

THE REFERENDUM, REFLECTED IN THE ROMANIAN CONSTITUTIONAL COURT'S CASE LAW

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Abstract

The referendum is the main instrument of direct democracy, a means of consultation by which the People has the possibility to directly exercise national sovereignty. In Romania, the referendum has to be organized every time the Constitution is subject to a revision, regardless of who has initiated it, and also when the dismissal of Romanian President is at stake. The result of the valid referendum cannot be disregarded in these two cases. So, this kind of referendum is compulsory both in what concerns its organization and its outcome. There is also a so-called consultative referendum, which is organized at the national level at the request of the President of Romania, who may ask the Romanian citizens to express their will as to questions of national interest. This one is optional from both fore-mentioned points of view: its necessity and its result. The Constitutional Court of Romania supervises the observance of the procedure for the organization and carrying out of a referendum, and it confirms its results. The referendum was a pretty controversial issue in Romania in the context of political changes that lead in 2012 to the suspension of the President of Romania and it continues to stir the feelings of the political stage in connexion with further intended amendment of the Basic Law. The present paper aims to depict the importance of the case law of the Constitutional Court concerning the referendum, as a guardian of constitutional democracy that renders compulsory decisions 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. In this regard, it strongly recommended to the State's institutions to engage in a loyal co-operation between themselves.

Keywords: *Referendum, Sovereignty, Direct democracy, Constitutional Court, Constitutional review.*

Introduction

Meant to be an effective mechanism of the direct democracy, an expression of national sovereignty whose exclusive owner is the people, the referendum is the legal instrument through which citizens have the opportunity to participate actively in shaping the political decision at state level by explicitly expressing their opinion on actual issues regarding the organization and functioning of the State and the structuring and arrangement of political life, in general.

As to its utility and the very reason for its existence, opinions have been divided over time. Thus, some scholars praised their virtues, others warned about its shortcomings and disadvantages¹. Thus, since the seventeenth century, the theory of democracy, understood as the ruling of the majority, has been divided into two currents of thought. One is represented by the participatory school, according to which the truly democratic means of making public policy decisions is the direct and full participation of all citizens without any interposition.

The mentors of this school of thought are classical scholars like Rousseau, or modern theorists like Benjamin Barber, Lee Ann Osbourne or Carole Pateman. On the opposite side are the partisans of the representative school or of the "responsible elite" whose pioneers were John Stuart Mill and Henry Jones

Ford, and, later, the modern theorists Joseph Schumpeter, E.E. Schattschneider and Giovanni Sartori². According to this theory, citizens elect democratically a representative body that, on their behalf, will make political decisions as governors.

Nowadays, the referendum is generally accepted as necessary at certain moments of particular importance to a State, in certain historical or political circumstances, inasmuch as it does not question the effectiveness of Parliament as the representative assembly of the People and does not destabilize its authority, but only reflects the will of the People, giving voice to its choice on punctual issues of particular importance to the State.

The importance of the issue addressed by this study becomes obvious if we consider the impact of referendums that may sometimes be particularly strong, especially in the international geopolitical context. This was, for example, the case with the wave of referendums organized in 2003 in eight Central and Eastern European countries concerning their accession to the European Union (Czech Republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovakia and Slovenia)³.

The broad resonance that referendums may have is also illustrated by the blocking of the ratification of the Treaty establishing a Constitution for Europe through the negative vote of the French and Dutch People expressed in the referendums held in their

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¹ Olivier Duhamel, "Le référendum – Introduction", *Pouvoir* no.77/1996: 5.

² Austin Ranney, "Référendum et Démocratie", *Pouvoir* no.77/1996: 10.

³ See Jean-Michel De Waele, *Referendumurile de aderare la Uniunea Europeană* (Iași: Editura Institutul European, 2007).

countries on 29th of May 2005 and 1st of June 2005, respectively. Also, a true political storm was triggered throughout Europe by the surprising and disturbing outcome of the referendum on the United Kingdom European Union membership, on the 23rd of June 2016. Similarly, the symbolic referendum organized on the 1st of October 2017 for Catalonia's independence from Spain had major echoes at the European level. Last but not least, one can recall the referendum by which Turkey has recently⁴ amended the Constitution granting exaggerate presidential powers, with critical consequences for the democratic features of that State.

The particular implications of the political will expressed by the citizens through the referendum were noted in the literature, being analyzed in round tables or conferences on this topic⁵. It is also noted that in France, the prestigious *Pouvoirs* magazine, dedicated a whole number to this subject, inviting reputable specialists to examine the issue of the referendum.

The present study aims to highlight the situation of Romania, where the referendum contributed to defining the political will of the citizens, with six referendums organized so far. To this end, this study will mainly present the applicable normative framework, namely the provisions of Law no. 3/2000 on the organization and conduct of the referendum, as interpreted by the Constitutional Court in its rich case-law on this matter by the decisions made both in the framework of the *ex ante* review of constitutionality, by means of constitutional objections formulated with regard to the law which would become Law No. 3/2000 or the subsequent amending and supplementing laws before their entry into force, as well as in *ex-post* review, by way of exceptions of unconstitutionality raised during a pending trial on the law applicable to the case.

1. Sovereignty and Referendum

The concept of sovereignty has, in the theory of constitutional law, very complex meanings, being analyzed from a triple perspective. Thus, one can speak of state sovereignty, national sovereignty, and the sovereignty of the people. Essentially, state sovereignty expresses the idea of the *suprema potestas* that is indissolubly attached to the State⁶. National sovereignty, specific to the Nation, as a collective subject, whose will is distinct from that of its members,

necessarily implies the delegation of the exercise of this power. That is why national sovereignty usually equals the sovereignty of the Parliament⁷. Finally, popular sovereignty, based primarily on the concept of citizenship as it was set up by Jean Jacques Rousseau in the social contract theory, reflects the ability of all citizens of a State to be equal in the state-level decision-making process⁸. Democracy in its pure form, as a way of leading the State by citizens through their direct participation in political decision-making, is no longer feasible in the manner used by the ancient Greek and Roman civilizations⁹. That is why it was necessary to be adapted to contemporary societies, by its transformation into representative democracy, where the prerogatives of power belong to the People, exercising them sovereignly, but through a limited number of representatives, democratically elected¹⁰. In order to reconcile these two systems, they were combined, so that currently, the referendum - organized in well-defined cases -, together with the parliament as a result of a free electoral process organized periodically and correctly, shape a new form of democracy, known as semi-direct democracy or participatory democracy. This system also provides to the People other means of expression, such as the right of legislative initiative or the public debate of draft laws¹¹.

