

National referendum.

Existing regulatory framework and future perspectives

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Abstract

Highlighting a number of shortcomings in the legislation on referendum, the present study proposes some solutions for their correction, using in this respect the experience and guidelines governing the matter in democratic states. Likewise, it underlines the advantages of putting together into an election code both the electoral law and the law on the organization and holding of a referendum.

Keywords: referendum, Constitutional Court, legal certainty, rule of law.

JEL Classification: K10

1. Introduction

The shortcomings in the referendum legislation as assessed in the past years² require its reconsideration and harmonization with the relevant international documents, respectively with the amendments brought, in the last years, to electoral legislation. The purpose of this study is to identify some of these shortcomings, as well as solutions to correct them. It is thus continued the approach presented in another paper³, where the issue raised by the current electoral legislation was discussed in terms of the need to adopt an electoral code.

2. National referendum - legal framework

The Constitution of Romania contains references to the concept of referendum in the following articles:

- Article 2 (1): *“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”*;
- Article 73 (3) d): *“By organic laws it shall be regulated: [...] d) organisation and conduct of a referendum”*;

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² See, for example, the opinion expressed by the Venice Commission on the compatibility with Constitutional principles and the Rule of Law of Government Emergency Ordinance amending Law no. 3/2000 regarding the organisation of a referendum [Opinion no.685/2012, CDL-AD(2012) 026, dated 17 December 2012].

³ Marieta Safta, *The need to adopt an Electoral Code in Romania*, paper presented at the Annual Scientific Session of the Institute of Legal Research of the Romanian Academy with the topic “*Science and Coding in Romania*”, 30 March 2012, available *on line* at www.ccr.ro - Internal and international relations – 2012, visited on 1 February 2014

- Article 90: “*The President of Romania may, after consultation with Parliament, ask the people of Romania to express their will as to questions of national interest, by a referendum*”;

- Article 95 (3): “*If the proposal of suspension from office [of the President] has been approved, a referendum shall be held within 30 days for removing the President from office*”;

- Article 146 i): “*The Constitutional Court has the following powers: [...] it sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns*”;

- Article 151 (3): “*Revision [of the Constitution] shall be final after approval by a referendum held within 30 days from enactment of the bill or proposal concerning such revision.*”

Having read the aforementioned legal provisions, we find that the referendum, as conceived by the constituent legislator, is one way to exercise national sovereignty and it occupies a central position amongst the concepts of the rule of law, value strengthened by the regulatory level established in its regard by the same legislator (organic law). We also find that, under the Constitution, there are two forms of referendum that is legally binding (for dismissal of the President in case of his/her suspension by Parliament, respectively for revision of the Constitution), as well as a form of consultative referendum (on questions of national interest, upon request by the President of Romania).

The framework law in the matter is Law no. 3/2000 on the organisation and holding of a referendum⁴.

The mentioned normative act comprises a set of rules referring to electoral legislation- regarding parliamentary, presidential, local elections, elections for European Parliament (Article 15¹, Article 17, Article 18, Article 31, Article 62), the legal framework in matter of referendum being extended by incorporation of “accordingly” applicable rules, which opens up the path of legal interpretation, and therefore of possible differences of opinion that are inherent in the process of interpretation of the law.

Furthermore, although since its adoption Law no.3/2000 has been amended several times (the document sheet is available *on line* at – www.clr.ro - Legislative Repertoire) the most recent amendment being carried out on December 2013 by Law no. 341/2013⁵, these amendments did not concern all rules of reference, which update would have been absolutely necessary if a set of normative acts they refer to were repealed long time ago (for example, Law no.68/1992⁶ and Law no.70/1991⁷).

⁴ published in the Official Gazette of Romania, Part I, no.84 of 24 February 2000, as subsequently amended.

⁵ published in the Official Gazette of Romania, Part I, no.787 of 16 December 2013.

