Pop, *Rolul practicii judiciare a Curţii Supreme de Justiţie în consolidarea statului de drept,* Studii de drept românesc n°3-4/1992, p.27 [↑](#footnote-ref-70)
71. M.Criste, *Un contrôle juridictionnel des lois en Roumanie ?*, Revue Française de Droit Constitutionnel n°8/1992, p.179 et s. [↑](#footnote-ref-71)
72. See article 144 of the Constitution in its version before the revision of 2003. [↑](#footnote-ref-72)
73. Already in 1929 Hans Kelsen was advising that constitutional courts should have jurisdiction over law and delegated legislation, as well as any other legal act (individual acts of Parliament included) which can be directly connected to the Constitution, but not on: (i) treaties due to difficulties which may arise on the international arena, (ii) administrative acts in order to avoid overlapping with administrative review, and (iii) judicial acts due to their individual character. See H.Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, *op.cit.*, p.86. The jurisdiction of the Romanian Constitutional Court is limited, generally speaking, to acts of *réglementation primaire* (see article 146 of the Constitution). [↑](#footnote-ref-73)
74. According to article 145 of the Constitution in its original version, in case a law would be found unconstitutional in an *a priori* review "the law shall be returned to Parliament for reconsideration. If the law is passed again in the same wording by a majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality shall be removed and promulgation thereof shall be binding". [↑](#footnote-ref-74)
75. Upon the first revision of the Constitution, in 2003, that specific provision of article 145 has been repealed. [↑](#footnote-ref-75)
76. Decision n°6/1992 stopped the Parliament from regulating facts which were already examined by courts with regard to the situation of real estate nationalised by the communist regime. [↑](#footnote-ref-76)
77. Decision n°75/1994 and decision n°139/1994 stopped the Government from adopting delegated legislation with the same normative substance as laws previously declared unconstitutional by the Court. [↑](#footnote-ref-77)
78. Decision n°19/1995 declared unconstitutional a law which was meant to increase the revenues of individual MPs through an extensive interpretation of statutory provisions, while decision n°6/1996 found that in order to benefit of increased revenues which translate into additional expenditure for the state budget MPs have to foresee the additional revenues that would allow for it, in accordance with the Constitution. [↑](#footnote-ref-78)
79. Decision n°70/1999 found that, according to the Constitution, the President may initiate a referendum either before taking certain measures or after, and that he cannot be limited to organise such a popular consultation only in order to test the will of the people prior to a decision-making process. [↑](#footnote-ref-79)
80. E.S.Tănăsescu, *Roumanie – un système judiciaire entre formalisme excessif et excès de pouvoir*, in G.Vrabie, *Le pouvoir judiciaire*, Institutul European, Iasi, 2011, p.89-104. [↑](#footnote-ref-80)
81. The principle of equality, in its double function of overarching value of democracy and fundamental right, has been one of the most important tools for accomplishing this task. See E.S.Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck, 1999, București. [↑](#footnote-ref-81)
82. Such as the right to a differential treatment (positive discrimination) which has been deduced on the basis of the principle of equality (decisions n°107/1995 and n°27/1996) or the right of a person to answer in the press to allegations concerning her or him previously published by the same media which has been deduced on the basis of the constitutional protection of human dignity and the freedom of expression (decisions n°8/1996, n°55/1996, n°394/1997, n°132/1998, n°177/2000) [↑](#footnote-ref-82)
83. Between 1992 and 2004, out of 28 decisions of unconstitutionality ruled in *a priori* review in no less than 16 cases the Court struggled to find an interpretation that would allow for the law to come into force albeit with some limitations. [↑](#footnote-ref-83)
84. Confronted with inconsistencies in its own case-law the Constitutional Court dared once in 1993, twice in 1994 and three times in 1995 to gather its Plenum and adopt rulings with general binding force despite the fact that such a procedure was not specifically mentioned in its internal regulation (organic law n°47/1992). [↑](#footnote-ref-84)
85. Decision n°38/1993 prolonged with three months the validity of an unconstitutional provision of the Criminal Code in order to avoid a *vacuum juris* and allow Parliament to take appropriate legislative measures. Decision n°1/1993 of the Plenum of the Constitutional Court has been adopted as a consequence of inconsistencies in the case law of the Constitutional Court with regard to that specific provision of the Criminal Code. [↑](#footnote-ref-85)