In the spirit of this idea outlined in the current context, the Romanian constitutional legislator stated, in 1991, when drafted the democratic Basic Law, detached by the communist regime, defeated in December 1989, that „*National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum. No group or individual may exercise sovereignty in their own name*” (Article 2).

Romanian Basic Law regulates three types of national referendum: the consultative referendum, initiated by the President of Romania on matters of national interest, mentioned in Article 90, the referendum on the dismissal of the President of Romania from office, referred to in Article 95(3) and the one approving the revision of the Constitution, regulated by Article 151(3).

The organic law dedicated to this issue details and specifies the legal and technical conditions connected with the organization and conduct of the referendum, namely the Law no.3 of 2000 on the organization and

⁴ On the 16th of April 2017.

⁵ Like the one recently organized by Le Centre Régional Francophone de Recherches Avancées en Sciences Sociales in collaboration with the Romanian Association of Constitutional Law, on 15-16th of September 2017, with the topic “Prendre la démocratie au sérieux – référendum et société civile dans le contexte contemporain”.

⁶ Giorgio del Vecchio, *Lección de filosofía jurídica* (București: Editura Europa Nova, 1997), 278.

⁷ Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentarii pe articole* (București: Editura C. H. Beck, 2008), 23.

⁸ *Ibidem*, 22.

⁹ For details on the evolution of the concept of democracy and its application, see, for example, Anthony Arblaster, *Democrația* (București: Editura DU Style, 1998), Robert A. Dahl, *Democrația și criticii ei*, (Iași: Institutul European, 2002), Leonardo Morlino, *Democrație și democratizări* (Iași: Institutul European, 2015).

¹⁰ Ion Deleanu, *Instituții și proceduri constituționale – în dreptul roman și comparat*, (București: Editura C.H.Beck, 2006), 103-104.

¹¹ See, in this regard, Valentina Bărbățeanu, “Curtea Constituțională și democrația participativă sau implicarea cetățenilor în procesul legislativ”, *Buletinul Curții Constituționale* nr.1/2016.

holding of the referendum¹², as subsequently amended and supplemented. It specifically mentions the fact that the national referendum is the form and means of direct consultation and expression of the sovereign will of the Romanian People (Article 2 of the law). The regulation of the referendum by a separate law is fully in line with those established by the Venice Commission experts who appreciated that, in order to be truly democratic, referendums – just like the elections - must satisfy certain requirements. One is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe's electoral heritage, which apply *mutatis mutandis* to referendums¹³.

2. Temporal Aspects Regarding the Organization and Holding of the Referendum, from the Constitutional Jurisdiction Perspective

Regarding the moment in time when the referendum can be organized, the Constitutional Court considered that the amendment of Law no. 3 of 2000 by introducing the provision according to which the organization of the referendum cannot take place simultaneously with the holding of the presidential, parliamentary, local elections or of the elections for the European Parliament, or with less than 6 months prior to the date of the said elections is not consistent with Article 90 of the Basic Law, according to which the President of Romania, after consulting the Parliament, may ask the people to express their will on issues of national interest, and with those of Article 95 (3) stipulating that, in the event of approval of the proposal to suspend the President of Romania, within a maximum of 30 days, a referendum shall be held for the dismissal of the President. The Court noticed¹⁴ that, it is clear from the analysis of the two constitutional texts that the referendum can be held at any time during the year if the Parliament has been consulted or if it approved the proposal to suspend the President of Romania. Therefore, according to the Constitution, there is no other condition prohibiting the organization and holding of the referendum simultaneously with the presidential, parliamentary, local or European Parliamentary elections, or at a certain time before or after the said elections. As such, where the law does not distinguish, the interpreter cannot distinguish it, either (*Ubi lex non distinguit, nec nos distinguere debemus*). Consequently, the Court stated that the conditions set by the legislator for conducting the referendum were supplementing the provisions of the Constitution, which

is unacceptable and determines their unconstitutionality. The Court also found that these provisions may result in constitutional blockages, the date of the elections becoming appendant on the date of the referendum¹⁵.

Another interesting issue was raised from the perspective of a supposed contrariety between the provisions of Article 34 of Law no. 3 of 2000, according to which "The ballot will open at 8.00 and end at 20.00", on the one hand and on the other hand, the constitutional and conventional norms guaranteeing freedom of thought, conscience and religion, as well as and the right to vote. The grievance of unconstitutionality concerned the idea of discrimination on the basis of religious affiliation, having regard to the factual and legal situation put forward by the author of the exception, namely the fact that the citizens of religious denominations who have a weekly prayer on Saturday were deterred to attend the referendum organized for the dismissal of the President of Romania on Saturday, the 19th of May 2007, between 8.00 and 20.00. The Constitutional Court found that the claims of the author of the exception were unfounded¹⁶. In this regard, the Court held that guaranteeing the above freedoms requires the State to observe specific obligations, whether negative or positive, the latter being materialized in appropriate measures so as to avoid disturbing the exercise of individual freedom of thought, conscience and of religion. In the discussed case, the Court held that the source of the alleged constitutional conflict lies in the impossibility of simultaneous exercise of an electoral right - the right to vote – and of the freedom of religion, manifested by the practice of rituals specific to the cult that declared the day of prayer the seventh day of the week, Saturday. Both the establishment of Saturday as the date of the referendum on the dismissal of the President of Romania on the 19th of May 2007¹⁷ and the hourly interval provided by the legally criticized text prevented the followers of this cult from voting in the organized referendum, having religious obligations to be fulfilled during the entire Saturday from dawn to sunset.