⁶ Law no.68/1992 for elections to the Chamber of Deputies and the Senate, published in the Official Gazette of Romania, Part I, no. 164 of 16 July 1992, was repealed by Law no.373/2004 for elections to the Chamber of Deputies and the Senate, published the Official Gazette of Romania, Part I, no.887 of 29 September 2004, the latter law being itself repealed by Law no. 35/2008 for elections to the Chamber of Deputies and the Senate and for amending and completing Law no. 67/2004 for the election of the authorities of local public administration, Law no. 215/2001 on local public

Thus, in 2009, the Law no. 3/2000 was amended by Government Emergency Ordinance no.103/2009⁸, and it was introduced, *inter alia*, Article 15¹, text referring to the legislation in force in matter of parliamentary and local elections. Nonetheless, Article 62 under Chapter VI- *Transitory and Final Provisions* of Law no.3/2000, stating that “*The provisions under Chapter XII of Law no.68/1992 for election of the Chamber of Deputies and the Senate, as well as those of Chapter VI of Law no.70/1991 on local elections shall be applied accordingly, insofar the present law does not provide otherwise*”, remained unchanged. This created a situation where in the body of the same law there are references both to the electoral legislation in force and to the legislation repealed, which makes difficult the identification and interpretation of legal rules applicable to the referendum.

For the national referendum of 29 July 2012, the Central Electoral Bureau proceeded to the official interpretation of the rules of reference contained in Articles 17, 18, 31 (3) and Article 62 of Law no.3/2000. Thus, by Decision no.34 of 28 July 2012, it established that “*in case of the national referendum for dismissal of the President of Romania, the provisions of Title I of Law no. 35/2008 for elections to the Chamber of Deputies and the Senate and amending and completing Law no.67/2004 for election of the authorities of local public administration, Law no. 215/2001 on local public administration and Law no. 393/2004 on the status of locally elected officials, shall be deemed applicable, to the extent that Law no. 3/2000 does not provide otherwise.*”

The Constitutional Court, by Ruling no. 3/2012⁹, invoking Article 17 of Law no. 3/2000, highlighted the need to correlate the legal framework applicable in the matter of referendum with Law no. 370/2004 for election of the President of Romania¹⁰.

It is also worth taking into account the recommendations of the Venice Commission. The relevant document of this Commission - the Code of Good Practice on Referendums¹¹, is based on the experience of countries that responded to the questionnaires based on which the code was developed¹².

administration, and Law no.393/2004 on the status of locally elected officials, published in the Official Gazette of Romania, Part I, no. 196 of 13 March 2008.

⁷ Law no.70/1991 on local elections, published in the Official Gazette of Romania, Part I, no.239 of 28 November 1991, was repealed by Law no.67/2004 for election of the authorities of the local public administration, published in the Official Gazette of Romania, Part I, no.271 of 29 March 2004, the latter law being, in turn, amended, also by Law no. 35/2008.

⁸ published in the Official Gazette of Romania, Part I, no. 656 of 2 October 2009.

⁹ published in the Official Gazette of Romania, Part I, no. 546 of 3 August 2012.

¹⁰ republished in the Official Gazette of Romania, Part I, no.887 of 29 September 2004, as subsequently amended.

¹¹ Venice Commission – Code of good practice on referendums adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).

¹² Venice Commission - Study on referendum - Draft Summary Report relating to national referendums, www.venice.coe.int.

The diversity of legal norms and, especially, their non-correlation, reveals a fact emphasized on other occasions - namely the lack of legal certainty¹³, representing just as many arguments for the need of a simplification of the legislation in matter of referendum, in compliance with the Constitution, the Law no.24/2000 and the recommendations contained in the relevant international instruments.

3. The referendum – *de lege ferenda* proposals

3.1. Uniqueness of regulation

Pursuant to Article 14 (1) Law no.24/2000 on legislative technique rules for drafting normative acts “*Regulations of the same level and having the same object normally are included in a single act.*”

Respect for the principle of uniqueness of regulation provided by Law no.24/2000 would determine inclusion of all referendum rules into a single act, without references engendering divergent interpretations. To highlight the legislative interconnections, the rules for reference can be of course done used but in this case, reference must be formulated with sufficient precision to permit a consistent interpretation. Respecting the current structure of the law - i.e. the distinction between national and local referendum - the new regulation should properly correlate the two types of referendum with the applicable rules in the matter of national elections (elections for Parliament and elections for the office of President of Romania) and of local elections. Moreover, inclusion of all these laws into an Electoral code would facilitate this process.

