

**THE ROLE OF THE CONSTITUTIONAL COURT IN THE
PROCEDURE FOR THE ORGANISATION AND HOLDING OF THE
REFERENDUM AND THE CONFIRMATION OF ITS RETURNS**
- jurisdictional issues -

I. The constitutional and legal framework

The referendum was enshrined at constitutional level as a means of consultation by which the people have the possibility to directly exercise national sovereignty, thus expressing their will in relation to issues of general interest or that are particularly important for the State.

Thus, the constitutional framework in the case of the referendum is represented by the following provisions of the Basic Law:

- 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 holding of a referendum;*

- 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 has been approved, a referendum shall be held within 30 days for removing the President from office."*;

- 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."*

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

held on matters of special interest for territorial-administrative entities, according to the law.

The constitutional provisions were materialized through organic law, and were detailed and developed through Law no. 3/2000 on the organisation and holding of the referendum¹, as subsequently amended and supplemented.

It results from the interpretation of the constitutional and legal texts that the referendum for the dismissal of the President from office and the one for the approval of the revision of the Constitution are mandatory both in what concerns the need to organize them and in relation to their result. The referendum on matters of national interest initiated by the President of Romania under Article 90 of the Constitution is a consultative referendum.²

The exercise of the powers of the Constitutional Court in relation to the organisation and holding of the referendum and to the confirmation of its returns is made according to the provisions of Article 146 i) of the Constitution, of Articles 46 and 47 of Law no. 47/1992 on the organisation and operation of the Constitutional Court, as well as of Articles 44 and 45 of Law no. 3/2000 on the organisation and holding of the referendum, as subsequently amended and supplemented.

- Pursuant to Article 146 i) of the Constitution: *"The Constitutional Court has the following powers: [...]*

i) it sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns;"

- Pursuant to Article 46 of Law no. 47/1992: *"(1) The Constitutional Court shall supervise the observance of the procedure for the organization and holding of a referendum, and it shall confirm its returns.*

(2) In order to implement the provisions under paragraph (1) above, the Constitutional Court is entitled to request information from any public authorities.

(3) At the request of the Constitutional Court, the Central Electoral Bureau must present information on the stages and operations related to the holding of the referendum.";

- Pursuant to Article 47 of Law no. 47/1992: *"(1) The Plenum of the Constitutional Court shall decide on the validity of the referendum, with a two thirds majority.*

(2) The ruling of the Constitutional Court establishes whether the procedure for the organization and holding of the referendum was complied with, and it shall confirm its returns.

¹ Published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000

² See Ruling of the Constitutional Court no. 37/2009, published in the Official Gazette of Romania, Part I, no. 923 of 30 December 2009

(3) Before publication in the Official Gazette of Romania, Part I, the ruling of the Constitutional Court shall be presented to the Chamber of Deputies and the Senate, in joint session.”;

- Pursuant to Article 44 of Law no. 3/2000: “The returns centralized, at national level, by the Central Electoral Bureau, including the votes validly cast for every answer on the ballot paper and the number of null votes, shall be sent, under military protection, to the Constitutional Court, within 24 hours from the end of the centralisation.”;

- Pursuant to Article 45 of Law no. 3/2000: “(1) The Constitutional Court shall present a report to Parliament concerning the observance of the procedure for the organization and holding of the national referendum, and it shall confirm its returns.

(2) The Law for the revision of the Constitution or, where appropriate, the measure of removal from office of the President of Romania shall take effect upon publication in the Official Gazette of Romania, Part I, of the ruling of the Constitutional Court confirming the returns of the referendum.

(3) The Constitutional Court shall publish the result of the referendum in the Official Gazette of Romania, Part I and in the press.”

II. The object and the date of the referendum

Article 15 (1) of Law no. 3/2000 on the organisation and holding of the referendum states: *“(1) The object and date of the national referendum shall be established as follows:*

a) by law, in the case of a referendum on the revision of the Constitution, in compliance with Article 147(3) of the Constitution;

a) by Parliament resolution, in the case of a referendum on the dismissal of the President of Romania from office, in compliance with Article 95(3) of the Constitution;

c) by decree of the President of Romania, in the case of a referendum on matters of national interest”.

Since the adoption of Law no. 3/2000, several referendums have been organised in Romania as follows:

- one referendum on the revision of the Constitution (held between 18-19 October 2003). The Romanian Constitution was approved by the national referendum of 8 December 1991;

- two referendums on the dismissal of the President of Romania from office (held on 19 May 2007 and 29 July 2012);

- two referendums at the initiative of the President of Romania on matters of national interest (held on 25 November 2007 and 22 November 2009).

1. Although, as a general rule, the referendum should be held over a one-day period, in exceptional cases, in order to ensure a higher participation to the ballot, the legislator can also regulate to have the referendum held over a period of several days.

Thus, out of the five referendums organised after the entry into force of Law no. 3/2000, four were held over a one-day period, while the national referendum for the revision of the Constitution was held over a 2-day period.

Through Ruling no. 1 of 15 October 2003³, the Constitutional Court stated that "by setting a 2-day period for holding the national referendum on the revision of the Constitution, instead of one, the general interest related to the proper holding of the referendum, through a higher turn-out, is not affected, and the provisions of Article 151(3) of the Constitution, according to which the referendum shall be held '*within 30 days from enactment of the bill or proposal concerning such revision*' are not breached".

