

Types of referendum in revised Constitution

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Abstract

There are more types and kinds of referendum so for all forms of referendum, the Constitutional Court is the one confirming the results and certifying the accuracy of the procedure for organization and holding of a referendum. Also there are many criteria and species of referendum

Keywords: *referendum, Constitution, Constitutional Court, species of referendum, optional referendum, popular consultation, Mandatory referendum, Consultative referendum, Referendum initiated by Parliament, Referendum on popular initiative.*

1. Sovereignty's manifestation

Art. 2 of the Constitution: "The national sovereignty belongs to the Romanian people and is exercised through its representative bodies, resulting from free, periodical and fair elections and also through a referendum."

In this article are set out the general principles governing the Romanian state.

Mihai Constantinescu estimated that national sovereignty is one of the consequences of the national character of the state. Therefore, it belongs to the nation that exerts, not directly but through its representative bodies, as in representative democracy case.¹ Thus "it combines the principle of the national sovereignty, involving the constituted authorities and empowered to exercise that of popular sovereignty, which might involve the exercise of this sovereignty directly."² The Law of revision pointed out that authorities are formed by free, regular and fair choice. The essential condition for a constitutional democracy,

¹ Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru and Elena Simina Tănăsescu, *Constituția României revizuită. Comentarii și explicații* (Romanian Constitution Revised. Comments and Explanations), All Beck, Bucharest, 2004, p. 4.

² *Ibidem*, p. 5.

perhaps it explains the representative nature of the state organs, “in a democratic society, always, the state leaves the ballot.”

Cristian Ionescu considers that Article 2 states the way of exercising the sovereignty: through representation and by referendum. “The National referendum is the form and means of direct consultation and expression of the sovereign will of the Romanian people regarding the revision of the constitution, the president's dismissal and the issues of national interest.”³

Ion Deleanu appreciates that this article is an example of sovereignty exercise synthesis through representative organs like the national sovereignty, and the practices of the direct democracy, achieving thus a “semi-representative” or “semi-direct” democracy.⁴

The democratic character of our state is put into practice by the legislator from Romania in Article 2 of the Constitution, which states not “just the holder of the state power nominating exclusively the Romanian people, but also the ways in which it may exercise the state sovereignty, namely either by its representative organs designated by the way of free, fair and regular elections, or through direct referendum.”⁵ This fact is owed to the Romanian legislator’s will thus putting in harmony the provisions of Article 1 of Romania’s Constitution as democratic and legal state. Its preference it was directed to the instruments of direct democracy built in the system of representation, the Romanian Constitution stipulating both the referendum and the popular initiative as a way to facilitate the direct participation of the people to exercise the state power.

The restrictive enumeration of Article 2 can not express that there is a third way of exercising the state power in Romania, as well as any of the two mentioned methods that can be used with equal rights, on equal terms, “either the referendum, or the exercise of the state power by its representative bodies can not be considered as having the subsidiary nature of one to the other.”⁶

The authors make another distinction between the popular initiative and the referendum, including the prospect that the referendum was included only in the way of exercising the power described in the second Article. The state power is

³ Cristian Ionescu, *Constituția României, Legea de revizuire comentată și adnotată cu dezbateri parlamentare* (Revision Law, commented and annotated with parliamentary debates), All Beck, Bucharest, 2003, p. 8.

⁴ Mihai Constantinescu, Ioan Muraru, Ion Deleanu, Florin Vasilescu, Antonie Iorgovan and Ioan Vida, *Constituția României comentată și adnotată* (Romanian Constitution commented and annotated), Regia Autonomă Monitorul Oficial, Bucharest, 1992, p. 17.

⁵ Ioan Muraru and Elena Simina Tănăsescu, *Drept constituțional și instituții politice* (Constitutional Law and Political Institutions), vol. II, C.H. Beck, Bucharest, 2006, p. 133.

⁶ *Ibidem*.

power control. So its exercise would involve not only the opportunity to take decisions, but also to implement them, “ultimately, the degree of responsiveness of the human collectivity towards the power of being the unique of verification of the efficiency of the state power.”⁷

The popular initiative is only a manifestation of will, even largely democratic, but that does not reach to a sensitive decision likely to be taken out and effectively to produce changes in the social reality does not constitute a way of achieving the state power, but only one of taking part in the exercise of power.