In particular, the principle of the uniqueness of legislative regulation would allow the elimination of redundancies by specifically establishing a single class of rules, the compilation and the updating of electoral lists - both permanent and additional -, the procedure for displaying these lists, the numbering and the public information on polling stations and voting precincts. Uniqueness of legislation would imply a uniform legal terminology, i.e. removing those terms or expressions that no longer find a match in the new legislative framework. For example, as regards the electoral lists - within Law no.3/2000 we find both the expression “*permanent electoral lists*” (e.g. Article 5(2), Article 25 (1) of Law no. 3/2000) or “*additional*” electoral lists (e.g. Article 20 of Law no.3/2000) defined by other enactments applicable in electoral matters, and the expression “*referendum lists*” [e.g. Article 7 (2) of Law no.3/2000], which is not defined by law.

3.2. Principles of regulation

Regulation of a body of principles with a corresponding chapter of sanctions for violations of those principles and rules applicable to referendums

¹³ Ion Predescu, Marieta Saftam *The principle of legal certainty, the foundation of the rule of law, in the Constitutional Court Bulletin no.1/2009*, available on line at www.ccr.ro – Publications – Constitutional Court Bulletin., visited on 1 February 2014.

would allow a better correlation with constitutional norms and relevant international documents.

The provisions of the Code of Good Practice on Referendums prepared by the Venice Commission [hereinafter referred to as the *Code*] and, essentially, the experience of Romania and of European countries that stood at the basis of this Code demonstrates the need to provide guarantees in relation to referendum in particular with regard to the vote by the citizens - a universal, equal, free, secret suffrage. If aspects relating to the universal, equal and secret nature do not pose particular challenges in relation to currently existing rules, the free suffrage issue does not have an appropriate regulation in the current referendum law.

The Code distinguishes in this respect between the voters' freedom to form an opinion and freedom of voters to express their wishes and action to combat fraud. The current regulation in matter of referendum is deficient in both aspects.

Thus, as regards voters' freedom to form an opinion, Article 3 (3.1) a) of the Code establishes the rule according to which "administrative authorities must observe their duty of neutrality [...] which is one of the means of ensuring that voters can form an opinion freely", and, as a corollary, under subparagraph f) of the same paragraph, it states that "sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion". A future referendum regulation should include the development of this principle and, as corollary, sanctions for its violation.

Regarding the freedom of voters to express their wishes and action to combat fraud, we find that the current referendum law contains no definition of fraud, which would enable its sanctioning in accordance with the principles of the same Code which, under Article 3.2 section xv, provides that "the state must punish any kind of electoral fraud". This deficiency has also been noted in the national referendum for dismissal of the President dated 29 July 2012 by the Central Electoral Bureau which, by Decision no. 26/26 July 2012, defined the fraud, as well as the procedure for finding fraud in the referendum result, by analogy with the provisions of Law no. 35/2008 in this matter, namely "*any illegal action that occurs before, during or after the voting, or during the vote count and preparation of reports, resulting in distortion of the will of voters and creating benefits embodied in whether or not the turnout quorum was achieved, i.e. by changing the outcome of the referendum.*"

Reasons relating to the uniqueness of regulation, the clarity and the precision thereof require that fraud's definition be included in the referendum law itself or be common to the whole electoral matter and not inferred by way of interpretation.

Such a definition and procedure must consider also the specific powers of the Constitutional Court in the referendum procedure. From this perspective, it is worth mentioning the rationale for the Constitutional Court Decision no. 70/1999¹⁴, in the sense that this Court cannot be subjected, in its action to find frauds in the

¹⁴ Published in the Official Gazette of Romania, Part I, no. 221 of 19 May 1999.

referendum, “to any restraint such as the necessity to have some complaint filed by political parties or their alliances.”

