



SARA Law Research Center

International Journal of Legal and Social Order, <https://www.ccdsara.ro/ijlso>

ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188

Nº. 1 (2024), pp. 136-148

LEGITIMITY OF POLITICAL DECISIONS: THE ROLE OF THE REFERENDUM IN THE DEMOCRATIC PROCESS

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Received 10.11.2024; accepted 14.12.2024

DOI: <https://doi.org/10.55516/ijlso.v4i1.223>

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Abstract

The popular vote in Romania has a history that spans several decades in various political and social contexts.

Starting from the initial forms of consultation of the population known as the plebiscite, at present, as a result of social and political evolution and transformations, we find the referendum regulated at constitutional level.

The referendum is an important tool in the democratic process to allow citizens to speak directly on key issues affecting society. Through the referendum, citizens have the opportunity to participate actively in political decision-making, thereby strengthening the principles of the democratic state. This form of direct democracy gives citizens the opportunity to vote on specific issues such as revision of the constitution, impeachment of the president, adoption of important laws or topics of public interest.

The role of the referendum is also to legitimize political decisions and to evaluate the mandates of elected representatives, which can lead to public debates that stimulate citizens' information and promote a better understanding of the problems faced by society.

Referenda are therefore not only a voting tool, but also a means of civic education and strengthening social cohesion, with the potential to strengthen democracy and create a sense of belonging and responsibility among citizens.

The Constitutional Court of Romania has a fundamental role in ensuring the legality and legitimacy of the referendum process, contributing to the protection of democracy and the fundamental rights of citizens. It helps to maintain a balance between political decisions, popular will and respect for constitutional norms.

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Key words: *referendum, plebiscite, constitution, rule of law, political decision.*

INTRODUCTION

In Romania, the history of the referendum is closely linked to its political and social evolution, reflecting the major changes that have taken place over time.

The first attempts to organize the referendum in Romania were recorded at the beginning of the 20th century, but the consecration as a form of direct consultation of citizens in connection with a law of a very special importance or on a situation of national importance occurred after 1991 in the context of Romania's transformation into a democratic state and the regulation of the referendum in the constitution.

Although the history of the referendum in Romania practically begins after 1991, with the adoption of the constitution enshrining the rule of law, we cannot fail to mention that forms of popular consultation existed before 1991.

Thus, with the realization in 1859 of the national unitary state through the union of Wallachia and Moldavia and the adoption in 1864 of the "Developing Statute of the Convention of 7/19 August 1858" and of the electoral law, practically the first constitution in Romania appeared and with the first constitution was manifested the first form of consultation of the population, namely the plebiscite.

The constitutions of 1866, 1923, 1938, 1948, 1952, 1965, 1986 followed, which, through their content, reflected the political situation in Romania. During 1944-1948 and 1989-1991, constitutional acts were issued.

As a result of the emergence of the Constitution and the development of constitutional law in doctrine, the Constitution was defined as "that law which, having legal force superior to other laws, systematically regulates both the principles of the socio-economic structure and those of the organization and functioning of the state based on it, guarantees the fundamental rights of citizens materially and establishes the duties corresponding to these rights".

The form of consultation of citizens prior to 1989, in the context of the adoption of constitutions, was the plebiscite which, due to the conditions in which it was organized, acquired a negative connotation, denoting an unfree and incorrectly organized popular vote from a democratic point of view. As a result, the masses have been subjected to disinformation and manipulation by certain interest groups which have imposed certain momentary decisions on their elected representatives (Parliament) through pressure and a "vote of the masses".

The Plebiscite took place in the context of the dissolution of the Assembly (parliament) by the ruler being considered to have been organized in the attempt of the ruler Alexandru Ioan Cuza to cover, in fact, a coup d'état.

The constitution of 1866 was inspired by the constitution of Belgium of 1831 and was adopted during the reign of King Carol I. The king's accession to

the throne was put to a popular vote in March 1866 when ‘a body of voters of the same size was called upon to say whether he wished to designate Carol I as sovereign prince of the United Principalities. The decision came after the removal of Alexandru Ioan Cuza from the leadership of the state, the deputies and state officials had sworn allegiance to Filip de Flanders, who, however, did not accept to take over power from Bucharest’. The result of the consultation was: 224 romanians voted against, 685.969 voted in favour. Thus began the reign of the kings of Hohenzollern.

