# Comments on Decision no. 727 of 9th July 2012 of the Constitutional Court of Romania

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**Abstract**: The contencious constitutional bodies are required tools for a genuine rule of law in any democracy. In our scientific study we shall analyze the Constitutional Court's Decision no. 727 of 9 July 2012 on the constitutional review of the Chamber of Deputies, of the Senate and of the joint Chambers of Parliament Regulations. The aim of our research was to highlight the Constitutional Court's role to warrant the supremacy of the Constitution. We have analyzed the extent of the Romanian Constitutional Court's area of competences since its inception until now, and we have also analyzed in detail Decision no. 727/2012. The comments we have passed are, to the utmost extent, critical concerning the Decision made by the constitutional judges, our arguments being grounded on both previous decisions of the Court, as well as on doctrine and comparative law. Throughout the study we have put forth a number of solutions that can improve the role of the Romanian Constitutional Court in its efforts to enhance the rule of law.

**Keywords**: rule of Law; Constitutional Court; constitutional review; decisions; Parliament

## 1. The Role of the Constitutional Court in a Rule of Law

The rule of law exists and expresses itself in the most accurate way through the supremacy of the Constitution, which is perceived not only as a feature or a principle of the legal-political system, but also as the very essence of constitutionalism, as an order that guarantees the viability and efficiency of the Constitution. The constitutional justice developed on a gradual basis, in different contexts and having variable sources of inspiration. The constitutional review is

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divided into 2 large systems: on one hand, the *American model*[1], in which control is exercised, by way of exeption, by the common law courts, and on the other hand, we are talking about the *European model*[2] (Vasilescu, 1996, pp. 163-176; 1998, pp. 29-58; Gilia, 2007, p. 41), which entrusts the control responsibility to a special assigned authority (Court Bar Council).

The constitutional review means a primary condition for the rule of law because it certifies the actual supremacy of the Constitution (Deleanu, 2006, p. 140)[3], the supreme judicial act, on which the entire law order in a state is based.

Nowadays, constitutional review makes the object of a quasi-unanimity among the jurists and politicians, who consider it as an essential element in a rule of law.

Dynamics of jurisdictionality phenomenon of a rule of law originates in two distinct roots: on one hand, the assimilation between the judge and the law, and on the other hand, the idea of Montesquieu, acoording to which *„le pouvoir arrête le pouvoir" (power stops power),* which means that each power needs a counterpower if we want the law to prevail. This phenomenon triggers increasing questions on the compatibility between the *constitutional review* and the *democratic principle* (Troper, 1990, pp. 31-48; Rousseau, 1995, 1998). It has been often said that the will of the nation can be *„overturned"* by *„irresponsible judges"*. Therefore the triumph of the rule of law should mean a threat to democracy. Everything depends on how we define democracy. For that purpose, Michel Troper noted: „If we define democracy as a form of government in which laws are drawn up by the people or his elected ones, the answer (concerning the democracy compatibility and

[1] By means of the famous decision of the *Marbury v Madison* case (1803), the United States Supreme Court ruled that the Constitution is overly powerful, while the courts are in charge to make sure the Constitution is observed by everyone. Thus any court may refuse a law enforcement if that law is regarded as unconstitutional.

[2] The European model of constitutional justice is the result of Hans Kelsen theoretical thoughts on the jurisdictional borders of the Constitution (1920). The political events passed by, and after World War II most of the European countries appointed such juridictional bodies. The year 1989, also known as „*annus mirabilis*", was for the ex-communist countries the moment they shared these Western practices too. To be chronologically precise, we mention that constitutional review first took place in England, following a resolution given by Edward Coke in *Bonham Case*.

[3] The constitutional justice means the assembly of institutions and techniques that warrants the supremacy of the Constitution. The term „*constitutional justice*" appears for the first time in Hans Kelsen's works, and also in Charles Eisenmann's works. For the first author, it means the jurisdictional warrant of the Constitution. For the second author, it means a form of justice, or a form of jurisdiction to be more precise, related to constitutional laws. Without it the Constitution is nothing but a political programme, mandatory only at moral level and with a symbolical importance.

constitutional review) is nothing but negative. Democracy cannot put forth a deep explanation to constitutional review. The apologies are inconsistent and there are two types: a) control is a mean serving democracy; b) the constitutional review, without serving democracy, is useful for other purposes, but being compatible with democracy" (Troper, 2004, p.8).