3.3. Necessary distinctions

3.3.1. Validity of the referendum Turn-out /approval quorum

The current regulation renders conditional the validity of a national referendum of a quorum (minimum percentage) of participation - at least 50% plus one of the persons registered on the permanent electoral lists [art. 5 alin. (2) of the Law no. 3/2000].

Through the Law no.341/2013, which will enter into force one year after its publication in the Official Gazette, the reference text has been modified, and the validity of a national referendum will be conditioned on the fulfilment of two conditions: a turn-out quorum (minimum percentage) of at least 30% of the persons registered on the permanent electoral lists and at least 25% valid votes of voters registered on the permanent electoral lists. Since the text of Article 5 (2) of Law no. 3/2000 that regulates the turn-out quorum does not distinguish between the types of referendum mentioned in the Constitution, it results that it is applicable to all three types of national referendum.

As for the issue of regulation of such quorum, examining the Report adopted by the Venice Commission at the 64th plenary session (Venice, 21-22 October 2005) - *Referendums in Europe – An analysis of the legal rules in European States*, paragraphs 109-115, we find that some of these states have regulations that establish either a quorum of participation (50% of the electorate in Bulgaria, Croatia, Italy, Malta - abrogative referendum, Lithuania, Russia, Macedonia - decision-making referendum) or a quorum (minimum percentage) of approval (a quarter of the electorate in Hungary, a third of the electorate in Albania and Armenia, 40% of the electorate in Denmark). In some situation, achievement of the mentioned turn-out quorum determines the binding or consultative nature of the referendum (in Poland and Portugal, if the turnout is not more than 50%, the referendum is de facto consultative and non-binding). It is worth noting that the concept of referendum for dismissal of the President does not exist in European laws, except for Austria¹⁵, as well as the fact the issue of participation/approval quorums is usually approached with regard to the binding referendum.

If, in itself, establishing a quorum of participation in the referendum on which its validity might depend can be supported with good arguments - the Constitutional Court itself describing it as “*an essential condition for the referendum to be able to express the real and actual will of the people, representing the prerequisite for a genuine democratic manifestation of sovereignty by the people, in accordance with the principle enshrined in Article 2 (1) of the Basic Law*”¹⁶ – a regulation lacking any distinction and correlation with

¹⁵ See Article 60 (6) of the Constitution of Austria.

¹⁶ Decision no.731/2012, published in the Official Gazette of Romania, Part I, no. 478 of 12 July 2012.

the constitutional provisions that are the source for the concepts referred to in the referendum (e.g. regulations regarding election of the President and his/her dismissal) raise problems in terms of legal certainty¹⁷.

Considering the specificity of concepts on which citizens are called upon to decide in a referendum - the Constitution, the office of President of the country - we think it would be preferable, as regards the decision-making referendum, to establish of quorum / minimum percentage of approval and not a quorum of participation, as it is more relevant the majority with which these measures are approved than the number of people participating in the referendum. Regulation of quorum - percentage of approval, with the aforementioned distinctions, would result in legal certainty also with regard to the effects of the referendum - in terms of meeting or not meeting statutory majority to approve the law or the measure subject to referendum, thus eliminating the possibility of divergent legal interpretation in terms of these effects.

As for the minimum percentage for approval of the measure subject to referendum, we believe that it must be established by reference to the number of voting Romanian citizens (all voters), removing the current distinction regarding the residence of the Romanian citizens (in the country or abroad), distinction that does not properly reflect the structure and size of the electoral body.