2. In what concerns the change in the interval for holding the scrutiny, the Court had the occasion to rule twice, during the *a priori* constitutional review, on two laws adopted almost simultaneously by Parliament.

In the first case, through Decision no. 735 of 24 July 2012⁴, after examining the amendments to the provisions related to the time interval for the holding of the referendum, the Constitutional Court held that the constitutional provisions on the referendum procedure do not state expressly, nor implicitly, on a certain time interval for holding the referendum. "The provision or modification of this time interval falls within the exclusive competence of the legislator, as the latter is the only one entitled under Article 73 (3) d) of the Constitution to regulate the organization and holding of the referendum through an organic law. The extension of the time interval for holding the referendum from 12 hours (according to the initial form of Law no. 3/2000, the referendum is held between 8.00 and 20.00 hours) to 16 hours (the referendum is held, as evidenced by amended legal provisions, between 7.00 and 23.00 hours) is but the will of the legislator who wanted to ensure a higher turn-out rate.

Therefore, such a provision is not contrary to the constitutional principle of the rule of law, but, on the contrary, it creates the necessary conditions so that the Romanian people could express their sovereign will."

In the second case, the Constitutional Court was referred to with the unconstitutionality of the amendments to the provisions referring to the date of the referendum in Law no. 3/2000, i.e. of the substantiation of a new

³ Published in the Official Gazette of Romania, Part I, no. 728 of 17 October 2003

⁴ Published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2012

means to set the time interval for its holding - through **Government resolution**. The referral was settled through Decision no. 736 of 24 July 2012⁵.

One of the pleas of unconstitutionality stated that "by introducing a different time interval for holding the referendum for the dismissal of the President of Romania from office, not one year before, as the Constitutional Court had recently established as unacceptable, but less than 10 days before the day of the ballot⁶, the electoral legislation was thus amended in violation of the Code of good practice in electoral matters." It was alleged that, by ratifying the Treaty of Accession to the European Union and by obtaining the status of member of the European Union, Romania undertook all the obligations stemming from the primary legislation of international treaties, in general, and of European legislation, in particular, as well as the documents issued by the Council of Europe, implicitly by the European Commission for Democracy through Law - the Venice Commission.

The Court found that "all the provisions of the international documents mentioned in the referral concerned a different matter - the electoral one, which, although largely governed by common principles with those covering the organisation and holding of the referendum, have specific features. The requirement of stability of law is common to both fields, but regulatory issues must be tackled differently, depending on the specificities of the electoral field, respectively of the field related to the organisation and holding of the referendum.

Thus, unlike the elections, which are held at fixed intervals and their date is known long before their organisation, it is highly unlikely to know the date of a referendum one year in advance, or long before it is held. Therefore, the 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), makes a distinction - when addressing the stability of the legislation referring to referendums - within its provisions, stating that 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. Pursuant to Article II (2) c) of the Code, fundamental rules include, 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

⁵ Published in the Official Gazette of Romania, Part I, no. 516 of 25 July 2012

⁶ Law amending Law no.3/2000 on the organisation and holding of the referendum was adopted on 18 July 2012, and the scrutiny was scheduled to take place on 29 July 2012.

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.

Given this specificity and the differentiation mentioned, it results that the elements related to the organisation and holding of the referendum – such as the time interval – may be subject to amendments less than one year before the day of organisation thereof, insofar as this does not affect the general interest of proper conduct of the referendum."

As grounds for the referral it was also held that the adoption of the amending text led to a certain degree of inaccuracy and lack of clarity, because this gave the Government the possibility to "juggle" throughout the scrutiny. For all these reasons, the text is considered unpredictable. Moreover, the effectiveness of the respective measures is questioned in relation to the date on which they shall be adopted or approved, fact that raises suspicions about its returns.

The Court held the validity of these pleas, for the following reasons:

"National referendum is, in accordance with Article 2 of the Constitution, one of the forms of expression of the sovereign will of the Romanian people. The importance attached by the framers to this instrument of direct democracy is also reflected in the provisions of Article 73 (3) d) of the Constitution, according to which the organisation and holding of the referendum shall be established by organic law. In fact, the Code of Good Practice on Referendums also recommends, in Article II (2) a), that, apart from rules on technical matters and detail, which may be included in regulations of the executive, rules of referendum law should have at least the rank of a statute.

Such technicalities and details are those involving, for example, the calendar for the implementation of actions required for holding a referendum, its budget, model of the stamps, ballot papers, electoral lists and reports to be used.

As the time interval for the referendum is one of the elements of the procedure for organizing and holding thereof, and not a technical or detail aspect, its establishment is subject to the rule established by Article 73 (3) d) of the Constitution, respectively that of **regulation by organic law**. Therefore, its regulation through Government resolution is contrary to the relevant constitutional text. Moreover, such a regulation would be likely to result in a state of uncertainty as to an element of this procedure, in contradiction with the principle of legal certainty implicitly established by Article 1 (5) of the Constitution."

3. Over time, the Romanian legislator tried to amend Law no. 3/2000 on the organisation and holding of the referendum, in the sense of

introducing a provision stating that the referendum cannot take place simultaneously with the presidential, parliamentary or local elections or with the elections for the European Parliament or with less than 3/6 months before the date of the above-mentioned elections⁷.

