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REFERENDUM AS AN INSTRUMENT OF DEMOCRACY IN A STATE GOVERNED BY THE RULE OF LAW: AN ANALISYS THROUGH THE LENS OF THE ROMANIAN CONSTITUTIONAL COURT'S CASE-LAW

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Abstract

The paper intends to highlight the importance of the referendum in a democratic State and to stress the need that its organization and conduct have to be in accordance with the standards required by a State governed by the rule of law. The role of the Constitutional Court will also be depicted and its case-law will be briefly presented in what concers the most relevant aspects of the referendum as an instrument used by the citizens in order to participate in the decision-making process at the State level.

Key words: *referendum, rule of law, democracy, constitutional court, constitutional review.*

INTRODUCTION

The management of contemporary state-organized society requires a complex institutional architecture, rigorously organized, which has to be able to ensure the efficient functioning of the state mechanism. In those states that proclaimed in the very Fundamental Law their social character, with the intention of following the wellfare of their own citizens, the state power must act in such a way as to allow the constant development of social life, by enacting measures that tend to ensure a decent standard of living for their citizens, by establishing the highest possible benchmarks for the protection of fundamental human rights and freedoms and by developing social policies that come in the benefit of citizens as much as possible. According to Article 1 Paragraph (3) of its Constitution, Romania is a social state. At the same time, the text provides that it is also a democratic and constitutional state. These three characteristics define the current political and legal physiognomy

of the Romanian state, necessarily imprinting on it a behavior that empowers these features.

I. CHARACTERISTICS OF THE STATE GOVERNED BY THE RULE OF LAW

Antagonistic and courageous reply to the despotic or absolutist state, the state governed by the rule of law has as its ultimate goal not only to ensure the authority of the law, but also so that the rulers, who hold the power, to be subject to the law and limited by legal norms (*Ioan Muraru, Elena-Simina Tănăsescu,, 2019, p.7).* The definition of the concept of the rule of law was achieved including thanks to the case-law of the Constitutional Court, which, for example, by Decision no. 70 of April 18, 2000, published in the Official Gazette of Romania, Part I, no. 334 of July 19, 2000, or Decision no. 17 of January 21, 2015, published in the Official Gazette of Romania, Part I, no. 79 of January 30, 2015, held that this implies the subordination of the state to the law. Moreover the law has to have the capacity to censor political options and, in this framework, to weigh the possible abusive, discretionary tendencies of the state's structures. Also, the rule of law ensures the supremacy of the Constitution in the normative ensemble, in addition with the correlation and compliance of laws and all other normative acts with the Supreme Law. At the same time, the rule of law enshrines a range of guarantees, including jurisdictional ones, which ensure the respect of the rights and freedoms of citizens due to the self-limitation of the state and consequent inclusion of public authorities' activity in the coordinates of the law.

This last idea, according to which the entire activity of state institutions must be carried out in accordance with legal norms, is undoubtedly the most obvious expression of the rule of law character of the Romanian state. In consideration of this, the Parliament itself, as the supreme legislative body, must adopt laws that make it possible to meet the demands of the rule of law. In the doctrine, However, a warning was formulated in the juridical doctrine, in the sense that the definition of the rule of law as a set of limitations aimed to prevent the possible arbitrary actions of the authorities presents, indeed, the advantage of framing *ab initio* the actions of the state within the limits of the law, but the only effective guarantee in this aspect is the very principle of legality. But it can be easily perverted from a valid and effective formal rule into a simple formalism emptied of content *(Muraru, Tănăsescu, 2019, p.8).*

The counterweight to this risk resides in the constitutional review of laws, which is an essential dimension of the rule of law. Its purpose is to guarantee the supremacy of the Constitution, to contribute to the defense of the values enshrined in it and to increase the level of protection of rights and freedoms, by creating a normative system whose degree of compliance with the provisions of the Fundamental Law is as high as possible. As early as 1885, Georg Jellinek, in the work "A Constitutional Court For Austria", came with the idea of review of the constitutionality of laws exercised by a specialized court distinct

from the judicial authorities of the state. This theory was later defined by Hans Kelsen, who defined conceptually the so-called "European model" of constitutionality review of laws, characterized by the establishment of a single constitutional court, which would rendre generally binding decisions, by which to eliminate from the legal system the provisions of law contrary to the Supreme Law *(Hans Kelsen, "La garantie juridictionnelle de la Constitution", 1928)*.