Faced with these claims by the author of the exception, the Court stated that there is no incompatibility between the status of citizen – which implies the right to vote -, and that of practitioner of a religious cult recognized by the Romanian state. The fact that, through the way of organizing and holding the referendum on the dismissal of the President of Romania on the 19th of May 2007, regulated by a law with general applicability for all the citizens of the country, the adherents of a religious minority in

¹² Published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000.

¹³ CDL-AD (2005)034, Referendums in Europe – an Analysis of the Legal Rules in European States, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

¹⁴ Decision no. 147 of the 21st of February 2007.

¹⁵ Ibidem.

¹⁶ Decision no. 845 of the 8th of June 2009.

¹⁷ By Article 1 paragraph 3 of the Decision no. 21 of 2007 of the Romanian Parliament.

Romania were unable to exercise their right at the same time, choosing to fulfill the religious obligations and practices specific to the cult in the same timeframe for the elections, cannot be converted into a reason for unconstitutionality of the provisions of art. 34 of Law no. 3/2000, nor into a restriction of either the exercise of the right to vote or the freedom of religion.

The right to vote expresses the essence of the relationship between the State and its citizens, independent of the citizen/church relationship, and, according to Article 2 paragraph 1 of the Constitution, the referendum, together with the elections organized for the constitution of representative bodies of the Romanian people, is the constitutional way of exercising national sovereignty. The Court has held that the importance of a referendum or the election that is taking place at a given moment in a state is clearly superior due to the level of a general interest involved in comparison with the narrow interest, limited to a group or at individuals, that a particular religious minority proclaims. So, the followers of such a cult can not reasonably claim that the organization of the specific operations of a national election should take place according to the practices of that cult. In electoral matters, especially, but not exclusively, the legislator considers the general interest of the society and can not legislate according to the religious option of every citizen, without thus being questioned the freedom of conscience safeguards.

At the same time, this legislative policy can not have the meaning of discrimination on the grounds of religious affiliation, as the author of the exception claims. It gives expression to the natural mechanism of a democratic, social state in which the rights and freedoms of citizens are protected so as to achieve a reasonable balance between the general interest of society, on the one hand, and individual rights and freedoms, on the other.

Also related to the date of the referendum, the Constitutional Court recently examined¹⁸ allegations regarding the law amending Law no. 3/2000 that attributed to the Government the power to establish the date of the organization of the referendum for the revision of the Constitution, despite the fact that this is an exclusive right of the Parliament.

Considering the specific powers attributed at constitutional level in what concerns each type of national referendum, Article 15 paragraph 1 of the Law no. 3 of 2000, as it currently stands, specifies the type of normative act that determines the organization of the referendum and its date, as well as the authority which will issue it, depending on its constitutional legitimacy regarding the initiation of the referendum. Thus, the subject and the date of the national referendum are established by law, in the case of a referendum on the revision of the Constitution, by Parliament's decision, in the case of the referendum on the dismissal of the President of Romania and by a decree of the President

of Romania, in case of a referendum on issues of national interest.

The differentiation that the text mentioned in Law no. 3 of 2000 makes between the three types of referendum in terms of the normative act which, in the procedure of its organization and deployment, determines the object and the day when it will take place, is justified by the constitutional provisions conferring the competence to initiate a referendum, respectively The President of Romania, by decree, on the referendum on issues of national interest, and by Parliament, by decision, in the situation of the dismissal of the President of Romania, respectively by law, in the case of the revision of the Basic Law. For the consistency of the procedure, it is reasonable that the same authority that initiates the referendum to also be the one setting the date of the referendum. For the hypothesis in question in the examined case, regarding the amendment of the Basic Law, the Court noted that it is the Parliament that adopts the draft or proposal for revision of the Constitution. In order to become final, the review must be approved by referendum, thus gaining full legitimacy through the general will of the people. Therefore, with a view to ensuring a complete procedural mechanism for the amending of the Constitution, including the regulation of its final stage, the Parliament is entitled to establish, by a separate law, the date of the referendum, thus setting the moment when the law it has adopted would be subject to popular approval. Unlike this hypothesis, in the case of the suspension of office of the President, the Parliament sets the date of the referendum by a decision, which is issued in exercising its control function, part of its constitutional attributions. Instead, the revision of the Constitution, as a fundamental law of the state, is made by means of a law amending and / or supplementing it and that is why, consequently, as a matter of course, for the normative act on the organization of the referendum to be also a law, not an administrative act issued by the Government.

The legislator's concern for the establishment of the date of the referendum continued. Thus, through the Law for amending and completing the Law no. 3 of 2000 it has been stated that "Romanian citizens are called to express their will by voting in the national referendum on the revision of the Constitution, in the last Sunday of the 30-day period provided for in Article 151 (3) of the Constitution of Romania, republished, calculated from the date of the adoption by the Parliament of the draft constitutional law, the Government having the obligation to make public, by means of mass media, its text and the date of the national referendum". The fore-mentioned provision has been subjected to *a priori* constitutionality review and analyzed by the Constitutional Court by Decision no. 47 of 1 February 2018,

The authors of the objection of unconstitutionality criticized the fact that the date of the

¹⁸ Decision no.612 of the 3rd of October 2017.

referendum is to be established by the very Law no. 3/2000 and not by a separate law, as specified by the Constitutional Court by Decision no. 612 of the 3rd of October 2017. The Court emphasized that what is important, in terms of the conformity of the procedure for organizing and conducting the referendum with the spirit of the Constitution, is the legitimacy and legal force of the act by which it is triggered and where the defining aspects are established, as the date when it is to take place.