Referred to with the plea of unconstitutionality of these provisions, through Decision no. 147 of 21 February 2007, the Constitutional Court found that "this text of law infringes the constitutional provisions of Article 90, according to which *'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'*, as well as those of Article 95 (3), according to which, if the suspension from office of the President of Romania has been approved, "[...] a referendum shall be held within 30 days for removing the President from office." It results from the analysis of the two constitutional texts that the referendum may be held at any time during the year, if the Parliament was consulted or if it approved the proposal for the suspension of the President of Romania from office. Therefore, according to the Constitution, there is no other condition that would prohibit the organization and holding of the referendum simultaneously with the presidential, parliamentary or local elections, or with the elections for the European Parliament, or during a certain period prior or subsequent to the above-mentioned elections. Hence, where the law does not make any distinction, neither should the interpreter (*ubi lex non distinguit, nec nos distinguere debemus*). Consequently, the terms established by the legislator for the holding of the referendum, through the impugned law, adds up to the provisions of the Constitution, which leads to their unconstitutionality.

Moreover, these extra-constitutional requirements encompassed within the law hinder the organization of any referendum, given the fact that, actually, in Romania, elections could be held every year. Furthermore, considering the fact that the law refers to local elections, without specifying

⁷ Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum, adopted by the Romanian Parliament on 20 December 2006, sent back for re-examination by the President of Romania, readopted on 20 February 2007, found unconstitutional through Decision no. 355 of 4 April 2007, published in the Official Gazette of Romania, Part I, no. 318 of 11 May 2007. The law was re-examined in accordance with the Constitutional Court's decision and, on 15 October 2008, the Law supplementing Article 5 of Law no. 3/2000 on the organisation and holding of the referendum was adopted, which was found unconstitutional through Decision no. 1218 of 12 November 2008, published in the Official Gazette of Romania, Part I, no. 785 of 24 November 2008.

Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum, adopted by the Romanian Parliament on 6 February 2007, found unconstitutional through Decision no. 147 of 21 February 2007, published in the Official Gazette of Romania, Part I, no. 162 of 6 March 2007. The law was re-examined in accordance with the Constitutional Court's decision and, on 21 March 2007, the Law supplementing Article 10 of Law no. 3/2000 on the organisation and holding of the referendum was adopted, which was found unconstitutional through Decision no. 420 of 3 May 2007, published in the Official Gazette of Romania, Part I, no. 295 of 4 May 2007.

whether it refers to general or by-elections, it is a known fact that the latter could take place every month. Therefore, the cancellation of the referendum by the hindrances established by law is another argument underlying the finding that the new provisions are unconstitutional. Likewise, it is found that these provisions of the impugned law could generate constitutional blockages, as the date of the elections would become dependent on the date of the referendum."⁸

4. During the constitutional review carried out before the promulgation of the Law on the organisation and holding of the referendum, the Constitutional Court ruled also on the provisions listing [Article 12 a)-g)] specific cases related to matters of national interest in relation to which the President can ask the people to express their will, as well as "*h) other matters proposed by the President of Romania to the Parliament, in the exercise of his constitutional powers*". On this occasion, through Decision no. 70 of 5 May 1999⁹, the Constitutional Court found the provisions unconstitutional in relation to the phrase "*proposed to the Parliament*", as "only the President is entitled to determine what specific matters of national interest are to be taken to the people, by a referendum, in order to express its will".

Pursuant to the provisions of Article 145 of the unrevised Constitution, the law was sent back to Parliament for re-examination. Contrary to the Constitutional Court's decision, it completely discarded the content of point h), thus limiting the President's possibility to propose to the people other matters of national interest on which they should express their will through referendum, different from those expressly mentioned by law.

Subsequently, the Constitutional Court was referred to by the Advocate of the People through the *a posteriori* review, and, through

⁸ For a dissenting opinion, see the arguments of the authors of the pleas concerning the non-observance of the procedure for the organisation and holding of the national consultative referendum of 22 November 2009, initiated by the President of Romania through Decree no. 1.507 of 22 October 2009 for the organisation of a national referendum, pleas settled through the Constitutional Court's Ruling no. 33 of 26 November 2009, published in the Official Gazette of Romania, Part I, no. 918 of 29 December 2009: "In what concerns the grounds invoked for the repeal of the Decree of the President of Romania no. 1.507 of 22 October 2009, it is stated that, in essence, although , pursuant to Article 90 of the Constitution, the purpose of the national consultative referendum is the expression of the will of the people on matters of national interest, in fact, its purpose is to influence the will of the electorate in the sense of approving the referendum. The organisation of a consultative national referendum on the same day as the first ballot for the presidential elections where the acting president is also a candidate for a second (and final) term of office leads the referendum astray from its significance as the expression of the sovereign will of the people, thus turning it into a presidential electoral instrument. During the electoral campaign, the President of Romania makes use of his constitutional power to decide the organisation of a referendum on a populist topic, which gives him a plus of visibility, that he benefits from, unlike the other candidates that are lacking this presidential instrument."

⁹ Published in the Official Gazette of Romania, Part I, no. 221 of 19 May 1999.