## 2. Enlarging the Area of Expertise of the Constitutional Court over the Years

„*The institutionalization of the structure and functionality of the rule of law in modern-European perspective entails the construction at constitutional level of an organism designed to neutrally and honestly watch over the observance of the values and spirit of the future democratic Constitution of Romania, in permanent and natural compliance with the rights and liberties of citizens*" – said Prof. Marian Enache during the Constituent Assembly debates.

Via the 1991 Constitution of Romania it has been established the Constitutional Court, a resort of constitutional law, unique in the history of a country in which the control over the constitutionality of laws had been exercised by political law courts or organisms, carried out by the Great National Assembly (Ionescu, 2006; Valea, 2010, pp. 142-148). In order to create this organism, there has been a real battle in the Constituent Assembly, in which there were involved the followers of the American model versus those of the European model, featured by control over the constitutionality of laws (Gilia, 2010, p.p 250-251)[1]. The Romanian constituent choosed the Kelsenian model of constitutional justice. The Constituent Assembly expressly and limitative assigned the Constitutional Court a set of responsibilities

[1] In the Constitution statements, the authority in charge with the constitutional review of laws was named the Constitutional Council, thus being clear the resemblance with the similar institution in France. The Constitutional Council tasks were any less similar to those of the present Constitutional Court. Thus, the Constitutional Council role was to adjudicate ex officio or upun notification on the constitutionality of the Government's organic laws and orders appointed on the basis of legislative delegation. Ex officio and mandatory, the Constitutional Council was to adjudicate on the constitutionality of organic laws, before promulgation, and on the constitutionality of Standing Orders of Parliament. Another task of the Constitutional Council was to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns, to ascertain the circumstances which justify the interim in the exercise of office of President of Romania by the President of the Senate, to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns, to exercise the role of electoral contencious instance in the case of impugning the election of deputies and senators, to solve the appeals regarding the unconstitutionality of a political party, to solve the competence conflicts between central and local authorities, and to carry out any other prerogatives provided by the Constitution or organic laws.

pursuant to Art. 144 lit. a-i of the Constitution. Some of the competences actually aimed at the constitutional review[1], others at some aspects of the constitutional life[2].

Following the review of the Constitution of Romania in 2003, the area of competences was enlarged, the Court being charged to judge the constitutionality of *treaties or other international agreements*[3], and also to solve the judicial conflicts of constitutional nature between public authorities, at the instance of the President of Romania, of one of the two Chambers chairmen, of the Prime Minister or the President of the High Council of the Magistracy[4]. The Court was also charged with other responsibilities pursuant to the organic law of the Court (Art. 146 lit. 1) of the Constitution). By introducing lit. 1) of the Art. 144 of the Constitution it has been given the green light to appoint by law several responsibilities which in fact exceeded the constitutional directives. The Court itself, by means of Decision 148 of 16th April 2003 on the constitutionality of the legislative proposal on the Constitution review, stated that „this proposal[5] (control over the constitutionality of resolutions) is going to be cut out in order to keep the *political neutrality* of this public authority and to push the will of the original constituent authority" [6].

In 2010, through Law no. 177/2010 amending Law no. 47/1992 on the organisation and operation of the Constitutional Court, of the Romanian Procedure Civil Code, the Court acquired a new competence, that is to give a judgment on the *resolutions of the Plenary of the Chamber of Deputies, of the Senate and of the Plenary of the joint Chambers of Parliament, following the notification of one of the two Chambers presidents*, of a parliamentary group or at least 50 deputies or 25

[1] It's about: the constitutionality of laws, before promulgation, the Court adjudicates *ex officio* on initiatives to revise the Constitution; on on the constitutionality of the Standing Orders of Parliament; decides on exceptions brought to the Courts of law as to the unconstitutionality of laws and orders.