What is essential is that this act comes from the authority that has the constitutional mandate to initiate each type of referendum, according to its powers, namely the decree of the President of Romania, regarding the referendum on issues of national interest, Parliament's decision, in the situation the dismissal of the President of Romania, and the law, in the case of the revision of the Basic Law. Therefore, the fact that the Parliament established by Law no. 3 of 2000 the date of this last type of referendum is in accordance with the constitutional requirements concerning the Parliament's exclusive competence to decide on this matter. It is, therefore, irrelevant whether it is a separate law adopted on the occasion of the organization of each referendum or the provision is included in the framework law on the organization and conduct of the referendum. And in the new legislative view, the date of organizing this referendum is determined by Law no. 3 of 2000, as the last Sunday of the 30-day period referred to in Article 151 paragraph 3 of the Basic Law.

The Court also held that the Parliament maintained itself within the scope of the constitutional text invoked, establishing by Law no. 3 of 2000 the fixed and unequivocal time stamp in relation to which is calculated the date on which the referendum will take place, but strictly circumscribed to the period of maximum 30 days in which the referendum for the revision of the Constitution must be organized. The Court noticed that the provisions of the Basic Law invoked do not require the full use of that time-limit, but provide for the most remote time to which the citizens may be summoned to the national referendum, so the establishment of its date within that period cannot be considered a disregard of the mentioned constitutional text.

In addition, the Court has held that nothing prevents the Parliament from adopting a law, depending on the circumstances, in order to set a different date for the holding of the referendum - within the said 30-day period - if this is necessary to ensure the proper conditions for citizens to express their will on the revision of the Constitution as a way of exercising national sovereignty.

Also as regards the schedule of the referendum, the Court noted that, although the rule is that the referendum should be held in one day, in exceptional

cases, in order to ensure greater participation in the vote, the legislature may also regulate the referendum to take place over several days. In this regard, the Court held¹⁹ that the establishment of a national referendum on the amending of the Constitution in two days instead of one day does not affect the general interest in conducting the referendum in good condition.

The same was the Court's ruling on the extension of the voting time in the referendum, from 12 to 16 hours²⁰. Since the time frame of the referendum is one of the elements of the procedure for organizing and holding it, its establishment is subject to the rule established by Article 73 paragraph 3 letter d) of the Constitution, that imposes its regulation by organic law. As a result, its regulation by government decision contravenes the constitutional referred provision. In fact, such a regulation would be likely to cause a state of uncertainty regarding an element of this procedure, contrary to the principle of legal certainty imposed by Article 1 paragraph 5 of the Constitution²¹.

3. Participation Quorum, Turnout Quorum and the Returns of the Referendum in the View of the Constitutional Case-Law

Currently, the law stipulates that the referendum is valid if at least 30 percent of the number of people enrolled on the permanent electoral lists participate in it. The condition to be met for the validity of the referendum is the same for all types of referendum, Article 5 Paragraph 2 of the Law no. 3 of 2000 requiring the meeting of a certain participation threshold in relation to the number of persons on the permanent electoral lists.

The law was deduced from the *a priori* constitutionality review, and the Court found²² that it introduced a novelty in terms of the validity of the referendum, stating that "The result of the referendum is validated if the validly expressed options represent at least 25 percent of those enrolled in the lists permanent election ". Thus, besides the conditions established by the law in force, the new regulation makes the validation of the result of the referendum conditional upon the surmounting of a threshold in relation to the number of persons on the permanent electoral lists, according to which the majority of the valid votes is established.

The Court stated that for the validation of the referendum it is necessary to meet these two minimum conditions, which is a way of securing the representativeness of the scrutiny. Besides, the Court noted that a quorum for the participation of most voters is also needed in other states, as well: Poland, Bulgaria, Croatia, Italy, Malta, Lithuania, Slovakia or Russia. In Latvia, the quorum is half the voters who participated

¹⁹ By Ruling no. 1 of the 15th of October 2003.

²⁰ Decision no. 735 of the 24th of July 2012.

²¹ Ibidem.

²² Decision no. 334 of the 26th of June 2013.

in the last legislative elections. In Portugal, if the participation rate is not more than 50 percent, the referendum has no binding, but only consultative effect.

A quorum of approval of a quarter of the electorate is established in Hungary. In Albania and Armenia, the quorum is one third of the electorate. In Denmark, a constitutional amendment must be approved by 40 percent of the electorate; in other cases, the voted legal provision is rejected not only if the simple majority of voters voted against, but only 30 percent of voters enrolled in the electoral lists - the Netherlands or Denmark.

The Court held that the law does not require citizens to participate in the referendum, but only their right and it is in the will of every citizen to decide freely whether to exercise this right or not. In the Constitutional Court Decision no. 3 of August 2, 2012, published in the Official Gazette of Romania, Part I, no. 546 of August 3, 2012), the Court held that the expression of a political option can take place not only by participating in the referendum but also by not participating in it, especially in cases where the relevant legislation imposes a quorum of participation. A majority of the blockage can be created in relation to the number of citizens of a state. This way, those who choose not to exercise their right to vote believe that through passive conduct they can impose their political will. Exercising a constitutional right, citizens see their own beliefs indirectly, by not accepting the contrary. Therefore, the non-participation in the referendum, namely the non-exercise of the right to vote, is also a form of expression of the political will of the citizens and of participation in political life.

Over the time, the legislative instability concerning the referendum, caused by the frequent amendment of this legislation, especially during periods when Parliament was preparing for a dismissal of the President or when initiating the revision of the Constitution, turned out to be not just a factor of legal uncertainty, but also a source of civic contempt towards this legislation, often criticized on the occasion of its application. In this context, the Court held that the legislator can change the quorum for participation in the referendum, but the Constitutional Court must ensure that the instrument is not used for contrary purposes than the one that the constituent legislator intended in what concerns the referendum, as an essential legal institution in a state governed by the rule of law and as a form of direct participation of citizens in decision-making process.