In February 1938, Carol II proposed to the country a new Constitution. He did so after deciding not to convene the elected Parliament in December 1937 and after appointing members of a technocratic government headed by the patriarch. The vote on the plebiscite was compulsory and lasted from 8 a.m. to 5 p.m. Before the elections, jobs were held and there were parades on the streets, a newspaper said, ‘schools, guards and pre-military with music’. Almost 4.3 million citizens were on the ruler's side, and only 5483 appear to be against. the constitution thus approved was in force for two years and seven months .

Ion Antonescu also organized two plebiscites. The citizen was called upon to pronounce on one and the same thing, i.e. ‘the approval of the face of Marshal Antonescu’s leadership of the country since 6 September 1940’. The first consultation was held on 2-5 March 1941, the second was supposed to last from 9 to 12 November 1941, but was extended by three days, when it was seen that the mobilization was weak. 3.4 million citizens sided with the marshal, having garnered – half a year earlier – 2.9 million votes. It was the only time in our history that voters were called to the polls in alphabetical order: A to L went in the morning and M to Z in the afternoon. The number of those who resisted was 2996 in March and 68 in November. "The country's unanimity sat next to Marshal Antonescu", noted a chronicler of the time.

In the autumn of 1986, the General Secretary of the Romanian Communist Party, Nicolae Ceausescu, first amended the Constitution, because it did not provide for referendums. The subject of popular approval was formulated as follows: "a 5% reduction in Romania's armaments, personnel and military expenditure". The country was then a member of the Warsaw Pact, an alliance against NATO. Young people aged 14-18 were also called to the polls – with the right to vote in an advisory capacity. Statistics show that only 4 teenagers and 233 adults would be absent from the call. 17,655,974 Romanians said "yes".

By analyzing the history of popular consultations in Romania, we can better understand the dynamics of the relationship between the state and citizens, as well as how the popular vote influenced the evolution of the Romanian society and legitimized the political decision. Between 1864 and 1989, six plebiscites were organized for the legitimacy of political decisions.

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I. SOME ASPECTS CONCERNING THE NATIONAL REFERENDUM

In line with the evolution of the constitution and society, the manner of consulting the population in matters of public interest has also evolved from the incipient forms represented by the plebiscite (1864), to the current forms regulated by the provisions of Articles 2, 90, 95, 146, 150, 151 of the Constitution and the provisions of Law No 3/2000, as amended.

The referendum is an essential tool of direct democracy, through which citizens can express their opinion on certain issues of public interest.

It follows from the constitutional and legal provisions in force that in Romania the referendum is the means of direct consultation of the population and of expressing the sovereign will of the Romanian people regarding the revision of the constitution, the dismissal of the President of Romania, issues of national interest.

Depending on the issues that may form the subject of the referendum, it can be initiated by the president of the country in situations involving issues of national interest. The Government may propose to the President the approval of a referendum for constitutional amendments. Parliament may decide to hold a referendum on constitutional or legislative matters. Citizens may initiate a referendum under the conditions laid down in Articles 150 and 151 of the Constitution.

The referendum to amend the Constitution and the referendum to dismiss the President have a decisional character, and the effects are direct.

The referendum on issues of national interest shall be advisory in nature and its effects shall be indirect. The indirect effect is explained by the Constitutional Court as appearing when the result requires the intervention of other bodies, most often the legislative ones, in order to implement the will expressed by the electoral body. However, the will of the people must not be disregarded and the results of the referendum must be put into practice, even if it is an advisory endeavour, 'the effects of the referendum must be expressly provided for in the Constitution or by law, whether the referendum is advisory or decision-making'. However, there is no deadline for the results to be put into practice, so a decision can be postponed indefinitely. An example is the result of the 2009 referendum, when Romanians voted for a parliament with 300 elected representatives.

A proposal to revise the constitution from citizens requires 500.000 signatures of citizens. The referendum can be reached only after the draft amendment to the fundamental law is approved with two thirds of the votes of the MPs. The result of the referendum is validated if the validly expressed options represent at least 25% of the citizens registered on the permanent electoral rolls. Also, the subjects of the initiative to revise the constitution may be the president, at the proposal of the government, as well as at least a quarter of the number of deputies or senators.