86. Ruling n°1/1996 confirmed it. [↑](#footnote-ref-86)
87. Decision n°63/1997 established that with a new mandate an MP gets a new immunity and thus criminal investigations started under the previous mandate need to be refreshed with a new application for the withdrawal of that new immunity. [↑](#footnote-ref-87)
88. B.Iancu, *Constitutionalism in Perpetual Transition: The Case of Romania*, in B.Iancu, The Law/Politics Distinction in Contemporary Public Law Adjudication, Eleven International Publishing, Utrecht, 2009, p.187. [↑](#footnote-ref-88)
89. G.Caspar, *op.cit.*, p.445: “Every social issue will become a constitutional issue, and law and its oracles will be severely overtaxed. It will also create the potential for constitutional disappointments on the part of those who will come to believe that constitutional promises have been breached.” Also see R.Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, Fordham Law Review, vol.75 (2006-2007), p.722. [↑](#footnote-ref-89)
90. On the "collateral damages" of rule of law see W.Leisner, "L'Etat de droit - une contradiction ?", *Mélanges Eisenmann*, Cujas, Paris, 1975, p.65. [↑](#footnote-ref-90)
91. Currently, article 146 of the revised Constitution provides that the Romanian Constitutional Court can rule upon initiatives for the revision of the Constitution, international treaties as ratified by Parliament, laws, delegated legislation, and standing orders of houses of Parliament and can solve legal conflicts of constitutional nature between public authorities; supervise the procedure for the election of the President and of circumstances that justify the vacancy/suspension of that office; supervise the procedure of and ascertain the results of referendums; supervise the procedure for popular legislative initiatives; decide on the constitutionality of political parties. [↑](#footnote-ref-91)
92. Who was right in asking "What does “conflict of a (legal) constitutional nature between the public authorities” mean? It may, of course, mean, first of all, positive or negative conflicts relating to powers in a specific case. However, the proposed text goes further. It appears to embrace all conflicts between the public authorities concerning the interpretation and application of the Constitution in a specific situation. The concept of “conflict” remains to be defined". See <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)004-e>, p.11. (last visited 28.03.2014) [↑](#footnote-ref-92)
93. Constitutional provision which reminds art.93(3) of the German Fundamental Law: "The Federal Constitutional Court also acts in such other cases as are assigned to it by federal legislation." [↑](#footnote-ref-93)
94. See article 148 of the Constitution in its version prior to the revision of 2003. [↑](#footnote-ref-94)
95. Law n°177/2010 for the revision of law n°47/1992, of the Civil Procedural Code and of the Criminal Procedural Code, published in Official Journal n°672/2010. [↑](#footnote-ref-95)
96. It worth to be noted that although initially wanted by political forces opposing President, as the composition of the Constitutional Court seemed favourable to them back in 2007-2008, the expansion of the Court’s jurisdictions in 2010 proved beneficial to the President due to the fact that meanwhile he, together with the parliamentary parties supporting him, had managed to appoint four out of the nine constitutional judges. [↑](#footnote-ref-96)
97. See detailed provisions of article 95 of the Constitution. It worth mentioning here that the Romanian Constitutions has a separate provision (article 96) for the criminal liability of the President, which requires a much more intensively judicialised procedure. [↑](#footnote-ref-97)
98. Also see E.S.Tănăsescu, *The President of Romania, or the Slippery Slope of a Political System*, European Constitutional Law Review, vol.4 (2008), p.64-97. [↑](#footnote-ref-98)
99. But not in 1994, when a negative opinion of the Constitutional Court stopped an impeachment against the President then in office. Also see advisory opinion n°1/1994, advisory opinion n°1/2007, advisory opinion n°1/2012. [↑](#footnote-ref-99)
100. Also see E.S.Tănăsescu, *Suspension du Président de la Roumanie*, Constitutions, n°4/2012, p.550-557. [↑](#footnote-ref-100)
101. In its advisory opinion n°1/2012 the Constitutional Court found that the Romanian President had indeed initiated “*conflicts with other participants to the political life*” which could be solved and that “*for his declarations, which are political opinions, he remains responsible, from a political and moral point of view, in front of the electorate and the civil society*”, but that against him can be hold the fact that he “*has not exercised with maximum efficiency the mediation function between powers of the state and between the state and the society*”. [↑](#footnote-ref-101)
102. See decision n°727/2012 *supra* footnote n°45. [↑](#footnote-ref-102)