II. CHARACTERISTICS OF THE DEMOCRATIC STATE

In the context of the rule of law, the third feature that defines the Romanian state, namely the democratic character, appears as a natural complement to the other two, the social character and the rule of law, forming the structure of resistance on which all other elements of the the state are based. Under this aspect, Article 2 Paragraph (1) of the Constitution establishes the benchmarks in which democracy is exercised, generically understood as the power of the people to self-govern.

The aforementioned constitutional provisions enshrine, on the one hand, representative democracy, that means that citizens take part in the exercise of state power by electing representatives, who form an electoral body that will exercise the prerogatives of power in the name and for the entire people *(I. Deleanu, 2006, p. 103 and 104)*. Thus, the election of the members of the Parliament and of the President of Romania is done within a transparent and fair electoral process, where every citizen posessing the right to vote has the opportunity to express his option regarding the persons to whom he or she will entrust the exercise of sovereignty.

On the other hand, Article 2 Paragraph (1) of the Constitution enshrines another facet of democracy, known, in legal doctrine, as participatory democracy. Thus, citizens have the opportunity to express themselves directly and to contribute to making of major decisions of the State through the referendum, which constitutes the method of consultation of the entire people regarding various problems of the country, of national interest. In addition, through Article 74 Paragraph (1) and Article 150 Paragraph (1) of the Constitution, along with the instruments specific to direct and representative democracy - respectively the referendum and the elections at national and local level -, the Romanian constituent legislator also established the citizens' legislative initiative, as a way of expressing participatory democracy *(Valentina Bărbățeanu, 2016, p. 19)* [1] , Likewise, the referendum that can be organized at the local level, so that the members of a local community could express their opinion on issues of narrower interest, limited to the level of a certain administrative-territorial unit, but of no less importance for those residents *(Elena Emilia Ștefan, 2022, p. 74-84)*.

[1] https://www.ccr.ro/buletinul-curtii-constitutionale

III. THE REFERENDUM, A DIRECT WAY OF ACHIEVING DEMOCRACY

From the perspective of the topic of this paper, it should be underlined that it is important to legally regulate the referendum in such a way as to achieve the purpose for which it was conceived. As follows from Article 2 Paragraph (1) of the Constitution, the referendum is the main instrument of direct democracy, a means of consultation through which the People have the opportunity to directly exercise the national sovereignty *(Valentina Bărbățeanu, 2018)*.

In Romania, the Constitution requires the organization of a referendum in two situations: in order to finalize the procedure for revising the Constitution by popular vote (Article 151 Paragraph (3)) and when the dismissal of the President of Romania is sought, for committing serious acts of violation of the Constitution (Article 95 Paragraph (3)), which can only be achieved through the vote of the citizens, due o the fact that through the popular vote he or she was elected to office. The Fundamental Law also regulates the possibility of convening a consultative referendum, wher the people can express their opinion on issues of national interest (Article 90).

The above-mentioned provisions contained in the Fundamental Law are detailed at a legal, infra-constitutional level, by Law no. 3 of 2000 on the organization and conduct of the referendum[2], which establishes the procedural rules that must be respected on the occasion of all three types of referendums. Also relevant from the point of view of the rule of law is the fact that, in addition to the norms that discipline their organization and conduct, a system of control of the compliance with the law of the operations corresponding to the referendum was established. Thus, by Article 146 Letter i) of the Constitution, the Constitutional Court was given the competence to oversee compliance with the procedure for its organization and conduct and to confirm its results. As guiding principles of the philosophy considered with regard to the referendum, the Court has held, in its case-law, that the main feature of the referendum lies in its function of legitimizing power, duet o the fact that the popular will validates the acts that are subject to its approval. At the same time, however, the Court has stressed that the referendum does not constitute an alternative to parliamentary democracy and it is useful only to the extent that it does not question the effectiveness of the Parliament as a 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 specific issues of particular importance for the State[3].

IV. REFERENDUM REGULATIONS AT THE INTERNATIONAL LEVEL

National regulations draw their essence from the generic rules proclaimed at the international level. Thus, the Universal Declaration of Human

[2] Published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000
[3] Decision 334 of 26 June 2013, Official Journal no. 407 of 5 July 2013

Rights provides in Article 21 that any person has the right to participate in the governance of his or her country, directly or through freely elected representatives. In the same sense is Article 25 Letter a) from the International Covenant on Civil and Political Rights according to which every citizen has the right and the opportunity to take part in the management of public affairs, either directly or through freely elected representatives.