The referendum for the dismissal of the President of Romania is mandatory and shall be established by decision of the Parliament, under the conditions provided for in Article 95 of the Constitution. The dismissal of the President of Romania is approved if, following the referendum, the proposal received a majority of the valid votes cast.

As regards the topics on which the President may call a referendum, the legislation states that they are 'of national interest'. The Constitutional Court ruled that the head of state is the only one who can decide the topics for consulting the population, and the Parliament cannot interfere, censoring its decision.

II. NATIONAL REFERENDA AFTER 1989

2.1. Over the years, several referenda have been organised in Romania on various issues such as declaring Romania's intention to join the European Union (2003), replacing the phrase 'between spouses' in Article 48(1) of the Constitution with a more restrictive one, 'between a man and a woman' with regard to the family (2018), the decrease in the number of parliamentarians, the suspension of the President, etc.

The first referendum looked, again, like the plebiscite of 1864, at a constitution, respectively, the one discussed in the first parliament elected after the fall of the communist regime. The Christian and Democratic National Peasants' Party then called for a boycott of the approval referendum, inter alia because the form of government was not put to a vote. More than 8.4 million voters agreed to the new fundamental act and 2.2 million opposed it.

A referendum was held in 2003 to validate constitutional amendments. The most significant change concerned the duration of the presidential term, which increased from 4 to 5 years and made a slight differentiation in the functioning of the chambers. Scheduled for one day, the consultation was extended the next day. The number of those who opposed the revision was ten times lower than those who agreed.

In 2007 the referendum saw the impeachment of the president. The procedure had been launched in 1994 against another president, but the Constitutional Court considered that there were no grounds to punish the head of state, so a popular vote was not reached, provided as a mechanism to confirm the decision taken in the assembled chambers. Thirteen years later, the Constitutional Court also found that there was no reason to impeach the president, but 322 deputies and senators did. Thus, a referendum was organized in which 44.5% of the voters participated, so the procedure was invalidated, because the majority of those registered on the electoral lists were needed. Of those present, 75% voted against the suspension.

It was also in 2007 that the President initiated a popular consultation. Thus, the President proposed a new way of voting, i.e. he asked the citizens whether they agreed that "starting with the first elections to be held for the

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Romanian Parliament, all deputies and senators should be elected in single-member constituencies, on the basis of a two-round majority vote". The referendum was held on the same day as the first European Parliament elections, but in separate polling stations. As only a quarter of citizens spoke, the consultation had no effect.

In November 2009, at the same time as the presidential election, the President initiated two referendums. The first aimed to abolish the Senate, and the second proposed that the maximum number of elected representatives should be 300. Both proposals were broadly supported: 72% wanted a chamber, not two, and 83% of citizens agreed to set a maximum number of 300 elected. The results were valid, because the presence exceeded the threshold of 50%, but the legislators ignored them.

In 2012, a new proposal to suspend the president was rejected by the Constitutional Court because although the majority of those who voted said yes, only 46% of the citizens went to the polls.

On 6-7 October 2018, a referendum was held to amend Article 48 of the Romanian Constitution. The initiative aimed to replace the phrase 'between spouses' in Article 48(1) of the Constitution with a more restrictive one, 'between a man and a woman'. The referendum sought a constitutional ban on same-sex marriage. The Constitutional Court endorsed the amendment proposal on July 20, 2016, noting that it does not bring any interference to any individual right. The revision proposal was also endorsed by the Chamber of Deputies on 27 March 2017. On 11 September 2018, the Senate, as the decision-making body, adopted the proposal to revise the Constitution by 107 votes" in favour", 13 votes 'against' and seven abstentions. The question put to voters was 'Do you agree with the law revising the Romanian Constitution as adopted by Parliament?', to which they had to answer 'yes' or 'no'. The referendum failed as the validation threshold was not reached. According to the Central Electoral Bureau, 21.1% of Romanians with the right to vote went to the polls in the two days dedicated to the consultation.