Decision no. 567 of 11 July 2006¹⁰, it settled the exception of unconstitutionality concerning the provisions of Article 12 of Law no. 3/2000, and found them unconstitutional. In the rationale of its solution, the Court held that, according to Article 90 of the Constitution, "*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*". After examining the constitutional text, it results that it does not define, on the one hand, "*the matters of national interest*", and, on the other hand, it does not state that such matters shall be subsequently established by law. In the absence of such clarifications, the provisions of Law no. 3/2000 bring supplements to the invoked constitutional text, which only establishes the procedure for the referendum initiated by the President on "matters of national interest", which implies two stages:

a) consultation with the Parliament, which is about to adopt a resolution in the joint meeting of the two Chambers, with the vote of the majority of Deputies and Senators, on the referendum initiated by the President of Romania. Had the Parliament not been consulted, the President cannot proceed to the initiation of the referendum;

b) consultation with the people, who express their will on matters of national interest submitted by the President.

We can draw the unequivocal conclusion that Article 90 of the Constitution establishes the President's exclusive competence in determining the matters of national interest to be submitted to referendum, even if Parliament's consultation is mandatory. Only the President of Romania is entitled to decide which are the matters of national interest and, in this framework, to establish, by decree, the specific issue to be submitted to referendum and the date for holding the referendum¹¹. From this perspective, the Court finds that the restrictive enumeration under Article 12 (1) of the Law no.3/2000 of certain situations considered to be "*matters of national interest*" is likely to restrict the President's right to consult the people, being a well-known fact that, in time, national interest may differ, that new situations could occur at any time, which might require the organisation of a referendum. Any enumeration of the situations considered to be of "*national interest*" at the time the legislator adopts the regulation may subsequently become a restriction, a limitation that may affect the constitutional right of the President to decide by himself on matters on which he wants to consult the people. This exclusive right of the President relies on the constitutional

¹⁰ Published in the Official Gazette of Romania, Part I, no. 613 of 14 July 2006.

¹¹ To the same effect, see also Ruling of the Constitutional Court no. 7 of 7 November 2007 on the plea referring to the organisation and holding of the national referendum on the introduction of the first-past-the-post voting system for the election of the members of the Romanian Parliament, published in the Official Gazette of Romania, Part I, no. 759 of 8 November 2007.

provisions of Article 80 on "*Role of the President*", of Article 2 (1), according to which "*National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies [...], as well as by means of a referendum*", of Article 81 (1) on the equal electoral legitimacy of the President of Romania and the Parliament's, and of Article 1 (4), which establishes that "*The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of a constitutional democracy*".

The setting, by law, of matters of national interest is an interference of the Parliament with the exercise of the exclusive powers granted, by Constitution, to the President and, therefore, a disregard of the principle of the separation and balance of powers within the framework of a constitutional democracy."

But, as previously shown, a consultation with the Parliament is mandatory. It shall rule, in the joint session of the Chamber of Deputies and Senate, through a resolution adopted by a majority vote of the members present¹².

III. Turnout quorum and the returns of the referendum

1. The Constitutional Court held that the result of the referendum depended on the cumulative fulfilment of two conditions:

- the first one refers to the minimum number of citizens that need to take part in the referendum so that it should be valid and
- the second one refers to the number of votes validly cast, which determine the result of the referendum.

The first condition is enshrined by Article 5(2) of Law no. 3/2000, according to which "*The referendum shall be held valid provided that the cast expresses the will of half plus one of the number of persons enrolled on the permanent electoral lists*".

The condition that needs to be satisfied for the validity of the referendum is the same for all types of referendums, and Article 5 (2) of

¹² Through Decision no. 392 of 17 April 2007, published in the Official Gazette of Romania, Part I, no. 325 of 15 May 2007, the Court found as unconstitutional the provisions of Law no. 3/2000 stating that the resolution by which Parliament expresses its opinion on the referendum initiated by the President of Romania shall be adopted "by majority vote of Deputies and Senators". The Court found that, according to the provisions of Article 76(1) of the Constitution, Parliament's resolutions shall be adopted by simple majority vote, unless otherwise provided by law. The situation covered by Law no. 3/2000 is not included in the fields referred to by the Constitution in which parliamentary resolutions can be adopted only by a majority vote of the members of the two Chambers.

Law no. 3/2000 requires an absolute majority, consisting of half plus one of the number of persons enrolled on the permanent electoral lists. The Court holds that this is an essential condition so that the referendum expressed, in a real and effective manner, the will of the citizens, thus being the premise of a purely democratic manifestation of sovereignty on the part of the people, in compliance with the principle stated in Article 2 (1) of the Basic Law.

The participation in the referendum of the majority of the citizens is an act of civic responsibility, by which the electorate shall decide whether to sanction the President of Romania or not, having the possibility to dismiss him or not from office.

The second condition referring to the majority of the votes cast at national level offers a unitary regulation for all types of referendums enshrined by the Constitution, as it also articulates the representativeness-related requirement from the perspective of the result of the ballot. Thus, the same legislative solution can be found in the case of the referendum on the revision of the Constitution, of the referendum for the dismissal of the President of Romania from office, of the referendum on matters of national interest and of the local referendum, where, pursuant to Article 7(2), Article 10, Article 12(2) and, respectively, to Article 14(2) of Law no. 3/2000, the result is established depending on the majority of the votes validly cast at national level or, where appropriate, at the level of the territorial-administrative entity.