Also, with particularly important and strong reverberations on the Romanian system are the statements of the European Commission for Democracy through Law (Venice Commission) comprised in the Code of Good Practices in Referendum Matters, adopted at the 70th Plenary Session, in Venice, on March 16-17, 2007. According to that, referendum is considered to be European electoral heritage. The document regulates the rules relating to voting, the drawing up of electoral lists, the way of organizing the vote, the rights of national minorities regarding voting, the validation and consequences of the referendum *(Marian Enache, Ștefan Deaconu, Valentina Bărbățeanu, 2022, p.209)*.

Thus, for example, in the mentioned document, the Venice Commission showed that the law must provide that a minimum of access to private audiovisual media is ensured for the participants in the referendum, as regards the campaign for the referendum and for publicity. Also, the financing of political parties and the referendum campaign must be transparent (Pct. I.2.2.f. și g. of the Code of Good practices). The Code stipulates that during the entire period of the referendum, the public administration authorities must respect their obligation of neutrality, which constitutes an element of ensuring the free expression of the will of the voters (Pct. I.3.1.a. of the Code of Good practices). Likewise, the issue to be voted on must be clear. It must not mislead, it must not suggest an answer, the voters must be informed about the effects of the referendum, the participants in the polls must be able to answer the questions only with "yes", "no" or with a blank vote. The authorities must provide objective information. This implies that the text submitted to the referendum, accompanied by an explanatory report or a balanced material belonging to the partisans and opponents of the proposal, must be made available to the voters with sufficient time in advance. Information must be accessible in all official languages of the State and in the languages of national minorities (Pct. I.3.1.c. și d.).

A rule that the Constitutional Court of Romania respects and has been many times put in the position of verifying is the one according to which the fundamental aspects in the matter of referendum law must not be able to be modified at least one year before the referendum. Altenatively, they must be regulated by the Constitution or at a higher level than ordinary law Pct. II.2.a. și b. of the Code of good conduct.

The recommendations of the Venice Commission reflect the existence of another ideological register in which the referendum should be understood, namely that resorting to the means of direct democracy, such as the referendum, is not always completely lacked of dangers regarding the restriction of citizens' rights, the abuse of some authorities or the distortion of the goal of the referendum. That is precisely why the use of the referendum must be carefully considered by the state authorities and the process of its implementation by the civil society as a whole must be carefully observed *(Marian Enache, Ștefan Deaconu, Valentina Bărbățeanu, 2022).*

V. THE ROLE OF THE CONSTITUTIONAL COURT REGARDING THE REFERENDUM

The Constitutional Court presents a report to the Parliament regarding the respect of the procedure for the organization and holding of the national referendum and it also confirms its results. The Court publishes the result of the referendum in the Official Gazette of Romania, Part I, as well as in the press (Article 4 Paragraph (1) and (3) of Law no. 3 of 2000)).

The referendum is considered valid only if at least 30% of the number of people registered in the permanent electoral lists participate in it, the decision being taken with at least 25% of the votes of those registered on the permanent electoral lists (Article 5 Paragraph (2) and (3) from Law no. 3 of 2000).

As the only authority of constitutional jurisdiction in Romania, the Constitutional Court exercises – among other powers - the constitutionality review of laws before their promulgation, through the *a priori* constitutionality review, but also after they enter into force and begin to produce legal effects, by means of *a posteriori* review of constitutionality. If the first one is a prophylactic control, the purpose of which being to prevent the contamination of the legislative system with legal provisions contrary to the Constitution, the second one has a sanctioning purpose, having the effect of removing from the legislative system the provisions of the laws or Government ordinances that form the object of the the review. It is undeniable the role that the Constitutional Court has had over the last decades in terms of clarifying various aspects related to the organization and conduct of the referendum. By means of the decisions it rendered regarding various provisions of Law no. 3 of 2000 or the laws that successively amended and supplemented the said law, it managed to contribute to the outline of a cohesive and coherent normative framework, in accordance with the constitutional provisions, but also with the democratic standards imposed by the Venice Commission. At the same time, it issued a multitude of valuable judgments that directed legal thinking towards an authentically democratic vision and channeled the Parliament's legislative creation towards a standard as close as possible to the requirements of the rule of law.