Comparative law gives us a solution, i.e. to combine the participation and the approval quorums. For example, in Lithuania, in the case of a mandatory referendum, the quorum is a 50% turnout and one-third of the voters must approve the draft proposal (Report adopted by the Venice Commission at the 64th plenary session (Venice, 21-22 October 2005) – *Referendums in Europe – an analysis of the legal rules in European States*, par.115)

3.3.2. *Effects of the referendum*

The Code of Good Practice on Referendum provides, under section 8, the following: “*a). The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law. b). Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.*”

Examining the Romanian legislation in the matter we find that it is defective in this respect, since it does not expressly provide the effects of the referendum and the procedure to follow.¹⁸

The framework-law prescribes the method of determining the results of the referendum, as follows: in case of referendum for revision of the Constitution: “*referendum result is determined by the majority of valid votes throughout the*

¹⁷ See also Section 7 of the Code of Good Practice on Referendums is relevant: “*it is advisable not to provide for: a). a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no; b). an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.*”

¹⁸ See also Decision no 80/2014 on the legislative proposal on the revision of the Constitution of Romania, p. 287.

country [...]” (Article 7 (2) of Law no.3/2000); in case of referendum for dismissal of the President: “dismissal of the President of Romania is approved if, after the referendum, the proposal obtained the majority of valid votes” (Article 10 of the same law); in case of consultative referendum : “citizens are called upon to pronounce themselves [...] and decide by a majority of valid votes in the country.” As for the decision-making referendum, Article 45 (2) of Law no.3/2000 provides that “the law for revision of the Constitution or, as the case may be, the measure of dismissal from office of the President of Romania shall enter into force after publication in the Official Gazette of Romania, Part I, of the ruling of the Constitutional Court confirming the results of the referendum.”

Therefore, the law does neither stipulate the effects of the consultative referendum nor what happens if the referendum is declared void or it is declared non-valid. Given the silence of the law, it was for the Constitutional Court to determine these effects, by interpretation of constitutional provisions, given its unlimited jurisdiction in the matter conferred by the constituent legislator and by the infraconstitutional legislator by the formula “sees to the observance of the procedure for the organisation and holding of the referendum and confirms its results.”

Thus, in relation to the consultative referendum, the Constitutional Court established that the principle of constitutional loyalty, resulting from and interpreted in conjunction with the constitutional provisions of Article 1 - *the Romanian State*, Article 2 - *Sovereignty* and Article 61 - *Role and structure* (of Parliament), requires “that authorities authorised to take decisions in the areas concerned by the issues subject to referendum [...] must take into account, analyse and identify ways of implementing the will expressed by the people. Another view on the effects of the consultative referendum would reduce it to a purely formal exercise, a simple survey.” The Court also held also that “what distinguishes a consultative referendum from a decision-making referendum is not, mainly, the question regarding whether or not the will of the people is complied with - this will cannot be ignored by elected officials, as it is an expression of national sovereignty - but the effect of the referendum (direct or indirect). Unlike the decision-making referendum, the consultative referendum produces an indirect effect, in that it requires the involvement of other organs, most often of the legislative, to put into practice the will expressed by the electorate.”¹⁹

We believe that these aspects cannot be interpreted as meaning that the view expressed during consultative referendum is obligatory for public authorities, but in the sense that this opinion should be discussed, analysed and considered by them in guiding the decisions they take²⁰. Relevant in this context are a number of

¹⁹ Decision no.682/2012, published in the Official Gazette of Romania, Part I, no.473 of 11 July 2012.

²⁰ P. Taillon, *Pour une redefinition du referendum consultatif*, „Revue internationale de droit comparé”, vol. 59, no. 1/2007, pp. 143-155, available *on line* at www.persee.fr, visite on 1 February 2014.

issues such as, for example, participation in the referendum and the percentage of those who were voting for either one or the other option.

As for the situation of the decision-making referendum that has not achieved the validity quorum required by law, the Constitutional Court established its effects - in case of the referendum for dismissal of the President - by analogy with the effects produced by the failure to meet the majority required by law to approve the measure subject to referendum. We refer to Ruling no.6/2012 that practically resumed the solution pronounced by the Court in Ruling no.5/2007²¹, when the majority of votes required by law to dismiss the President was not met. In both cases, the Court held, as a result of the referendum, termination of the interim in the office of President of Romania and the resumption of constitutional and legal duties of the elected President.