2. Through Decision no. 731 of 10 July 2012¹³, the Court ruled through the *a priori* constitutional review on the referral concerning the provisions referring to the procedure of the referendum for the dismissal of the President of Romania from office, the authors of the referral challenging, basically, the change in the criterion for acknowledging whether the majority of votes cast for the dismissal of the President of Romania from office was obtained or not, which, according to the law subject to constitutional review, is represented by the majority of **the votes validly cast**, and by that of **the votes of the citizens enrolled on the electoral lists**, as set by the law in the form prior to the change.

Considering its case-law on the matter, the Court has underlined the following aspect: no constitutional text places a condition on the legislator's right to decide on a certain majority that would express its will in terms of dismissal, by referendum, of the President of Romania from office. But, the dismissal, by referendum, of the President of Romania from office is a penalty for having committed serious offences, reason for which the Court held that it was justified that it be approved by citizens by the majority of the

¹³ Published in the Official Gazette of Romania, Part I, no. 478 of 12 July 2012.

votes validly cast. Therefore, the Court found the amending provisions constitutional, as long as they ensure the participation in the referendum of at least half plus one of the number of persons enrolled on the permanent electoral lists.

3. Through Decision no. 147 of 21 February 2007, *cited above*, the Court has examined the objection of unconstitutionality lodged against the provisions of Law no. 129/2007 amending and supplementing Law no. 3/2000, prior to its promulgation, which, in the form subject to constitutional review, set different means of approval, through referendum, of the dismissal of the President of Romania from office, as he had been chosen during the first or second ballot, under the provisions of Article 81(2), respectively of Article 81(3) of the Constitution of Romania.

On that occasion, the Court held that, by amending the content of Article 10 of Law no. 3/2000, the legislator had wanted to apply, from the perspective of the votes cast, the principle of legal symmetry to the election of the President of Romania during the second ballot and to his dismissal from office following consultation with the population. The Court found that, by basing its solutions on the principle of symmetry, the legislator has ignored the fact that the application of this principle to public law, all the more so to constitutional law, especially to the organisation and operation of public authorities, was not possible. The principle of symmetry is a principle of private law, the possibility of its application to public law being excluded. Consequently, constitutional standards are asymmetrical by excellence, which led the Court to hold that the requirements set by the Constitution for the election of the President of Romania and those referring to his dismissal from office following a referendum were not symmetrical, as they represented different legal institutions, with different roles and purposes, each with its own distinct legal treatment. Moreover, in this context, the Court noted that the dismissal, by referendum, of the President of Romania from office did not represent an electoral competition, but rather a sanction for having committed serious offences in breach of the provisions of the Constitution. The distinctions referring to the dismissal of the President of Romania from office, by referendum, as set forth by the provisions of the impugned law, concerned the President of Romania having obtained his mandate after the first ballot, as well as the President of Romania elected in the second ballot and the interim president. Following the reasoning of the legislator, the Court noticed that, in the first case, the president was going to be dismissed from office by the absolute majority of votes of the electorate, and in the second case, by the relative majority of votes of the citizens attending the ballot, while, for the situation provided for under Article 99 of the Constitution, concerning "*Responsibility of acting president*", who was

not elected by vote, there was not any constitutional provision referring to dismissal from office. The Court found that such an interpretation was contrary to Article 1 (3) of the Constitution, according to which Romania was a state governed by the rule of law, and that such a state was against enforcing the same sanction on the President of Romania, differently, depending to the manner in which he obtained the position: in the first ballot, in the second ballot or following an interim of office.

The Court concluded that the rational settlement of this issue resulted from the interpretation of paragraph (3) under Article 95 of the Constitution, as well as from the corroboration of the provisions thereof with those of Article 81 (1) and Article 95 (1) of the Constitution. Thus, under Article 81 (1) of the Constitution, it is declared elected the candidate having obtained, in the first ballot, the majority of votes of the electorate enrolled on the electoral lists. According to the legal provision in force, this absolute majority also applies to the establishment of the returns of the referendum for the dismissal of the President of Romania from office, the same measure being applicable, according to the same rules, to the Head of State, regardless of the number of votes obtained or how he got this position. The application of the same legal treatment to the President of Romania elected in the first ballot, or in the second ballot, or to the interim president, for their dismissal from office by referendum, is required by the constitutional provisions of Article 95 (1), which provide for the same legal treatment for all three situations.

Therefore, the Court decided that the provisions by which the legislator established that the returns of the referendum for the dismissal of the President of Romania from office were differently established, according to the number of the ballot in which he was elected, were contrary to the constitutional provisions of Article 81 (2). Also, the Court noticed that, when the constitutional legislator wanted to set a certain majority of votes, it did it by a reference text, whose application to subsidiary situations was implied, except for the cases where such a majority was left to the law.

The Court found that the constitutional provisions referring to the majority required for the election of the president in the first ballot were enough to allow the setting of the solutions for the dismissal of the Head of State from office, under all circumstances, by analogy and not by legal symmetry.