Thus, for example, the Court noted that the provisions of the Fundamental Law do not create a hierarchy between the two instruments due of which the State power is enacted, namely the representative bodies at the national level, elected by citizens by vote, on the one hand, and the referendum, on the other hand. They cannot be considered to have a subsidiary nature to each other. Moreover, the referendum is not an alternative for parliamentary democracy, and its abusive use can lead to undermining the legitimacy and role of the Parliament as a representative body of the people. This is the reason why Law no. 3 of 2000 provides for the Parliament's obligation to submit a point of view regarding the organization of a consultative referendum organized at the call of the President of Romania in accordance with Article 90 of the Constitution, in the view of the Guidelines regarding the organization of the referendum, adopted by the Venice Commission[4].

Taking into account the recommendations made to the States by the Venice Commission regarding the stability of the legislation in the matter of the referendum, the Court held that, in principle, the stability of the law is an important element of the credibility of the electoral process, and the frequent modification of the rules and their complex nature can disorient the voter, so frequent changes or changes shortly before the referendum (less than a year) of the relevant laws should be avoided.

This problem was raised in particular with reference to the quorum for validating the referendum and the voting majority, which are elements that belong to the very essence of the institution of the referendum, are obviously fundamental aspects in the matter of referendum law. Thus, by Decision no. 334 of June 26, 2013, the Court held that changing the quorum for participation in the referendum is the prerogative of the legislator, but the Constitutional Court must ensure that this instrument is not used for purposes other than those that the constituent legislator had in mind when consecrating the referendum, as a legal institution essential in a state of law anf form of direct participation of citizens in the decision-making process. The Court must ensure the observance of the principles regarding the legal stability of the laws in the matter of the referendum, as well as that of the loyal consultation of citizens having the right to vote, principles that presuppose the creation of all the conditions for voters to aknowledge the issues subject to the referendum, the legal consequences of lowering the participation threshold to the vote, as well as the effects that the result of the referendum produces on the general interests of the community.

Since the participation threshold represents an essential condition for the referendum to be able to express in a real and effective way the will of the citizens, constituting the premise of an authentically democratic manifestation of

[4] Decision no. 334 of June 26, 2013, Official Gazette no. 407 of July 5, 2013

sovereignty, in accordance with the principle established in Article 2 of the Basic Law, the Court came to the conclusion that it must find a right balance between the need to protect the citizen's right to participate in the referendum, as a fundamental right, and the desire of a parliamentary majority to impose its political will on the state at one given point.

As such, the Court found that the Parliament can intervene in the matter of the referendum legislation, provided that it is not subjected to strictly conjunctural changes, based on claims of opportunity or political understanding, which favors one or the other of the political forces represented in the Parliament which forms the parliamentary majority at a given time. The Court appreciated that if a law concerning the substance of the referendum right, adopted by a parliamentary majority at a given time, manages to gather majority parliamentary support for one whole year, it can be assumed that it truly reflects an electoral majority and that democracy could not be affected in any way, as well as the character of Romania as a State governed by the rule of law and democratic principles.

The Court stated that even if it is indisputable that the Parliament is the supreme legislative body, its legislative behavior must be subject to the principle of constitutional loyalty, which requires the collaboration of all the powers of the State, without the use of disproportionate or abusive means to achieve political goals. The preservation of the constitutional and democratic character of the state obliges the Constitutional Court, as the supreme guarantor of the Constitution, to prevent the consequences of the untimely change of the legal provisions in the matter of the referendum and to comply with the principles of legal stability (which implies clarity, predictability and accessibility), of fair consultation of citizens with the right to vote, of the freedom of elections and of the interpretation in good faith of the letter and spirit of the Constitution. All these principles are structural elements/values of the general principle of legal security, unanimously accepted within the framework of constitutional democracy.

Consequently, the level of the participation quorum, which is the very formal condition according to which the Constitutional Court is entitled, pursuant to Article 146 Letter i) of the Constitution, to ascertain the validity and confirm the results of the referendum, is not a simple technical or procedural aspect, but is a substantial aspect, for the clarification of which it is necessary to determine the intention of the constituent legislator, using a systematic interpretation of the Constitution. Therefore, the new regulations, which were, at that time, the object of the review exercised by the Constitutional Court, must not determine a state of uncertainty regarding a defining element of this procedure, since the options of the ordinary legislator regarding the establishment of the quorum for participation in referendum can fluctuate in value depending on the will of the political majority in Parliament and its conjunctural interests and this kind of circumstance

is likely to create a general state of uncertainty regarding the validity of the referendum.