The Court has to ensure compliance with the principles of legal stability of the referendum laws and of the loyal consultation of citizens, principles which presuppose the creation of all conditions for the voters to be aware of the issues under scrutiny, the legal consequences of lowering the threshold of participation to vote, as well as the effects of the result of the referendum on the general interests of the community.

However, given that the threshold for participation is a prerequisite condition for the referendum to be able to effectively express the will of the citizens, constituting the premise of an authentic democratic manifestation of sovereignty, the Court stressed the fact that its task is to strike a fair balance between the need to protect the right to decide to participate in the referendum of the citizens as a fundamental right and the desire of a parliamentary majority to impose its political will in the State at a given moment.

The preservation of the rule of law and democracy requires the Constitutional Court, as the supreme guardian of the Constitution, to prevent the consequences of the unexpected change of the legal provisions in the field of referendum and to comply with the principles of legal stability (which require clarity, predictability and accessibility) the right to vote, the freedom of choice, and the interpretation of the letter and spirit of the Constitution in good faith, principles which constitute structural elements / valences of the general principle of legal certainty, unanimously accepted within constitutional democracy.

Therefore, the new regulations should not create a state of uncertainty about a defining element of the examined procedure, since the choices of the ordinary legislator regarding the quorum for participation in the referendum can fluctuate according to the will of the political majority in Parliament and the conjunctural interests of its nature and can create a general state of uncertainty regarding an essential element of the referendum, namely the validity of the referendum.

Accordingly, the Court noted that, in order to ensure compliance with the general principle of legal stability in the matter of the referendum, in line with the recommendations of the Code of Good Practices on the Referendum adopted by the Venice Commission, with the First additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the International Covenant on Civil and Political Rights, the provisions of the Law for the amendment and completion of the Law no. 3 of 2000 on the organization and conduct of the referendum are constitutional, but they cannot be applied to referendums organized within one year of the enactment of the amending law.

4. The Referendum Regarding the Amending of the Basic Law

Due to the long-term impact of a constitutional change, the Romanian lawmaker has established a procedure for revising the Basic Law that gives it both stability and legitimacy. That is the reason it provided that the organization and conduct of the referendum on

the amending of the Constitution, as well as its outcome, are mandatory²³.

According to Article 150 Paragraph 1 of the Basic Law, a revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of all Deputies or Senators, as well as by at least 500,000 citizens having the right to vote. Article 151 Paragraph 1 and 3 states that the bill or proposal for revision must have been adopted by the Chamber of Deputies and by the Senate, by a majority of at least two-thirds of the members of each Chamber and revision shall be final after approval by a referendum held within 30 days from enactment of the bill or proposal concerning such revision.

Regarding this kind of issue, the Venice Commission stated that „a national tradition of holding referendums may contribute to the democratic legitimacy of a constitution. In the view of the Commission, in certain circumstances, it may also reduce the risk that political actors could try unilaterally to change the rules of the game. Referendums can also contribute to strengthening the democratic legitimacy of the constitutional protection of human rights”.

Until now, there were seven initiatives of amending the Basic Law of Romania, but only one has achieved its final goal, in 2003. Each time, the Constitutional Court has rendered decisions regarding the compliance with the limits of revision enshrined as the “hard-core” of the Constitution, concerning the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of judiciary, political pluralism, the official language and the citizens' fundamental rights and freedoms, or their safeguards²⁴. It also confirmed the turnout of the national referendum on the 18th-19th of October 2003 and noted that the Law on the Review of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 669 of the 22nd of September 2003, was approved by referendum. At the time of publication of this decision in the Official Gazette of Romania, Part I, the Law for the Revision of the Romanian Constitution entered into force.

5. Referendum on the Dismissal of the President of Romania From the Office

The referendum on the dismissal of the President of Romania is compulsory and is determined by a decision of the Parliament, under the conditions stipulated in Article 95 of the Constitution. The dismissal of the President is in fact a popular revocation, Parliament can not dismiss he/she discretionary, as the President was elected by the people and not by the Parliament, that is why he/she

does not answer to the Parliament, but to the electoral body who chose him/her by universal suffrage²⁵. According to the forementioned constitutional provisions, in case the President of Romania has committed a serious offence in violation of the Constitution, he may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of Deputies and Senators, and after seeking opinion from the Constitutional Court. If the proposal of suspension from office has been approved, a referendum shall be held within 30 days for removing the President from office.

The dismissal of the President of Romania is approved if, following the referendum, the proposal has received the majority of the votes validly cast. This rule is valid only in conjunction with those established by the Constitutional Court by Decision no. 731 of 10th of July 2012, in the sense that the text is constitutional insofar as it ensures the participation in the referendum of at least half plus one of the number of persons on the permanent electoral lists.

Another procedural rule regarding the majority required to dismiss the President was outlined by another decision of the Constitutional Court²⁶, which was called upon to rule on the provisions of the same art.10 of Law no.3 of 2000, as it was to be amended. It intended to establish that the dismissal of the President of Romania is approved if it has obtained the majority of the votes of the citizens enrolled in the electoral lists, if the President of Romania was elected from the first ballot, and if the President of Romania was elected in the second ballot, his/her dismissal is approved if he/she has obtained the majority of votes validly expressed throughout the country by the citizens that voted.

Analyzing the objection of unconstitutionality, the Court found that, by amending the content of Article 10 of the Law no. 3 of 2000, the legislator wanted to apply, in terms of the votes cast, the principle of legal symmetry when electing the President of Romania in the second ballot and dismissing it as a result of the popular consultation. The Court noticed that, basing its solutions on the principle of symmetry, the legislator did not take into account the fact that the application of this principle in public law is not possible, even more so in constitutional law, especially when the organization and functioning of public authorities is at stake. The principle of symmetry is a principle of private law, and the possibility of its application in public law is excluded. That is why constitutional norms are asymmetrical *par excellence*. Thus, the Parliament is elected by the people, but ceases its mandate by passing the time or by the dissolution of the President of Romania; the Government is appointed by the President of Romania on the basis of Parliament's vote of confidence, but it is dismissed

²³ Article 6 of the Law no.3 of 2000.