[2] The Constitutional Court guards the observance of the procedure for the election of the President of Romania and confirms the ballot returns; guards the observance of the procedure for the organization and holding of a referendum, and confirms its returns; decides on objections of unconstitutionality of a political party etc.

[3] Art. 146 lit. b of the revised Constitution.

[4] Art. 146 lit. e of the revised Constitution.

[5] The legislative revising proposal provided at lit. j) that by means of an organic law the Constitutional Court can acquire other prerogatives, a fact that was forbidden by the constitutional regulation prior to revision.

[6] The Constitutional Court's Decision no. 148 of 16 April 2003, published in the Official Gazette of Romania, Part. I, no. 317 of 12.05.2003.

senators[1]. In technical literature, there have been aired critical opinions on enlarging the area of competence of the Constitutional Court concerning all the adopted resolutions by the Parliament. Within an ample and well-argumented article, the famous professor of Public Law, Verginia Vedinaş, said that: „expanding such a competence over a resolution given by the Parliament means an arrant unconstitutional solution, which will (…) also trigger an interference of the Constitutional Court in the activity of Parliament and will drain the practical content of this public authority statute, whose political role as a supreme representative organ shall totally be under the constitutional review of the Constitutional Court. And this is a real threatening to regulatory autonomy of the Parliament" (Vedinaş, 2010, p. 104).

In 2002, the Government of Romania adopted an Emergency Ordinance amending Law no. 47/1992 on the organisation and operation of the Constitutional Court, according to which the resolutions of the Plenary of the Chamber of Deputies, of the Senate and of the Plenary of the joint Chambers of Parliament were no longer under constitutional review. Only the Parliament Standing Orders were still under control. This amendment was in fact a come back to the previous legislative text, prior to the amendment carried out in 2010. But the law on approving the Government Emergency Ordinance no. 38/2012 has been attacked at the Constitutional Court by a group of 63 deputies.

## 3. Comments on the Decision no. 727 of 9th July 2010 of the Constitutional Court

The Constitutional Court passed a judgment through Resolution no. 727 of 9th July on the referral of unconstitutionality of the Law for amending indent (1) Art. 27 of Law no. 47/1992 on the organisation and operation of the Constitutional Court[2].

The authors of the referral considered that the impunged law is unconstitutional, as it deprives the Constitutional Court of its competence consisting of the constitutional review of the resolutions of the Plenary of the Chamber of Deputies, of the Senate and of the Plenary of the joint Chambers of Parliament. It thus leads to the situation in which a legal act (the above-mentioned resolutions) issued by a

[1] Art. 27 (1) of Law 47/1992, following modification and completion.
[2] The Constitutional Court's Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part. I, no. 477 of 12 July 2012.

public authority can no longer be reviewed in terms of lawfulness or constitutionality. Therefore, the Parliament could decide anything, including things that are contrary to the Constitution, which is unconceivable.

The authors of the referral also claim the absence of such a constitutional review could lead to an imbalance between State powers and to dictatorship, tyranny or despotism for the Romanian society.

From our perspective, the judgment that the lack of such a review over the Parliament resolutions could trigger negative effects on Romania is totally wrong, as the constitutional life in Romania went by under normal circumstances without introducing in 2010 such a constitutional review.

The Court examined the opinions of the Presidents of the Parliament Chambers, as well as the opinion of the Romanian Government. The President of the Senate claimed that if the framers had wanted to enshrine the Court's competence to conduct the constitutional review of other parliamentary resolutions than its standing orders, they would have expressly and separately regulated it. He also claimed that this led to an excessive overload of the Constitutional Court's activity, which hindered its activity, by also making it hard for the Court to carry out its role of guarantor for the supremacy of the Constitution.

The President of the Chamber of Deputies pointed out that the implementation of a constitutional review does not affect the Parliament's role of supreme body of the Romanian people, precisely because this supremacy should not lead to a breach of its constitutional duties.