The Court finally found that, in order to ensure compliance with the general principle of legal stability in the matter of referendum, in accordance with the recommendations of the Code of Good Practices in the matter of the referendum, adopted by the Venice Commission, with Protocol no. 1 in addition to the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, the provisions of the Law amending and supplementing Law no. 3/2000, which changed the participation quorum level, were constitutional, but could not be applied to referendums organized within one year from the date of entry into force of the amending law.

Another interesting issue submitted to the analysis of the Constitutional Court concerned the typology of the act by which the competent authorities, as the case may be, order regarding the organization of a certain type of referendum and establish the date of the said referendum. Thus, the Court found enconstitutional a law that intended to amende Law no. 3 of 2000 and to attribute to the Government the competence to establish, by decision, the date of the organization of the referendum for the revision of the Constitution, although this is an exclusive right of the Parliament (Decision of the Constitutional Court no. 612 of October 3, 2017, Official Gazette No. 922 of November 23, 2017).

Through the cited decision, the Court noted that Law no. 3 of 2000, in the form in force at that time (and which, by the way, has been preserved until now, precisely as a result of the decision of the Constitutional Court finding the unconstitutionality of the amending provision), specified the type of normative act establishing the organization of the referendum and its date, as well as the authority that will issue it, depending on its constitutional legitimation regarding the triggering of the referendum. Thus, the object and date of the national referendum are established by law, in the case of the referendum on the amendement of the Constitution, by decision of the Parliament, in the case of the referendum on the dismissal of the President of Romania and by decree of the President of Romania, in the case of the referendum on issues of national interest.

The differentiation that Law no. 3 of 2000 makes it between the three types of referendum under the aspect of the normative act which, in the procedure of its organization and development, establishes the object and the date on which it will take place, is justified through the prism of the constitutional provisions that confer the power to trigger a referendum, respectively to the President of Romania, by decree, regarding the referendum on issues of national interest, and to the Parliament, by decision, in the case of the dismissal of the President of Romania, respectively by law, in the case of revision of the Basic Law. For the coherence of the procedure, it is rational that the same authority that initiates the

organization of the referendum should also be the one that establishes the date and object of the referendum.

For the hypothesis under discussion in that case, that of the referendum organized for the revision of the Constitution, the Court held that it is the Parliament that adopts, with a majority of two thirds or, as the case may be, three fourths of the number of deputies and senators, the project or the revision proposal of the Constitution. In order to become definitive, the revision must be approved by referendum, thus receiving full legitimacy through the general will of the people. That is why, in order to ensure a complete procedural mechanism, which gives effectiveness to the legislative demarch to adopt the revision law, including the regulation of its final stage, the Parliament is entitled to establish, through a distinct law, the date of the referendum, thus determining the moment when the law it passed would be subject to popular approval.

Contrary to this hypothesis, in the case of the President's dismissal from office, the Parliament sets the date of the referendum through a decision, by virtue of its constitutional powers. On the other hand, in the case of amending the Constitution, as the fundamental law of the state, the normative act relating to the organization of the referendum should also be a law. Therefore, the Court found that the provision contained in the single article point 2 of the criticized law, with reference to Article 6 Paragraph (5) the second sentence of Law no. 3 of 2000, according to which the Government establishes by decision the date of the referendum and brings it to public knowledge, immediately, through mass communication means, contravenes the provisions of Article 151 Paragraph (3) from the Constitution.

CONCLUSION

The referendum is the most direct mechanism for exercising democracy, citizens having the opportunity to be directly involved in decision-making process, their vote being necessary for the confirmation of acts with a particularly large and important impact in Romanian society, namely the dismissal from office of the President of Romania and the amendemen of the Constitution. Also, the referendum allows citizens to express their opinion on issues of interest to the whole society and which can have a considerable influence on state life. The present work aimed to present part of the referendum issue, especially from the perspective of the Constitutional Court's contribution to improving the legislation that regulates its organization and conduct. The final goal was to maintain the legal regulation of the referendum within the standards of the rule of law, as a specific instrument for democratic states. However, it is essential to remember that the referendum cannot replace the Parliament, as the representative decision-making body of the people. Precisely for this reason, the Constitution conferred different effects on the various types of referendum, namely a mandatory effect regarding the revision of the Constitution and the dismissal of

the President from the office, but only an optional effect regarding the consultative referendum. The case-law of the Constitutional Court, developed in consideration of the rules imposed by the Venice Commission in the Code of Good Practice regarding the referendum, played an important role in configuring the legal framework in which this instrument of democracy can be used in a State governed by the rule of law.

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