103. The envisaged change to the organic law of the Constitutional Court had been promoted through an act of delegated legislation, contrary to article 115 of the Constitution which forbids for emergency ordinances to be adopted in “areas reserved to constitutional laws or to affect the status of fundamental institutions of the state, freedoms and duties stipulated in the Constitution or electoral rights”. [↑](#footnote-ref-103)
104. It merely appended "*and decisions of the Plenum of the House of Deputies and decision of the Plenum of Senate and decisions of the Plenum of houses in common seating*" to the legal provision stating that "*the Constitutional Court adjudicates the constitutionality of standing orders of Parliament upon notification from one of the Presidents of houses of Parliament, a parliamentary group or at least 50 deputies or 25 senators*." [↑](#footnote-ref-104)
105. In decisions n°53/2011 and n°54/2011 the Court ended up invalidating nominations made by MPs to the Superior Council of Magistracy although, in separate opinions to both decisions, three judges have tried to draw a distinction between political and normative parliamentary decisions, and among these last ones between those referring to individual persons and normative ones, arguing that only the later can be subject to constitutional review. No longer taking the same precautions, in the years to come the Court simply invalidated several parliamentary decisions of political nature or void of normative substance: decision n°667/2011 invalidated a memorandum of understanding between parliamentary groups on the composition of the standing bureaus of the Houses of Parliament, decision n°1630/2011 invalidated an agreement with regard to the legal regime of a specific senator, decision n°1631/2011 invalidated the election of the President of the Senate; decision n°209/2012 invalidated the vote of no confidence granted to Government, decision n°307/2012 invalidated the nominations made by MPs for the National Council of Audiovisual. [↑](#footnote-ref-105)
106. In decision n°732/2012 the Court ruled it cannot invalidate a parliamentary decision which bears effects with regard to a specific person (nomination or dismissal in a public office). [↑](#footnote-ref-106)
107. See decision n°783/2012 *supra* footnote n°46. [↑](#footnote-ref-107)
108. I.Muraru, A.Muraru, *Un siècle de contrôle de constitutionnalité en Roumanie*, EstEuropa, numéro spécial 2013, p.49-50 [↑](#footnote-ref-108)
109. See *Opinion on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other state institutions and on the Government emergency ordinance on amendment to the law n°47/1992 regarding the organisation and functioning of the Constitutional Court on the Government emergency ordinance on amending and completing the law n°3/2000 regarding the organisation of a referendum of Romania*, adopted by the Venice Commission at its 93rd Plenary Session on 14-15 December 2012, <http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD%282012%29026-e> , p.7 [↑](#footnote-ref-109)
110. *Ibidem*. [↑](#footnote-ref-110)
111. "Neither a constitutional framework that is conducive to judicial activism, nor a nondeferential, power-hungry constitutional court forms a sufficient condition for expansion of judicial power or the judicialisation of mega politics.[...] Political choices and interests are crucial factors in explaining the origins of constitutionalisation and judicial empowerment". R.Hirschl, *Towards Juristocracy*, *op.cit.*, p.12. [↑](#footnote-ref-111)
112. “In my opinion, it is more a political decision, than legal and constitutional” declared the president of Democratic Party, Emil Boc, who is also professor of constitutional law at a public university in Cluj Napoca. <http://www.bbc.co.uk/romanian/news/story/2005/07/050706_reactii_curte.shtml> (last visited 1.09.2013) [↑](#footnote-ref-112)
113. Cătălin Avramescu, *Desfiinţarea Curţii Constituţionale* (*Dismantling the Constitutional Court*), in the daily newspaper *Cotidianul* of 4.10.2005. [↑](#footnote-ref-113)
114. In fact, the political context was more complicated, with collateral evolutions and political intentions of a much bigger scale and involving a huge number of actors. The political storm was just another attempt to force anticipated elections into a political regime which had barred them on purpose, in order to avoid political instability known in Romania particularly between the two World Wars. It also was a desperate attempt to get a comfortable if any majority in Parliament for a President who knew he would have a hard time if he was to base all his future (political) actions on the volatile majority then existing, faced with a numerically strong opposition. [↑](#footnote-ref-114)
115. Previously the Court had resorted to procedural innovations in order to ensure the consistency of its case-law. See *supra* notes n°83-85. [↑](#footnote-ref-115)