In his turn, the Government considered that, in compliance with the Constitutional Court's case-law, adding or discarding competences for the Court, through its organic law, is a matter of necessity left at the discretion of the ordinary legislator.

The Court, having examined all of the opinions, specified that subject to constitutional review can be only those resolutions of Parliament adopted following the granting of the new power, *resolutions that affect constitutional values, rules and principles or, as the case may be, the organisation and operation of constitutional authorities and institutions*. The Court stated that Art. 27 of Law no. 47/1992 did not establish any differentiation between resolutions that can be subject to review by the Constitutional Court in terms of area in which they were

adopted or in terms of *normative* or *individual* nature, which means that all these resolutions are likely to be subject to constitutional review.

From our point of view, we have to mention that the resolutions adopted by the Chamber of Deputies and Senate regulate issues concerning the internal organisation and operation of the Chambers[1], and according Art. 64 of the Constitution, the Chambers benefit from organizational, functional and budgetary autonomy[2]. Since the organization and function of each Chamber is ruled by Standing Orders, their resolutions are adopted while applying the parliamentary Standing Orders. The constituent set forth in Art. 27(1) that the decisions regarding the Chambers regulations are adopted by majority vote of each Chamber, same as the organic laws. We also mention that other resolutions of the Chambers are subject to constitutional review[3].

Since they are judicial acts of the Chambers, the resolutions can seize constitutional values and principles that are subject matter to regulations, but don't have the quality to appoint such values and principles. That's why they can't be subject to constitutional review (Ionescu, 2012).

It's something natural for each Chamber, but also for the Plenary of the Parliament to adopt the resolutions required for a good function of the institution, and these resolutions should be the expression of free will of the elected by the people, not a resolution given by the constitutional judges.

The Court also stated that granting its power to exercise such constitutional review represents a diversification and strengthening of the competence of the Constitutional Court, the sole authority of constitutional jurisdiction in Romania, and a gain in the efforts to achieve a democratic State governed by the rule of law, and thus it cannot be considered a circumstantial action or one justified on grounds related to necessity. However, even the legal, political and social reality proves its

[1] For instance, the resolutions for appointing the leading boards of the Chambers.

[2] In a separate opinion, stated by the Constitutional Court's judges within Decision no. 53/2011, „the resolution means a judicial act particular to regulatory autonomy of the Chambers, as provided by Art. 64, Art. 67 and Art. 76 (1), generator of juducial effects, which are always internal but, on the side, may also have external effects". (…) „Drawing a distinction within the class of resolutions as judicial acts, we can state that only the normative resolutions can be subject to constitutional review, precluding the resolutions with individual aim".

[3] For instance, the resolution that ascertains the circumstances which jusitfy the interim in the **exercise** of office of **President of** (Art. 147 lit. g), the resolution to suspend the President of Romania from office (Art. 147 lit. h), the resolution when the President of Romania takes counsel for the organization and holding of a referendum (Art. 147 lit. j).

actuality and usefulness, since the constitutional court was asked to rule on the constitutionality of certain resolutions of Parliament questioning the constitutional values and principles. The Court justifies the use of this type of constitutional review in that it represents a means to endow the Constitutional Court with a coherent capacity of expression, likely to efficiently ensure the separation and balance of powers in a democratic state. *We wonder how the separation of powers could be ensured since the Court invalidates a legitimate resolution of one Chamber, which decides, by the supreme and free will of its members, the appointment of certain members in the management bodies or, on the contrary, their recall from that position? Isn't that an interference of the Court in the internal problems of the supreme People's representative forum?*[1]

The Court considered that, even if the prerogatives concerning the constitutional review over the Parliament's resolutions have been given to the Constitutional Court as provided by the Court's organic law, it acquired constitutional nature as provided under Article 146 (1) of the Constitution[2]. In our perspective, if the ordinary legislator would have wanted this type of review to have a real constitutional nature, he would have expressly regulated it in the Constitution text[3].