The amendment of the Constitution was supported by 91.56% of those present at the polls. On May 26, 2019, at the initiative of the President of Romania, the referendum on justice was organized simultaneously with the elections to the European Parliament. The referendum was validated in the context in which 41.28% of Romanians with the right to vote went to the polls . The President announced the beginning of the demarches for a referendum on the pardon and the amendment of the Criminal Code as early as 2017. However, the procedure was suspended until April 2019, when the President decided to re-consult Parliament to 'enlarge the scope of the referendum'. On April 4, the President announced the topics for the referendum: the prohibition of amnesty and pardon for corruption offences and the prohibition of the adoption by the Government of emergency ordinances in the field of criminal offences, penalties and judicial organisation, correlated with the right of other constitutional

authorities to refer ordinances directly to the Constitutional Court. The joint legal committees of the Senate and the Chamber of Deputies gave a favourable opinion on the organization of the referendum and the joint plenary of the two chambers gave a favourable opinion on the President's initiative. The referendum had two questions: 'Do you agree with the prohibition of amnesty and pardon for corruption offences?' and 'Do you agree with the prohibition of the adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and with the extension of the right to challenge ordinances directly to the Constitutional Court?'. To each of them voters had to answer 'yes' or 'no'.

After hearing the results of the referendum, the President sent a letter to the presidents of the political parties and formations represented in the Parliament, inviting them to consultations in order to establish the directions of action necessary for the implementation of the referendum.

The National Political Agreement for consolidating Romania's European path was signed, through which the signatories committed themselves to transposing into legislation the ban on amnesty and pardon for corruption offences, the ban on the adoption by the Government of emergency ordinances in the field of justice laws, the measures necessary to ensure integrity in public functions and the measures necessary to ensure – both at home and abroad – the full and effective exercise of the right to vote by Romanian citizens.

The agreement also requires the signatories to support "deepening integration with the European Union and strengthening the European project, as well as strengthening the transatlantic relationship".

II.2 Referendum in the age of digitalisation represents a new dimension of civic participation in the democratic process.

Digitalisation has profoundly transformed the way modern societies work, including democratic processes. The referendum, as a tool to directly express the will of the people, was influenced by technological advances, offering new opportunities and challenges in terms of civic participation. This theme explores how digitalisation affects the referendum, its advantages and disadvantages, and its implications for democracy.

Digitalisation has enabled the modernisation of the electoral process, including the referendum through electronic voting. The implementation of electronic voting systems can facilitate the participation of more citizens by reducing queues and waiting times and allowing remote participation.

Online platforms also allow information on the subject of the referendum to be disseminated quickly, making it easier for voters to be informed and for public debate to be promoted.

In this way, digitalisation can improve transparency. Citizens can be more informed and actively participate in decision-making.

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III. THE GUARDIAN OF DEMOCRACY IN THE PROCESS OF THE REFERENDUM

The Constitutional Court plays an important role in the referendum procedure by observing the procedure for its organization and conduct and confirming the results of the referendum.

Examining acts issued by the Constitutional Court in the context of the referendum procedure, it is concluded that these may be opinions and decisions and that they may directly or indirectly influence the conduct of the referendum and its results.

Opinions are delivered on the initiative to suspend the President from office and are the only acts of the Court that have an advisory character.

Decisions of the Constitutional Court are generally binding and have power only for the future. Consequently, all public authorities are bound by the decisions and rulings of the Constitutional Court.

According to the case-law of the Court, the force of "res judicata" attached to judicial acts attaches not only to the operative part, but also to the considerations on which the decisions of the Constitutional Court are based, both the Parliament and the Government, i.e. the public authorities and institutions, must respect both their recitals and their operative parts.

Examples of the importance and role of the Constitutional Court in the referendum procedure can be Decision no 799/2011, Decision no 730/2012, Decision no 2 of 27 June 2019, Advisory Opinion no 1/2012.

By Decision no 799/2011, the Constitutional Court ruled on the draft law on the revision of the Constitution submitted by the President of Romania at the initiative of the Government. Examination of the content of Decision no 799/2011 shows that the Constitutional review Court carried out an extensive analysis of the draft law on the revision of the constitution from the following perspectives: the fulfilment of the constitutional conditions of form and substance relating to the revision of the constitution, conditions which 'relate to the initiative of the revision and the limits of the revision', compliance with the provisions of international treaties on human rights to which Romania is a party, and compliance with the principles which underpin and define the Romanian State, laid down in Article 1 of the Constitution.

In exercising its powers, the Constitutional Court held that the draft law submitted by the President 'contains a series of amendments and additions to the draft revision law submitted to the President of Romania by the Government' and that the exercise of the right of initiative was carried out in compliance with Article 150(1) of the Constitution. Thus, the court ruled that the president has the possibility to decide whether to initiate the procedure for revising the constitution and if he decides to initiate the procedure he can only partially endorse or supplement the Government's proposal.