IV. The composition of the Central Electoral Bureau, of circumscription electoral bureaus and of voting section electoral bureaus

- Pursuant to Article 24 of Law no. 3/2000: *“(1) The Central Electoral Bureau is made up of seven judges of the High Court of Cassation*

and Justice, of which one shall fulfil the position of president, as well as of one delegate of each political party represented within Parliament.

(2) These seven judges shall be appointed within 3 days at the most from the setting of the day for the referendum, by drawing lots, by the President of the High Court of Cassation and Justice, off a list including all acting judges of the Court.

(3) The President of the Central Electoral Bureau is elected through secret vote by its members within 24 hours at the most from appointment.”

- Pursuant to Article 26 (1) of Law no. 3/2000: "In the case of the national referendum, the electoral bureaus of circumscription for the counties and for the municipality of Bucharest, the electoral offices for the districts of the municipality of Bucharest and the electoral bureau for the voting sections organized abroad shall include a president and no more than 6 delegates from the political parties represented in the Parliament; in case of the local referendum, the electoral bureaus of circumscription for the counties and for the municipality of Bucharest, for the villages, for the towns and municipalities, for the districts of the municipality of Bucharest, as well as the electoral bureaus of the voting sections shall include a president and no more than 6 delegates from the political parties represented in the local or county council.”

Through a plea of unconstitutionality, lodged through the *a posteriori* review, the above-mentioned legal provisions were considered as being contrary to the constitutional principle of equality under the law through the distinction that they make in what concerns the participation in the electoral bodies between political parties, based on the criterion of their representativeness within Parliament or within county or local councils.

By examining the exception of unconstitutionality from this perspective, through Decision no. 179 of 22 April 2004¹⁴, the Court found it as groundless.

The Constitutional Court referred to its case-law, in accordance with that of the European Court of Human Rights in relation to the interpretation of the provisions of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, referring to non-discrimination - equality under the law does not exclude different legal treatments in the case of different legal situations, if objectively and rationally justified.

The impugned legal provisions, which regulate the composition of the Central Electoral Bureau, of circumscription electoral bureaus and of voting section electoral bureaus, according to which only parties with parliamentary representation, in the case of the national referendum, or those who are represented within local or county councils, in the case of the local

¹⁴ Published in the Official Gazette of Romania, Part I, no. 499 of 3 June 2004.

referendum, can designate delegates for the respective electoral bodies, rely on a rational and objective criterion. Under no circumstances was it acceptable to have representatives of all the political parties existing at national level be part of these electoral bureaus, because, this way, such bodies would become non-functional and the electoral activity would risk blockage.

V. The Constitutional Court's exclusive power to rule on the observance of the procedure for the organisation and holding of the referendum and the confirmation of its returns

The Court holds that the constitutional ground for organizing the referendum is given by the provisions of Article 90, Article 95 (3) and Article 151 (3) of the Basic Law.

The constitutional provisions are developed by Law no. 47/1992 on the organisation and operation of the Constitutional Court, republished in the Official Gazette of Romania, Part I, no. 807 of 3 December 2010, as subsequently amended, by 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, as subsequently amended and supplemented, and by the Regulation of the joint sessions of the Chamber of Deputies and Senate [hereinafter referred to as the Regulation] approved through Parliament Resolution no. 4/1992, published in the Official Gazette of Romania, Part I, no. 34 of 4 March 1992, as subsequently amended and supplemented.

1. According to the above-mentioned normative acts, **the procedure for holding the referendum passes through the following stages:**

1. In the case of a referendum for the dismissal of the President of Romania from office:

- the setting, by the Chamber of Deputies and the Senate, in joint session, of the object and date of the national referendum for the dismissal of the President from office, within 30 days at the most from the date the suspension from office was approved [Article 95 (3) of the Constitution and Article 15 (1) b) of Law no. 3/2000];

- the holding of the referendum;

- the establishment, by the Constitutional Court, whether the procedure for the organisation and holding of the referendum and the confirmation of its returns was observed or not¹⁵ [Article 146 i) of the

¹⁵ As part of this power, the Constitutional Court issued the following rulings: Ruling no. 5 of 23 May 2007 on the observance of the procedure for the organisation and holding of the national referendum of 19 May 2007 for the dismissal of the President of Romania, Mr. Traian Băsescu, from office, and the confirmation of its returns, published in the Official Gazette of Romania, Part I, no. 352 of 23 May 2007, Rulings nos. 2, 3 and 4 of 23 May 2007 on the challenges referring to the observance of the procedure for

Constitution and Article 46 (1) of Law no. 47/1992]; prior to its publication in the Official Gazette of Romania, Part I, the Constitutional Court's ruling is submitted to the Chamber of Deputies and the Senate, in joint session [Article 146 i) of the Constitution and Article 47 (3) of Law no. 47/1992];

- the entry into force of the dismissal from office of the President of Romania upon publication in the Official Gazette of Romania, Part I, of the Constitutional Court's ruling confirming the returns of the referendum (Article 45 of Law no. 3/2000) or the resuming of the constitutional and legal powers by the President of Romania, in case the referendum is invalidated or the legal number of votes needed for the dismissal is not met.