Thus, given that the rules of reference as to the effects of the referendum for dismissal of the President, contained in Article 95 (3) of the Constitution and Article 45 (2) of Law no. 3/2000, present only the result of a valid referendum where most voters are in favour of dismissal of the President, an *a contrario* interpretation of these rules may not leave room for distinctions that the law does not expressly provide. Hence the conclusion that regardless of the reason for the referendum solution of non-dismissal of the President, the effect of the referendum is the same: the president is not dismissed, with the consequent termination of interim in the office of President of Romania and the resumption of constitutional and legal duties of the elected President. Any other interpretation would be an impermissible addition to law. Eventually, an interpretation by analogy with Law no.35/2008 or Law no.370/2004 could be made- even if susceptible to criticism - but only in case of annulment of the referendum due to fraud, case in which the Court Constitutional could order the repetition of the referendum in the conditions laid down by the latter law.

3.4. Clear rules of competence of public authorities involved in the procedure of organisation and holding of the referendum

Although a unique and clear regulation of each type of referendum, of the procedure and effects thereof would also clarify aspects related to the competence of public authorities involved in this procedure, we consider that a legislative intervention would be necessary also with the purpose of establishing these competences, in the sense of a precise circumstanciation, also by setting some sanctions in case of non-compliance with the duties provided by law.

An example in this regard is the competence to update the permanent electoral lists. Under the current legislation, there are several public authorities with responsibilities in the matter. Thus, Article 17 (2) of Law no. 3/2000 provides that "*mayors shall update permanent electoral lists [...] within 5 days as of the day the date of the referendum is established.*" Update procedure must be identified - according to standard reference text contained in the same legal text (not updated

²¹ published in the Official Gazette of Romania, Part I, no.352 of 23 May 2007.

in this regard) - in the regulations in force in electoral matters. Law no. 370/2004 for election of the President of Romania, relevant in terms of the reference standard in the matter of referendum for dismissal of the President (according to the interpretation contained in Ruling no. 3/2012 and in Decision no.70/1999 of the Constitutional Court) establishes under Article 7 (7) that "*Permanent electoral lists shall be updated by the mayor of the administrative-territorial unit together with the population record services.*" Pursuant to Article 25 (1) of Law no. 3/2000, "*The Central Electoral Bureau sees to the updating of the permanent electoral lists [...].*" Finally, pursuant to Article 46 (1) of Law no. 47/1992, "*The Constitutional Court shall see to the observance of the procedure for the organisation and holding of a referendum [...].*"

Likewise, it is necessary to circumstantiate the Constitutional Court's competence in the procedure of organisation and holding of the referendum, as Article 146 i) of the Constitution uses a very general wording when regulating this competence. The words used by the constituent legislator are adequate for a basic law, but not also for an infraconstitutional law, which should give precise details on the Constitutional Court's competence to "see" to the observance of the procedure for organisation and holding of the referendum. No matter how generous and comprehensive the word used by the constituent legislator would be, it cannot be interpreted as allowing the Court to substitute other public authorities, and the Constitutional Court made that clear in Decision no.6/2012, where it held that "it is not within its responsibility to update the permanent electoral lists and therefore it cannot make changes in the electoral lists. According to its competence, the Court can only ascertain whether the data difference as transmitted is likely to result in compliance or non-compliance with the turn-out quorum, i.e. in a change in the outcome of the referendum".

The Constitutional Court has circumstantiated its competence in the matter of referendum in a series of rulings and decisions (with reference to the competence of other institutions and public authorities) as follows:

- by Decision no. 70/ 1999²² the Court stated that Article 146 i) of the Constitution, by its general wording, "*acknowledges the Court's right to settle disputes specific for a constitutional review and, from this position, to settle the complaints or requests dealing with possible deviations from referendum rules and procedures. [...] the scope of this right granted by the Constitution, namely «to see» to the observance of the procedures of organisation and holding of the referendum, also includes the Court's possibility to refer to itself whenever it ascertains, by some direct means or based on the information acquired (whether from citizens, the press, non-governmental organisations, etc.), any violation of the said rules and procedures. This possibility is intrinsically related to the exercise of the Court's powers «to confirm» the results of the referendum.*"

- by Ruling no. 1/2003²³ the Court held that "*it has the power to see to the observance of the procedure for the organisation and holding of a referendum and*

²² published in the Official Gazette of Romania, Part I, no. 221 of 19 May 1999.