Regarding the observance of the provisions of the international treaties in the field of human rights to which Romania is a party, as well as the observance

of the principles that substantiate and define the Romanian state, the Constitutional Court found that some of the amendments proposed by the draft law on the revision of the constitution are constitutional, others unconstitutional, some of them it considered as not falling within the scope of the constitution and others it interpreted in the sense of constitutionality of the legal provisions. We also note that in the decision-making process there is a contrary opinion of a constitutional judge.

In another case, the Constitutional Court ruled on the inadmissibility of the request made by the President of Romania regarding the settlement of the constitutional legal conflict between the Romanian Parliament and the President of Romania, a conflict that arose as a result of the Parliament's action to order the suspension of the President of Romania. The effects of the suspension consist in the interruption of the presidential mandate until the validation of the referendum result by the Constitutional Court. In substantiating the decision on the inadmissibility of the President's request, the Constitutional Court stated that 'only the Parliament may decide to suspend the President, given this power, and once the parliamentary procedure for suspending the President of Romania from office has been initiated, according to the Constitution, it cannot be stopped', regardless of the opinion given by the Constitutional Court, which is of a strictly advisory nature. In the procedure for the suspension of the President of Romania, governed by Article 95 of the Constitution, the role of the Constitutional Court ceases once the advisory opinion is issued.

If the proposal for suspension from office is approved, a referendum on the dismissal of the president shall be held within 30 days.

As regards the situations in which the Constitutional Court delivered judgments, we note that by Decision No 33/2009 the Constitutional Court ruled on the application for annulment of Decree No 1507 of 22 October 2009 on the organisation of the national referendum, in which context it verified the constitutionality of the decree by reference to the constitutional provisions conferring on the President of Romania the power to have recourse to the referendum procedure on issues of national interest and defined the notion of issues of national interest. Moreover, by Decision No 2/2019, it held that "the resolution of complaints submitted to the Constitutional Court concerning compliance with the procedure for the organisation and conduct of the national consultative referendum also entails, inter alia, the verification of the constitutionality of the legislative acts issued with a view to organising the referendum or of those laying down procedural rules for its organisation and conduct, in so far as the resolution of complaints does not fall within the remit of the electoral bureaux or the courts". In the absence of any constitutional and legal regulation in this respect, all complaints filed and registered with the Constitutional Court are admissible until the Constitutional Court confirms (confirms, as the case may be) the results of the referendum.

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Regarding the referendum of 26 May 2019, the court noted that there was no complete information on all the legal and technical details involved in the two questions, as the recommendations of the Venice Commission were not followed. There were also several hypotheses in the questions, which would have required separate treatment. Given that the referendum was advisory in nature and that the expressed will, even in the context of obvious deficiencies in the drafting of the questions raised, gives guidance to the authorities as to the majority will expressed by the voters, there is no constitutional basis for invalidating the referendum.

Since a will with a political and not a legal effect has been expressed, in the sense analysed, the legal, technical and detailed aspects are to be duly assessed by the authorities and implemented in compliance with the constitutional and legal reference framework.

In conclusion, reviewing the procedure for the organisation and conduct of the consultative referendum of 26 May 2019, the Court found a number of shortcomings, both as regards Presidential Decree no 420 of 25 April 2019 and as regards the conduct of the referendum. However, the Court considered that the deficiencies found are not such as to support a violation of the constitutional framework that shapes the consultative referendum. Thus, under Article 90 of the Constitution, the people are consulted by the President of Romania, and the result of the consultation must be taken into account by the authorities in addressing the issues of national interest that formed the subject of the consultation, in the sense of their political orientation. This approach can materialize in various measures of public authorities, without imposing an option for one or another category of measures, such as the revision of the Constitution. As a result, the triggering of the consultative referendum, the questions put to the people by the President, the exploitation of the answers received by the public authorities are subsumed under a political effect which, in turn, produces consequences in terms of the political responsibility of the institutional actors involved, and not in terms of their legal responsibility. To the extent that the political decision is to adopt legislative measures, they may be subject to constitutional review in accordance with the applicable constitutional framework.