²⁴ Article 151 (1) and (2) of the Basic Law.

²⁵ Decision no. 70 of the 5th of May 1999.

²⁶ Decision no. 147 of the 21st of February 2007.

following a vote of distrust, due to the resignation of the Prime Minister or when he/she loses his/her electoral rights or is in a state of incompatibility, etc.; eligible public functions are held by people who have obtained them in elections and cease by revocation, occurrence of incompatibility, leakage of time, etc.

Similarly, in the case of the President of Romania, the holding of this position is entrusted to the person who won the presidential election and the cessation of the presidential election takes place as a result of a conviction for high treason, the approval of the dismissal by referendum, the incompatibility, etc. Therefore, the requirements set by the Constitution for the election of the President of Romania and those referring to his dismissal following a referendum are not symmetrical, because they are different legal institutions with different roles and purposes, each with distinct legal treatment.

Thus, the election of the President of Romania is governed by a homogeneous group of legal norms, which establish the rules regarding the organization and holding of the presidential election. At the end of this electoral process, according to Article 81 Paragraph 2 of the Constitution, the candidate who has assembled in the first ballot the majority of the voters who have been included in the electoral lists shall be declared elected. It is possible, however, that in the first ballot, none of the candidates obtain the absolute majority of the votes required by Article 81 Paragraph 2 of the Constitution. Under these circumstances, the electoral process must continue in order to get a winner. As such, the second ballot is organized, only with the first two candidates taking part ranged on the number of votes obtained in the first round. The candidate with the highest number of votes will be appointed as President of Romania.

On the other hand, the dismissal by referendum of the President of Romania does not have the significance of such an electoral competition. On the contrary, it is a sanction for committing serious acts by which the President of Romania violates the provisions of the Constitution. The distinctions regarding the dismissal of the President of Romania by referendum, as it results from the provisions of point 2 of the unique article of the criticized law, regard the President of Romania who obtained the mandate in the first round, the President of Romania elected in the second round of elections and also the interim president. Following the legislator's logic, in the first case, the president would be dismissed with the absolute majority of the votes of the electoral body; in the second case, with the relative majority of the votes of the citizens present at the polls, while for the situation provided by art. 99 of the Constitution, on the "Interim President's Liability" that was not elected by vote, there would be no constitutional provision on dismissal. Such an interpretation is contrary to Article 1 Paragraph 3 of the Constitution, according to which Romania is a state governed by the rule of law, such a

state opposing the application of the same sanction to the President of Romania, in different way that depend on how he/she obtained this function: in the first round of voting, second ballot or as interim in the exercise of his / her office.

The rational solution of this problem lies in the fact that, in the event of serious acts infringing the provisions of the Constitution, the President of Romania - whoever he/she is and anyway he/she would have become head of state - may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, with the vote of the majority of deputies and senators. As such, when the legislator established by law that the results of the referendum on the dismissal of the President of Romania are set differently, depending on the number of the ballot in which he was elected are contrary to the constitutional provisions of Article 81 Paragraph 2. In this respect are also the provisions of Article 96 of the Constitution, which establish a second way for the ceasing of the position of President of Romania, namely the prosecution for high treason. In this case, too, the opening of the road to the end of the presidential term is decided by the Chamber of Deputies and the Senate in a joint session, which may decide the prosecution of the President of Romania - no matter who he/she is, with how many votes he/she won the election or by what way he/she occupies this position. Hence the conclusion that, when the constituent legislator wished to establish a certain majority of votes, he did so by a reference text, whose application to subsidiary situations is understood, except where such a the majority is left to the law.

The constitutional provisions regarding the majority required for the election of the president in the first round are sufficient to allow the determination of the dismissal of the head of state in all cases by analogy and not by the legal symmetry. However, the Court stated that it does not rule out the possibility for the legislator to opt for a majority of relative votes for the dismissal of the President of Romania in all three situations. As a consequence, the Court found that the Law amending and supplementing Law no. 3 of 2000 on the organization and conduct of the referendum which envisages such a legislative solution is unconstitutional²⁷.

Following the re-examination of the law, the reason for unconstitutionality shown above was removed²⁸ by a new wording of Article 10, which stipulates, for all situations, a single majority of votes by which the President of Romania can be dismissed, if "the majority of the validly expressed votes at the national level bby the citizens who participated in the referendum" was met. In this way, the text has been put in concordance with the clarifications made by the Constitutional Court in the Decision no. 147 of 2007.

²⁷ Decision no. 147 of the 21st of February 2007.

²⁸ This fact was noticed by the Constitutional Court by a subsequent decision, namely Decision no. 420 of the 3rd of May 2007.

The question of the percentage of valid votes required for the dismissal of the President came again into the attention of the Court²⁹ in 2012, after the Article 10 was once again amended, meaning that the dismissal of the President of Romania is approved if, following the referendum, the proposal has met the majority of the votes validly expressed.

Noting the numerous legislative changes of the criticized provision, the Court recalled that in the Code of Good Practices on the Referendum adopted in 2007, the European Commission for Democracy through Law (the Venice Commission) recommended to States to ensure stability with regard to legislation in electoral and referendum matters.

The Court also found that the outcome of the referendum depends on the cumulative fulfillment of two conditions: one referring to the minimum number of citizens who have to participate in the referendum so it be considered valid and one on the number of validly cast votes that determine the result of the referendum. These conditions are detailed in Article 5 Paragraph 2 and Article 10 of the Law no. 3 of 2000. According to Article 5 Paragraph 2, as it was written at that time, "The referendum is valid if at least half plus one of the number of persons on the permanent electoral lists attended the polls".

The Court observed that the Law for the amendment of Article 10 of the Law no. 3 of 2000 provides a unitary regulation for all types of referendum established by the Constitution, giving expression to the representativeness demand in terms of the turnout of the vote. Thus, the same legislative solution can be found in the referendum on the amending of the Constitution, the referendum on issues of national interest and the local referendum, where the result is determined by the majority of votes validly expressed throughout the country.