²³ published in the Official Gazette of Romania, Part I, no. 728 of 17 October 2003.

to confirm its returns. In the meaning of the constitutional provision cited above, settlement of complaints referred to it relating to the procedure for organisation and holding of the national referendum, including on laws and ordinances that establish procedural rules for the organisation and holding thereof, belong to its scope of jurisdiction, to the extent that settlement of complaints does not fall in the scope of jurisdiction of courts or electoral bureaus” (this ruling regarded an *a posteriori* constitutional review on the Government Emergency Ordinance no. 92/2003 amending and completing some regulations on the organisation and holding of the referendum²⁴, establishing two days for holding the referendum on the revision of the Constitution);

- by Ruling no. 2/2007²⁵ the Court dismissed the complaint whereby it was argued that “the Central Electoral Bureau violated the provisions of Law no. 3/2000 on the organisation and holding of the referendum and those of Government Emergency Ordinance no. 34/2007 amending Law no. 3/2000, as it did not prepare a report on the voters who voted on the additional electoral lists and on those who declared on oath that they did not also vote on other electoral lists, nor did it established «the modality of observance and implementation of the provisions of Government Emergency Ordinance no. 34/2007 on the verification of persons who voted on the additional lists».” Responding to said criticism, the Court held, first, that no statutory provision requires the Central Electoral Bureau to highlight distinctly, in the centralized situation on the outcome of the referendum, at national level, those who exercised their right to vote registered on the additional electoral lists, while on the other hand, the Central Electoral Bureau has an obligation to submit to the Permanent Electoral Authority the additional electoral lists received from the electoral constituencies that will check them in order to detect the possible existence of multiple votes within 60 days from the date of the referendum.

- by Ruling no. 7/2007²⁶ the Court pointed out that “based on the powers conferred on it [...], in addition to confirming the results of the referendum, it is called to see also to the organisation and holding thereof, resolving those complaints that have a constitutional and legal basis.” The Court conducted an *a posteriori* constitutional review on Presidential Decree no. 909/2007 for organisation of a national referendum on the introduction of the single vote for the election of members of the Romanian Parliament.

- by Ruling no. 33/2009²⁷ the Constitutional Court held that it is competent, pursuant to Article 146 i) of the Constitution, to exercise an *a priori* constitutional review on the Presidential Decree no. 1.507/2009 for organisation of a national referendum;

- by Ruling no. 2/2012 on the request concerning the ascertainment of the inapplicability in the case of the referendum of 29 July 2012 of the provisions of

²⁴ published in the Official Gazette of Romania, Part I, no.710 of 10 October 2003.

²⁵ published in Official Gazette of Romania, Part I, no.389 of 8 June 2007.

²⁶ published in the Official Gazette of Romania, Part I, no. 759 of 8 November 2007.

²⁷ published in the Official Gazette of Romania, Part I, no. 918 of 29 December 2009.

the Sole Article paragraph (4) [concerning Article I(52) of Government Emergency Ordinance no. 41/2012] of the Law for the approval of Government Emergency Ordinance no. 41/2012 amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum, as well as of the sole Article paragraph (2) of the Law amending Law no. 3/2000 on the organisation and holding of the referendum, the Court held that *“the request cannot be regarded as a challenge for the purposes of Article 146 a) of the Constitution, whereas on the one hand, it does not envisage constitutional issues, and on the other hand, it is not aimed at challenging the legality of acts or deeds performed during the course of the referendum procedure.”* Likewise, the Court noted that *“pursuant to Article 25(1) and (2) of Law no. 3/2000 on the organisation and holding of the referendum, published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000, the Central Electoral Bureau is competent to issue decisions while interpreting the law in order to ensure the proper conduct of the referendum, decisions that can be subject to review by the Constitutional Court.”*