2. In the case of a referendum:

- the consultation of the Parliament, by the President of Romania, about the organisation of a referendum having a matter of national interest as its object, through a letter addressed to the Presidents of the two Chambers of Parliament [Article 90 of the Constitution and Article 11 (1) of Law no. 3/2000];

- the expression of the Parliament's viewpoint on the initiative of the President of Romania, by adopting a resolution, by majority vote, in the joint session of the two Chambers, within 20 days from the President's request [Article 11 (3) of Law no. 3/2000];

- the issuance, by the President of Romania, of the decree for the organisation of the national consultative referendum național, that sets its object and date (Article 11 (2) and (4) of Law no. 3/2000);

- the holding of the referendum;

- the establishment, by the Constitutional Court, whether the procedure for the organisation and holding of the referendum and the confirmation of its returns was observed or not¹⁶ [Article 146 i) of the

the organisation and holding of the national referendum of 19 May 2007 for the dismissal of the President of Romania, Mr. Traian Băsescu, from office, all published in the Official Gazette of Romania, Part I, no. 389 of 8 June 2007, Ruling no. 2 of 24 July 2012 on the request aimed at finding the inapplicability to the referendum of 29 July 2012 of the provisions of the Sole Article (4) [referring to Article I (52) of Government Emergency Ordinance no. 41/2012] of the Law approving 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 those of the Sole Article (2) of Law no. 3/2000 on the organisation and holding of the referendum, published in the Official Gazette of Romania, Part I, no. 516 of 25 July 2012, Ruling no. 3 of 2 August 2012 on the challenges referring to the observance of the procedure for the organisation and holding of the national referendum of 29 July 2012 for the dismissal of the President of Romania, Mr. Traian Băsescu, from office, published in the Official Gazette of Romania, Part I, no. 546 din 3 august 2012, Ruling no. 6 of 21 August 2012 on the observance of the procedure for the organisation and holding of the national referendum of 29 July 2012 for the dismissal of the President of Romania, Mr. Traian Băsescu, from office, and the confirmation of its returns, published in the Official Gazette of Romania, Part I, no. 616 of 27 August 2012.

¹⁶ Ruling no. 7 of 7 November 2007 on the challenge referring to the organisation and holding of the national referendum on the introduction of the first-past-the-post vote for the election of the members of the Romanian Parliament, published in the Official Gazette of Romania, Part I, no. 759 of 8 November 2007, Ruling no. 8 of 29 November 2007 on the observance of the procedure for the organisation and holding of

Constitution and Article 46 (1) of Law no. 47/1992]; prior to its publication in the Official Gazette of Romania, Part I, the Constitutional Court's ruling is submitted to the Chamber of Deputies and the Senate, in joint session [Article 146 i) of the Constitution and Article 47 (3) of Law no. 47/1992];

- the referendum is consultative.

3. *In the case of a national referendum for the revision of the Constitution:*

- pursuant to Article 151 (3) of the Constitution and Article 6 of Law no. 3/2000, Parliament adopts the law on the organisation and holding of the referendum, by setting the date of the referendum, who cannot exceed 30 days from the date the revision law was adopted;

- the holding of the referendum;

- the establishment, by the Constitutional Court, whether the procedure for the organisation and holding of the referendum and the confirmation of its returns was observed or not¹⁷ [Article 146 i) of the Constitution and Article 46 (1) of Law no. 47/1992]; prior to its publication in the Official Gazette of Romania, Part I, the Constitutional Court's ruling is submitted to the Chamber of Deputies and the Senate, in joint session [Article 146 i) of the Constitution and Article 47 (3) of Law no. 47/1992];

- the entry into force of the law for the revision of the Constitution upon publication of the Constitutional Court's ruling in the Official Gazette of Romania.

2. The object of the review conducted by the Constitutional Court in exercising its power referred to in Article 146 i) of the Constitution

Based on the powers granted to it through the Constitution, through Law no. 47/1992 and through Law no. 3/2000, besides confirming the returns of the referendum, the Constitutional Court is called to monitor its organisation and holding as well, settling those challenges that have

the national referendum of 25 November 2007 on the introduction of the first-past-the-post vote for the election of the members of the Romanian Parliament and on the confirmation of its returns, published in the Official Gazette of Romania, Part I, no. 834 din 5 December 2007, Ruling no. 33 of 26 November 2009 on the non-observance of the procedure for the organisation and holding of the national consultative referendum of 22 November 2009, published in the Official Gazette of Romania, Part I, no. 918 of 29 December 2009, Ruling no. 37 of 26 November 2009 on the observance of the procedure for the organisation and holding of the national referendum of 22 November 2009 and on the confirmation of its returns, published in the Official Gazette of Romania, Part I, no. 923 of 30 December 2009

¹⁷ Ruling no. 1 of 15 October 2003 on the challenge referring to the observance of the procedure for the organisation and holding of the national referendum on the revision of the Constitution, published in the Official Gazette of Romania, Part I, no. 728 of 17 October 2003, Ruling no. 2 of 22 October 2003 on the challenge referring to the observance of the procedure for the holding of the national referendum on the Law for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 742 of 23 October 2003, Ruling no. 3 of 22 October 2003 confirming the result of the national referendum of 18-19 October 2003 on the Law for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

constitutional and legal grounds. In line with the constitutional provision, the settlement of the challenges addressed to it referring to the observance of the procedure for the organisation and holding of the national referendum, including those referring to laws and ordinances setting procedural standards for its organisation and holding, belong to its scope, as long as the settlement of challenges does not come within the powers of electoral bureaus or courts¹⁸.