Similarly, the Court found that the condition to be met for the validity of the referendum is the same for all types of referendum, Article 5 Paragraph 2 of the Law no. 3 of 2000 requiring the meeting of the absolute majority consisting of half plus one of the number of persons on the permanent electoral lists. The Court held that this is an essential condition for the referendum to be able to effectively express the will of the citizens, constituting the premise of an authentic democratic manifestation of sovereignty through the people, in accordance with the principle stated in Article 2 Paragraph 1 of the Basic Law. The participation of the majority of the citizens in the referendum is an act of civic responsibility, in which the electoral body is to decide whether or not to sanction the President of Romania, having the possibility of dismissal or keeping him in office. As such, it found that the Law for the amendment of Article 10 of the Law no. 3 of 2000 is constitutional insofar as it ensures the participation in the referendum of at least half plus one of the number of persons on the permanent electoral lists.

6. The Referendum on National Interest Issues

According to Article 11 of Law no. 3 of 2000, the President of Romania, after consulting the Parliament, may ask the people to express their will through a referendum on issues of national interest. The issues that are subject to the referendum and the date of the referendum are established by the President of Romania, by decree.

Initially, this law stipulated that the referendum on issues of national interest was organized before the adoption of measures, including legislation. By Decision no. 70 of the 5th of May 1999, the Court found that this legal provision was unconstitutional because it limited the possibility for the President to initiate the referendum only to the situation in which it is held prior to the taking of measures. This wording created the premises of restricting the exercise of a constitutional right of the President and added a non-existent condition in the text of Article 90 of the Constitution, which provides: "The President of Romania, after consulting the Parliament, may ask the people to express their will on issues of national interest by referendum". In the light of these provisions, consultation of Parliament is, in all cases, mandatory. The Constitution does not, however, condition, by reference to a certain period, the initiation by the President of this form of popular consultation on issues of national interest. Thus, the legal provision submitted to the constitutional review was seen by the Court as a restriction of the President's right, by obliging him to propose to the Parliament what "other problems" are to constitute the object of the referendum it intends to initiate. In fact, the President is the only one entitled to establish "issues of national interest" on which he/she can ask the people to express their will by referendum.

The Court subsequently developed this theory, through Decision no. 567 of the 11th of July 2006 on the objection of unconstitutionality of the provisions of Article 12 Paragraph (1) of the Law no. 3 of 2000, which lists the problems considered of national interest. The Court found that the referendum procedure initiated by the President on "issues of national interest", involves two phases: the consultation of the Parliament, which is to adopt a decision in the joint session of the two Chambers, with the vote of the majority of the deputies and senators on the referendum initiated by the President of Romania. If the Parliament has not been consulted, the President will not be able to initiate the referendum. The second stage is the consultation of the people, expressing their will on matters of national interest submitted to them by the President.

Article 90 of the Constitution establishes the exclusive competence of the President in determining national issues of interest to the referendum, even if Parliament's consultation is compulsory. Only the President of Romania has the right to decide which are

²⁹ Decision no. 731 of the 10th of July 2012.

the issues of national interest and, within them, to establish by decree the concrete issue that is subject to the referendum and the date of its implementation. In this regard, the Court found that the limiting list in Article 12 paragraph 1 of the Law no. 3 of 2000 of certain situations considered to be "problems of national interest" is likely to restrict the President's right to consult the people, knowing that, over time, the national interest may differ, whenever new situations may arise, claiming the organization of a referendum. Any listing of situations considered to be of "national interest" at the time when the legislator adopts the regulation may later turn into a constraint, to a limitation that affects the constitutional right of the President to decide on its own problems to consult the people. That is why establishing by law the problems of national interest represents a mixture of Parliament in the exercise of the exclusive powers conferred on it by the Constitution to the President and, as such, a disregard for the principle of separation and balance of power within constitutional democracy.

7. The Role of the Constitutional Court in the Procedure of the Referendum

Beside reviewing the constitutionality of legislation, the Constitutional Court is responsible for exercising various powers which underline its important role in enforcing the supremacy of the Basic Law and the values and principles of democracy. In 1991, when drafted the first genuine democratic Basic Law after the Second World War, the Romanian constituent power stated that the national sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies, namely the Parliament and the President of Romania, established as a result of free, periodic and fair elections. But it also provided a way of direct involvement of the people in the political decision making process, by means of a referendum. Thus, the referendum becomes the instrument of direct democracy enshrined in the Romanian Constitution.

The Constitutional Court keeps in mind those stated by the Venice Commission in the Code of Good Practice on Referendums, according to which the principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights, applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed³⁰.

By Decision no. 51 of the 25th of January 2012, the Court pointed out, in relation to the legal force of

the provisions of the Code of Good Practice in Electoral Matters, drafted by the European Commission for Democracy through Law, invoked by the authors of the petition, that "its recommendations are the coordinates of a democratic election in which the states - which are characterized as belonging to this type of regime - can manifest their free choice in electoral matters, respecting the fundamental human rights in general and the right to be elected and to choose, in particular".

In Romania, the referendum has to be organized each time the Constitution is subject to a revision and also when the dismissal of Romanian President is at stake. In both cases, the result of the valid referendum cannot be disregarded. These two varieties of referendum are compulsory both in what concerns their organization and their outcome. On the contrary, the so-called consultative referendum is optional from both fore-mentioned points of view: its necessity and result. It is organized at the national level on the request of the President of Romania, who may ask the People of Romania to express its will as to questions of national interest.

The Constitutional Court supervises the observance of the procedure for the organization and carrying out of a referendum, and it confirms its results. In order to implement the provisions above, the Constitutional Court is entitled to request information from any public authority³¹. Within this power, the Court renders a ruling, which has to be taken by a vote of two-thirds of the judges of the Court. The Constitutional Court publishes the ruling on the outcome of the referendum in the Official Gazette of Romania, Part I, and in the press. Before publication in the Official Gazette of Romania, the ruling of the Constitutional Court shall be presented to the Chamber of Deputies and the Senate, in their common session³².