[1] We are in favour of the separate opinion, stated by the Constitutional Court's judges within Decision no. 53/2011, who reasoned that one cannot claim that „Art. 27 (1) of the Law no. 47/1992 makes subject of constitutional review all the resolutions adopted by each Chamber and by the Parliament as well". In other words, this text bestowed on the Constitutional Court the prerogative to review all the Parliament's resolutions, *the Constitutional Court thus becoming a „Super-Parliament"*.

[2] Some Court's judges made a separate opinion, stated in Decision 53/2011: „the first issue to be solved is *whether other responsibilities provided by the Court's organic law* are subject to the Constitutional Court's prerogatives or to the Court's responsibilities regarding its other activities. The second issue is whether *by means of law can it be added to the constitutional text regarding the Court's responsibilities, that is if according to Art. 146 lit. l) can it be added, by means of Law no. 47/1992, to the responsibilities expressly and separately provided by Art. 146 of the Constitution*".

[3] In the practice of states with consolidated democracies or in the Central and Eastern European young democracies, within the scope of prerogatives of constitutional bodies (Courts, Councils), we don't find this type of control over the Chambers resolutions appointed in Romania in 2010. For instance, the Constitutional Council of France has the following powers and tasks: 1. the supervision of presidential elections. The Constitutional Council examines the objections and confirms the ballot returns (Art. 58 of the French Constitution); 2. adjudicates, in case of objection, on the observance of the procedure for the election of deputies and senators (Art. 58); 3. guards the observance of the procedure for the organization and holding fo the referendum, provided by Art. 11 and 89 and Title XV. The Constitutional Council confirms the returns of the referendum (Art. 60); 4. adjudicates on the organic laws, before promulgation, on the proposed laws provided by Art. 11, before they are committed to referendum, and on the standing orders of parliamentary chambers, before they are carried into effect; 5. when, during an ongoing process in front of a Court, it is claimed that a legislative disposition prejudices the rights and liberties warranted by the Constitution (Art. 61(1)). In

It is also relevant how the Court emphasizes the importance of constitutional review of Parliament resolutions for the proper operation of the rule of law and for the observance of the separation and balance of state powers so that when it comes to the breach of constitutional values and principles by means of certain resolutions of Parliament, besides the political conflicts characterizing the relations between the majority and the Opposition, the Court may be required to ensure compliance with those values and principles, intrinsic to democracy, as sole political model compatible with the Basic Law.

Given this complicated statement, should we assume that the Court becomes a referee between the majority and the Opposition in the Parliament? Because we can't neglect how the Court's judges are appointed (Vrabie, 2010, pp. 3-34) [1].

Once again, we are for the imperative amendment of the constitutional text concerning the appointment of the constitutional judges out of the regular magistrates, strictly on professionalism principles, not on political criteria.

## 4. Conclusion

*Did the Constitutional Court become the leading actor of the Romanian constitutional life?* From our perspective, the answer is yes if we analyze the last episodes of our constitutional and political life. It seems that everything must be

Italy, in compliance with Art. 134 of the Constitution, the Constitutional Court states over: 1. the disputes related to the constitutionality of laws and acts behaving as laws of the state and regions; 2) the conflicts of competence between state powers, between state and regions and between regions; 3. the accusations against the President of the Republic, in compliance with the Constitution. In Poland, according to Art. 188 of the Constitution, the Constitutional Court states about: 1. the compliance of laws and treaties with the Constitution; 2. the compliance of laws with ratified treaties, whose ratification implies the previous enactment of a law; 3. the compliance of regulatory acts issued by central authorities of the state with the Constitution; 4. the compliance of political parties objectives and activities with the Constitution; 5. the complaint sent to the Court House on the strength of Art. 79 (1) of the Constitution; in compliance with Art. 189 of the Constitution, the Constitutional Court House solves the competence conflicts between the constitutional central authorities of the state.