116. B.Selejan-Guțan, *Transitional Constitutionalism and Transitional Justice in Post-Communist States - The Romanian Case*, Romanian Journal of Comparative Law vol.1 (2010) , p.303. [↑](#footnote-ref-116)
117. E.S.Tănăsescu, *Cour Constitutionnelle et système judiciaire: des rapports de force?*, Analele Universităţii din Bucureşti - Drept, n°2/2012, p.240-251. [↑](#footnote-ref-117)
118. Through the revision of the organic law n°47/1992 pertaining to the Constitutional Court through law n°177/2010. [↑](#footnote-ref-118)
119. See, among others, decision n°38/1993 and decision n°186/1999. [↑](#footnote-ref-119)
120. B. Iancu, *Separation of powers and the Rule of Law in Romania - The Crisis in Concepts and Contexts*, A. von Bogdandy, P.Sonnevend, Constitutional Crisis in the European Constitutional Area - Theory, Law and Politics in Hungary and Romania (*forthcoming 2014*) The author concludes that in the specific Romanian context as displayed during the summer of 2012 "an increase in the power of the constitutional tribunal is not necessarily conducive to the juridical integration and normalisation of the political order". [↑](#footnote-ref-120)
121. J.J.Rousseau, *Le contrat social*, Egloff, Paris, 1946, p72. [↑](#footnote-ref-121)
122. Decision n°975/2010 dealt with a situation where Parliament attempted to take advantage of the re-examination of a law which occurred due to an *a priori* review of constitutionality and generally improve the content of that piece of legislation while also taking on board the arguments developed by the Court. [↑](#footnote-ref-122)
123. The fight however seems to be limited to the only year 2009 as only decisions n°303/2009, n°458/2009 and n°1629/2009 mention that excessive formalism is not a consequence but an infringement of the rule of law. [↑](#footnote-ref-123)
124. The Constitutional Court ruled that the invalidation of abrogative laws simply brings back to life the legal act which had been abrogated in decisions n°783/2009, n°124/2010, n°41/2010 and n°1039/2012. [↑](#footnote-ref-124)
125. When Hans Kelsen concluded that constitutional courts could be given, under specific conditions, the possibility to invalidate a legal norm and inferred that, for *a limited period of time*, previously existing legal standards could be brought back to life, he rather had in mind the technique generally used by the German Constitutional Tribunal consisting in an explicit call to Parliament for an immediate legislative action in order to avoid a *vacuum juris*. See H.Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, *op.cit.*, pp.80-88. [↑](#footnote-ref-125)
126. R.Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, Fordham Law Review, vol.75 (2006-2007), p.721-753. [↑](#footnote-ref-126)
127. Let us remember here that - in this context – judicial activism refers to the propensity of a judge to invalidate decisions taken by other legitimate actors in order to enforce their own vision of the Constitution, with no implied judgment as to whether the activist stance is correct or not. This approach of activism is a mere antonym of restraint. [↑](#footnote-ref-127)
128. A.Zegrean, T.Toader, *La Cour Constitutionnelle de Roumanie*, Les nouveaux Cahiers du Conseil Constitutionnel n°38/2013, p.259. [↑](#footnote-ref-128)
129. M.Safta, *Developments in the Constitutional Review: Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator*, Perspectives of Business Law Journal vol.I (2012), p.1-17. [↑](#footnote-ref-129)
130. M.Safta, *op.cit.*, p.1. [↑](#footnote-ref-130)
131. R.Hirschl, *Towards Juristocracy*, op.cit., p.12. [↑](#footnote-ref-131)
132. A.Zegrean, T.Toader, *La Cour Constitutionnelle de Roumanie*, Les nouveaux Cahiers du Conseil Constitutionnel n°38/2013, p.259. [↑](#footnote-ref-132)
133. For a different opinion, claiming that, overall, the record of constitutional courts as far as their contribution to the consolidation of democracy is concerned is "rather mixed" and one should avoid both unrestrained enthsiasm and radical criticism, see W.Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in A.Czarnota, M.Krygier, W.Sadurski, *op.cit.*, p.16. [↑](#footnote-ref-133)
134. R. Grote, *Rule of Law, Rechtsstaat and État de Droit*, in C.Starck, *Constitutionalism, Universalism and Democracy: a Comparative Analysis*, Nomos Verlag, Baden-Baden, 1999, p. 269 *et seq* . [↑](#footnote-ref-134)
135. A.Lever, *op.cit.*, p.83. [↑](#footnote-ref-135)
136. See H.Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, *op.cit.*, particularly p.85 where he insisted upon the fact that constitutional judges should act as a collegial body, without any political parties' influence whatsoever, while their selection should take into account their knowledge in constitutional law. [↑](#footnote-ref-136)
137. Canadian Supreme Court in *Hunter v Southam Inc.*, 2 sCR145 (1984) *apud* D.Robertson, *Judge as Political Theorist: - Contemporary Constitutional Review*, Princeton University Press, 2010, p.36. [↑](#footnote-ref-137)