As effects of the ruling, the Law for revision of the Constitution or, as the case may be, dismissal from office of the President of Romania comes into force on the day of publication in the Official Gazette of Romania of the Constitutional Court's ruling confirming the referendum's results.

There were 5 referendums that have been organised in Romania until now: one referendum on the revision of the Constitution (held between the 18th-19th October 2003). The Romanian Constitution was initially approved by the national referendum of the 8th of December 1991; two referendums on the dismissal of the President of Romania from office (held on the 19th May of 2007 and the 29th of July 2012); two referendums at the initiative of the President of Romania on matters of national interest (held on the 25th of November 2007 and the 22nd of November 2009), regarding the introduction of the first-past-the-post vote for the election of the members of the

³⁰ CDL-AD(2007)008rev, Code of Good Practice on Referendums.

³¹ Article 46 of the Law no. 47 of 1992.

³² Article 47 of the Law no. 47 of 1992.

Romanian Parliament³³ and respectively, the moving to a unicameral parliament and the decrease in the number of members of the Romanian Parliament to a maximum of 300 parliamentarians³⁴.

The Constitutional Court establishes whether the procedure for the organisation and holding of the referendum and the confirmation of its returns was observed or not¹⁶ [Article 146 i) of the Constitution and Article 46 (1) of Law no. 47/1992]; prior to its publication in the Official Gazette of Romania, Part I, the Constitutional Court's ruling is submitted to the Chamber of Deputies and the Senate, in joint session [Article 146 i) of the Constitution and Article 47 (3) of Law no. 47/1992].

Regarding the manner in which this function was exercised, the Court delivered a decision³⁵ in the *a priori* review of constitutionality, analyzing the provisions of Article 45 Paragraph 1 of Law No. 3 of 2000, which should have been amended in the sense that "the Constitutional Court shall, at the reasoned request and accompanied by the evidence on which the parties or their alliances are based, cancel the national referendum if the voting and the results have been established through fraud". The authors of the objection argued that it contravenes the constitutional provisions that give the Constitutional Court the right to observe the procedure for organizing and conducting the referendum and to confirm its results. Since none of these constitutional provisions makes the exercise of the Court's powers subject to any referral, it is imperative that the Court would act *ex officio* and annul the referendum, if it finds that the procedure for its organization and conduct has been violated.

The Court has held that the claim was well founded. Thus, the Court noted that the Constitution, by means of a general wording, recognizes the Court's right to resolve actions specific to the constitutional litigation and, from that position, to resolve the petitions or complaints relating to possible deviations from the referendum rules and procedures. It is no less true, however, that within the scope of the right conferred by the Constitution on "observing" the observance of the procedures for the organization and holding of the referendum also comes the possibility of the Court to react by itself when it finds out directly or when it has information from citizens, the press, non-governmental organizations, etc. in connection with non-compliance with these rules and procedures. This possibility is indissolubly linked to the exercise of the Court's attributions to "confirm" the results of the referendum. In the case of finding frauds that question the fairness of the turnout of the referendum, the Court

does not confirm this result. The significance of nonconfirmation, which is a legal act with serious consequences, is that of finding the national referendum null and void. For this reason, the Court cannot be limited in its action by the necessity of the existence of a request from the parties or their alliances.

Conclusions

The jurisprudence synthesized above, although representing just a part of the issues which the Constitutional Court was called to resolve in connexion with the referendum, reflects the contribution that this authority has had in the clarifying of the normative framework governing the organization and holding of the referendum. The finality pursued by the Romanian jurisdiction of constitutional review has always been to maintain the democratic character of this instrument, through which citizens express their opinion and are able to participate in taking a decision. At the same time, the Court has always taken into account the fact that the main feature of the referendum resides in its function of legitimizing power, the popular will validating the acts to be voted. The referendum diminishes the gap between the governors and the governed, and democratically completes the relations resulting from the elections. In other words, the referendum is a means of manifesting the role of the citizen in politics, within the scope of the public debate. On the other hand, the referendum gives the people the opportunity to control the power and the way this is exercised, as well as the possibility to deal with extremely important political issues (such as those related to the dismissal procedure of the President of Romania). The Court also warned that the referendum does not constitute an alternative to the parliamentary democracy and its abusive use can undermine the legitimacy and role of Parliament as a representative body of the people. The same view was expressed in doctrine, where it has been noted that although the referendum can be a powerful instrument to increase the responsiveness of political system, nevertheless, one should not forget that too much responsiveness may not always be a good thing, and that on certain issues it may be worthwhile to protect elite consensus, namely the Parliament, against too much popular pressure³⁶.

The legislation examined by the Constitutional Court proved to be insufficiently clear and its frequent amendments, sometimes dictated by short-term interests, raised questions about its effectiveness and its ability to provide an effective framework for the

³³ The Decree of the President of Romania no. 909 of the 23rd of October 2007 for the organisation of a national referendum on, published in the Official Gazette of Romania, Part I, no. 719 of the 24th of October 2007, considered to be unconstitutional, as the object of the referendum was different from that on which the Parliament was consulted, as well as the fact that "it does not set a date, but a delay" for holding the referendum (Ruling no. 7 of 2007)

³⁴ The Decree of the President of Romania no. 1.507 of 22 October 2009 for the organisation of a national referendum (Ruling no. 33 of 2009)

³⁵ Decision no. 70 of the 5th of May 1999.

³⁶ Thomas Poguntke, "Introduction" in *Referendums and Representative Democracy. Responsiveness, accountability and deliberation*, ed. Maija Setälä and Theo Schiller (New York: Routledge, 2009), xvi.

referendum to express the political will of the people. In order to maintain the rule of law, it is necessary to address this issue seriously and responsibly so as to

respect both the principle of legal certainty and the democratically recognized ability of citizens to make their voices heard in matters of national importance.

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