These considerations should be taken into account by the legislator in the forthcoming referendum legislation, legislation that should define the words used in this area by the constituent legislator (*“sees to”* and *“confirms”*) by establishing the relevant scope of competence of the Constitutional Court. Another issue to be considered, still with reference to the competence of the Constitutional Court, is that regarding the acts issued by the Court in exercising its powers and which, under the Constitution and the law on the organisation and functioning of the Constitutional Court, are: decisions, rulings and advisory opinions. The Court does neither issue nor submit reports as currently - unconstitutionally - provided by the provisions of Article 45 (1) of Law no. 3/2000.

3.5. Compliance with the level of the legislation imposed by the Constitution

Under the Constitution, the referendum shall be regulated by an organic law. Even if the field of organic laws is not exempted from regulation by means of emergency ordinances, according to Article 115 of the Constitution, it is desirable, given the importance of the referendum, that the amendment of legislation be carried out by law passed by Parliament and not by way of exceptional procedures.

This is a conclusion that results also from the opinion expressed by the Venice Commission, initially referred to, opinion consistent with the Code of Good Practice on Referendums, where it is pointed out that apart from rules on technical matters and matters of detail (which may be included in regulations of the executive), rules of referendum law should have at least the rank of a statute.

3.6. Stability of regulations in the matter of referendum

According to the principles established by the same code developed by the Venice Commission, the fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law. The fundamental aspects are

in particular those concerning: the composition of electoral commissions or any other body responsible for organising the referendum, the franchise and electoral registers, the procedural and substantive validity of the text put to a referendum, the effects of the referendum (with the exception of rules concerning matters of detail), the participation of the proposal's supporters and opponents to broadcasts of public media, turn-out quorum.

This aspect was emphasized also in the Constitutional Court Decision no. 334/2013²⁸, where it was held *inter alia* that “*over time, legislative instability in the matter of referendum, due to changes in this legislation, especially in periods when Parliament was preparing a case for dismissal of the President, and currently at the initiation of the revision of the Constitution, has proved to be not only a factor of legal uncertainty, but also a question of civic challenging of this legislation, criticized upon its application*”, as well as the fact that “*Parliament can (and as is clear from the Court's decisions, even should) intervene in this matter of referendum law, provided that it does not subject it to purely conjectural amendments, based on opportunity or political understanding, that favours one or the other political forces represented in Parliament and forming at one point a parliamentary majority.*” These considerations were, in fact, the basis of the conclusions found in that decision, *i.e.* “*in order to ensure compliance with the general principle of legal certainty in the matter of referendum, in agreement with the recommendations of the Code of Good Practice on Referendums adopted by the Venice Commission, with the Protocol to the European Convention on Human Rights and Fundamental Freedoms and with the International Covenant on Civil and Political Rights, the provisions of the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum are constitutional, but they may not be applied to referendums organised within one year of the entry into force of the amending law.*” In agreement with the findings of the Court, Law no.341/2013, which recently amended Law no. 3/2000 on the organisation and holding of the referendum, provides under Article II that “*the provisions of this law shall enter into force one year after publication in the Official Gazette of Romania, Part I.*”

4. Conclusions

In conclusion, reconsideration of the legislation on referendum is primarily targeted at the uniqueness of the regulation, the regulation of a body of principles correlated appropriately with a chapter on sanctions for their violation, achieving distinctions in terms of the validity of the referendum and the quorum of participation / approval, defining the effects depending on the type of referendum, establishing clear rules of competence of public authorities involved in the procedure for organisation and holding of the referendum. Accessibility, foreseeability and stability of this legislation are also goals that the legislator should consider.

²⁸ published in the Official Gazette of Romania, Part I, no.407 of 5 July 2013.

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