[1] Professor Genoveva Vrabie stated that: „the rethinking of the conception regarding the judicial nature of the Constitutional Court and its place within the public authority system is asserting itself as a factor likely to improve the activity of the state bodies and to determine the settlement of the relationship between the two of them according to some democratic principles, pointing out in the first place the separation of state powers and rule of law". As for appointing the constitutional judges, the author considers that we must: „think to an improved selection system of the constitutional judges, and to eradicate the conflicts of interest. The appointed rules should balance the scale and prevent one of the powers to set itself up as a superordinate power".

solved by the Constitutional Court. The Court become the ultimate judge between State powers, although its constitutional role is to warrant the supremacy of the Constitution. The way we see it, the political forces in particular make a convenience of the Court's role, especially of the prerogatives provided by the Constitution and its organic law. Maybe this is the reason why the Court tended to grant itself certain prerogatives, which may not be unconstitutional, but do not comply with the doctrine of separation of powers and the supremacy of the Constitution.

Tudor Draganu, having analyzed the effects of the Constitutional Court's provisions the way they have been regulated following the revision of the Constitution in 2003, stated: „There is no other European state where such Courts are granted the prerogative to adress such injunctions to the Parliament in order to impel the Parliament to enact rules according to its will. (…) as provided by Art. 147 (1) and (2), the revised Constitution is against the principle of separation of powers, even if it is loosely interpreted, according to Hans Kelsen and reflected by several other European Constitutions. (…) but if the Court is assigned to adress the Parliament compulsory injunctions, could it be considered the people's *supreme* representative body or the state's exclusive legislator authority? (…) by means of its excessive prerogatives, didn't the Court become, without its will, if not a *superpower*, at least *the fourth power in the state*?" (Drăganu, 2004, p. 95-96).

In technical literature, it is stated that the competence of the Constitutional Court is the expression of a general phenomenon, whose intensity is specific to a rule of law, that is the judicial framing of political phenomenons. The law, par excellence, is the political will that had won due to the majority who voted. Consequently, the law constitutional review, that is the review of its constitutional legitimacy, provides the framing of the legislative political phenomenon within the constitutional norms (Muraru & Constantinescu, 1997, p. 48).

The recent activity of the Romanian Constitutional Court proved that this institution, which was under no political influence (Muraru & al., 2009, p. 31-32; Drăganu, 1998, p. 308-309; Ionescu, 2010, p. 143)[1], also became affected by the

[1] In technical literature, there have been pointed out several flaws regarding the political nature of the Constitutional Court, such as: a) some prerogatives of the Constitutional Court distinguish themselves by their political nature; b) it's a fact that the Constitutional Court's judges are not appointed by „political authorities" on political grounds, but, nevertheless, they are appointed by such authorities; c) the recurrent and partial renewal of the Constitutional Court leans towards the adaptation of its

interference of politics at all Romanian society levels. Most of the times, in highly delicate and important circumstances for the Romanian society, the decisions have been made with a score of five against four (in favour of the judges appointed by the governing majority, whether it was the President of the Republic or the Parliament). This proves the vulnerability of the Constitutional Court. That is why, lately, an increasing number of politicians, specialists or representatives of the civil society framed a deep reform for this institution[1].

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structure according to the changes occuring inside the political authorities structures who are entitled to appoint judges; d) the appointment of judges by the Parliament's Chambers is carried out on the basis of a parliamentary majority, politically established or following political negotiations; e) the separation between judicial and politics is – as previously said – apparent, while defining the meaning and implication of a constitutional text is not – always – the result of a syllogism or polisyllogism. Several other opinions have been adjudicated in the doctrine regarding the political affinity of the Constitutional Court's judges, and these are a proof the appointing system shows a deficit even with respect to the fundaments of candidature application and its approval. The appointment made by the President of Romania didn't receive much credit from the civil society. The fact is there are serious doubts concerning the equity and the political fancy of the Constitutional Court's judges and some of their decisions stand as a proof. .

[1] Some referrals pointed that the constitutional review should be made by law courts, so a return to the pretorian review. Other referrals aimed to change the way in which the judges are appointed, or to change the vote majority when making decisions. From our perspective, the Court's responsibilities should be expressly provided by the Constitution in order to exclude any other interpretation that might occur as a result of assigning other responsibilities provided by the organic law's text on the organisation and function of the Court.

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