The Constitutional Court found that the condition regarding the participation in the referendum of at least 30% of the persons registered in the permanent electoral lists (for both questions) is met. Also, the condition that validly expressed options represent at least 25% of those registered on the permanent electoral rolls (for both questions) is met. For the first question, the majority vote of the participants who expressed valid options (85.91%) was for the answer "YES", i.e. in the sense of the agreement with "the prohibition of amnesty and pardon for corruption offences". For the second question, the majority vote of the participants who expressed valid options (86.18%) was for the answer "YES", i.e. in the sense of the agreement with "prohibiting the

adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and extending the right to challenge ordinances directly to the Constitutional Court”.

Rejecting the appeals, the court found that the procedure for organizing and holding the national referendum of 26 May 2019 was observed and that it is valid, as of the total of 18.267.997 persons registered on the permanent electoral lists, 7.922.591 persons participated in the vote in the first question and 7.923.869 persons in the second question, i.e. 43.37% and 43.38% of the number of persons registered on the permanent electoral lists, respectively. At the same time, the options validly expressed for the first question are 41.16%, and for the second question 41.15% of the number of persons registered on the permanent electoral lists.

The Court confirmed the results of the national referendum of 26 May 2019 and found that 85.91% of the valid votes cast were for the answer ‘YES’ to the question ‘Do you agree with the prohibition of amnesty and pardon for corruption offences?’ and 86.18% for the answer ‘YES’ to the question ”Do you agree with the prohibition of the adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and with the extension of the right to appeal the ordinances directly to the Constitutional Court?”.

However, the outcome of the consultative referendum provides only political guidance on the issues of national interest that formed the subject matter of the consultation. However, the decision on how the will expressed in the referendum will be implemented lies with the public authorities with competence in the matter. Also, regardless of the content of the questions addressed to the people during a consultative referendum, the revision of the Constitution follows the procedure regulated by the provisions of art. 150-152 of the Fundamental Law, texts that establish the initiators, the rules of debate, adoption and approval of the law revising the Constitution, as well as the limits of the revision.

Thus, the revision of the Constitution can be initiated both by citizens (in compliance with the rules on the minimum number of supporters and territorial dispersion) and by the President, on the proposal of the Government, and involves the mandatory holding of a referendum, in accordance with Article 151(3) of the Constitution. This decision-making referendum, which has the effect of revising the constitution, is not to be confused with the consultative referendum, which, regardless of the questions submitted to the people and its theme, remains a consultation with political effects. The constitutional provisions regulate in this respect the competence of the court of ex officio constitutional review of both the initiative to revise the constitution and the law to revise the constitution. The court shall also ensure that the procedure for the organisation and conduct of the referendum, including the revision of the constitution, is observed.

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Ruling on the free formation of the will of the electorate, essential for free voting, the Venice Commission recommended that "the issue put to the vote must be clear, must not be misleading, must not suggest an answer, voters must be informed of the effects of the referendum, the participants in the elections must be able to answer questions only by 'yes', 'no', or by white vote". Similarly, the Venice Commission recommended that the authorities provide objective information.

CONCLUSION

The evolution from the plebiscite to the referendum reflects a transition from forms of expression of popular will that were often domineering and manipulative, to a democratic mechanism that encourages citizen participation and accountability.

In the proper functioning of this democratic mechanism, an important role is played by the Constitutional Court, which can interpret, modify or stop, within certain limits, the initiative submitted to referendum.

Thus, the relationship between the popular vote and the constitutionality control in the referendum is a complex one, being essential for ensuring a fair and legitimate democratic process.

Constitutional review by the Constitutional Court is designed to verify that referendum initiatives comply with constitutional norms and principles and ensure that the popular vote is not used to violate fundamental rights or promote policies contrary to the constitution.

The popular vote and the constitutionality control are interdependent in the referendum, the popular vote ensuring the legitimacy of political decisions, and the constitutionality control ensures that these decisions respect the legal norms and the fundamental rights of the citizens, essential for the functioning of the democratic system.

In the era of focus on digitalisation, the referendum takes on a new dimension full of opportunities but also challenges. It is essential that the authorities strike a balance between using technology to increase participation and ensuring the integrity and security of the electoral process. In this context, digital education and the promotion of a healthy online environment are becoming crucial for guaranteeing a functioning and inclusive democracy.

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