In the case of the referendum for the dismissal of the President of Romania from office, the challenges had the following subject-matters:

- The Central Electoral Bureau did not order any measure for verifying those who voted on supplementary electoral lists in order to identify those who voted more than once¹⁹;
- the a posteriori constitutional review referring to Government Emergency Ordinance no. 92/2003 amending and supplementing certain regulations on the organisation and holding of the referendum, published in the Official Gazette of Romania, Part I, no. 710 of 10 October 2003, by which two days were set for holding the referendum for the revision of the Constitution²⁰;
- the non-observance of the provisions of Article 24 (3) of Law no. 3/2000 on the organisation and holding of the referendum, as the President of the Central Electoral Bureau was not elected through secret vote by its members, within 24 hours from the appointment of the members of the Central Electoral Bureau²¹;
- the adoption of a resolution of the Central Electoral Bureau in breach of the legal provisions²²;

In the case of the referendum on matters of national interest, the challenges concerned:

- the Decree of the President of Romania no. 909 of 23 October 2007 for the organisation of a national referendum on the introduction of the first-past-the-post vote for the election of the members of the Romanian Parliament, published in the Official Gazette of Romania, Part I, no. 719 of 24 October 2007, considered to be unconstitutional, as the object of the referendum was different from that on which the Parliament was consulted, as well as the fact that "it does not set a date, but a delay" for holding the referendum²³;

¹⁸ Ruling no. 1/2003, cited above

¹⁹ Ruling no. 2/2007, cited above

²⁰ Ruling no. 2/2007, cited above

²¹ Ruling no. 3/2007, cited above

²² Ruling no. 4/2007, cited above

²³ Ruling no. 7/2007, cited above

- the repeal of the Decree of the President of Romania no. 1.507 of 22 October 2009 for the organisation of a national referendum on moving to a unicameral parliament and the decrease in the number of members of the Romanian Parliament to a maximum of 300 parliamentarians, as well as the reversal of the returns of the consultative national referendum held on 22 November 2009²⁴.

In the case of the national referendum for the revision of the Constitution, the challenges had the following subject-matters:

- the procedure for the organisation and holding of the referendum was violated by the Government through Emergency Ordinance no. 92 of 9 October 2003 amending and supplementing certain regulations on the organisation and holding of the referendum, published in the Official Gazette of Romania, Part I, no. 710 of 10 October 2003, by setting the date for holding the national referendum referring to the revision of the Constitution on a two-day period (18 and 19 October 2003), instead of one day²⁵;
- the non-observance of several provisions of Law no. 3/2000 on the organisation and holding of the referendum: there was a violation of the provisions granting citizens and political parties the right to express their opinions freely and without discriminations, the secrecy of the ballot was violated, mobile ballot boxes were used illegally, there were irregularities in drawing up the supplementary electoral lists, participants were allowed to vote in the referendum, although they did not have any identity papers and money or other benefits were promised to determine the electorate to vote²⁶.

Potential future unconstitutional acts issued by Parliament in accordance with the provisions applying to the referendum, that could ignore the provisions of the Basic Law, cannot be subject to challenges lodged pursuant to Article 146 i) of the Constitution²⁷.

²⁴ Ruling no. 33/2009, cited above

²⁵ Ruling no. 1/2003, cited above

²⁶ Ruling no. 2/2003, cited above

²⁷ See, to this effect, Decision of the Constitutional Court no. 734 of 24 July 2012, published in the Official Gazette of Romania, Part I, no. 516 of 25 July 2012. On that occasion, the Court held that the authors of the referral were trying to prevent a potential non-observance, by Parliament, of a Constitutional Court's ruling, issued in the exercise of its power referred to in Article 146 i) of the Constitution, i.e. "any Parliament resolution subsequent to the Constitutional Court's decision referring to its powers (confirmation, validation, invalidation of the returns of the referendum)" or any parliamentary resolution, subsequent to that of the Constitutional Court, setting the organisation and holding of a new referendum during the same procedure relying on Article 95 of the Constitution, procedure closed upon publication in the Official Gazette of Romania of the Constitutional Court's ruling on the referendum. The Court cannot examine and cannot rule on future and potential acts and facts of Parliament based on the idea of bad faith in what concerns the interpretation and enforcement of a text included in a ruling issued by this public authority and of a potential behaviour contrary to the obligation of constitutional loyalty and principles of the rule of law.

Through the ruling issued by the Constitutional Court in the exercise of the power referred to in Article 146 i) of the Constitution, standard whose general wording grants the Constitutional Court full competency in relation to its role as guarantor for the supremacy of the Constitution, the procedure for the organisation and holding of the referendum is closed and any challenge related to the observance of this procedure or the returns of the referendum is discarded.

No public authority can replace the Constitutional Court in issuing its decisions or take decisions that are contrary to what is held in the generally binding ruling of the Constitutional Court. Similarly, no public authority can decide to continue a procedure found as officially closed upon publication in the Official Gazette of Romania of the ruling issued by the Constitutional Court in the exercise of the power referred to by Article 146 i) of the Constitution and in compliance with what was stated in that ruling.²⁸

²⁸ Decision of the Constitutional Court no. 734/2012, cited above