2. National interest issues

Article 90 from the Constitution:

“Romania's President after the consultation with the Parliament, can ask the people to express, by referendum, its will on matters of national interest.”⁸

Mihai Constantinescu estimated that “the advisory referendum concerns the consulting referendum, whose results are not binding for the legislator.”⁹ The author believes that the referendum is not binding, but its results are not binding for the legislative authority. Mihai Constantinescu does not motivate such opinion or the consequences of such approach of the Article in the plan of the law.

Tudor Drăganu reiterates the lacunary character of this provision that “does not state in any other way the obligations that would result for the Parliament, for the President of Romania or for the citizens from a referendum vote expressed under his conditions.”¹⁰ The author concludes that although the Constitution stipulates that the only legislative authority is the Parliament and the President may organize a legislative referendum under this article. The Constitution prohibits the presidential enactment, but nothing precludes the parliamentary procedure of enacting the laws was exhausted, to intervene with a confirmation or rejection of a popular election of a norm.

This point of view was criticized by Ion Deleanu as it follows: “A referendum would cover the sanction of a law passed by the Parliament, through its confirmation or rejection – it is also a legislative referendum. And exactly on

⁷ Ioan Muraru and Elena Simina Tănăsescu, *op. cit.*, p. 134.

⁸ *Constitutia României* (Romanian Constitution), Erc Press, Bucharest, 2003, p. 49.

⁹ Mihai Constantinescu et. al., *op. cit.*, 2004, p. 148.

¹⁰ Tudor Drăganu, *Drept constituțional și instituții publice. Tratat elementar* (Constitutional Law and Political Institutions. Basic Treatise), vol II, Lumina Lex, Bucharest, 1998, p. 267.

the basis of article 61 which interdicts the presidential legislative referendum it would not be possible not even a *post factum* referendum.”¹¹

Tudor Drăganu appreciates that argumentation of Ion Deleanu does not take account of the fact that article 61 forbids that a law should be adopted with the avoidance of the parliamentary procedure. The author believes that after the procedure stated out in that Article was accomplished, nothing else prohibits the intervention of other constitutional factors in order to prevent the entry into force of a law that has already been passed. Moreover, the President may return a law already passed for further study and may notify the Constitutional Court. Another argument is that in case of the revision, amendment law does not enter into force without its approval by referendum. “The conclusion is that, through a referendum initiated by the President of the Republic, the law enacted by the Parliament could be confirmed or disproved, and it is undoubtedly required under article 2 of the Constitution, according to which the national sovereignty belongs to the Romanian people, who exercises it through its representative bodies and by the referendum.”¹² *Per a contrario*, if it was admitted that a referendum can not invalidate a law that has already been passed by the Parliament, then article 2 would be empty of content. The introduction of this regulation in the Constitution is considered by the author as “vain”. The laws that could be thus sanctioned by the electorate body would prevent some abuses that the Parliament would create by granting some rights for the elected of the nation, not being other way of control. The example of Tudor Drăganu is the project of the law through which the MPs wanted to be exempted from paying the tax on allowances and per diurnals. The first filter was announcing the Constitutional Court, which it declared it to be unconstitutional, but reaching the quorum of two thirds of the elected representatives could cause surprises. Only a national legislative referendum could have penalized the privileges.

The dispute may be extended with another constitutional law issue, particularly discussed in the French doctrine and practice that might be put into application also in Romania. In the French Constitution there is the famous Article 11 that allows the President of the Republic to submit the referendum “tout projet de loi”. As a presidential republic, France gives the President greater powers. The question of law is whether the President may refer to the popular approval constitutional laws also, or just the organic ones. The French Constitution has also

¹¹ Ion Deleanu, *Justiția Constituțională* (Constitutional Justice), Lumina Lex, Bucharest, 1995, p. 311.

¹² Tudor Drăganu, *op. cit.*, p. 267.

an article reserved for the Constitution's revision, under certain conditions. General de Gaulle interpreted in his favor the dispute, by organizing two referendums on constitutional issues. The arguments can be good and bad, especially leaving from the term "tout" which can be interpreted as including any norm, of any degree.¹³

The same interpretation can be as in the case of the Romanian Constitution, when "the matter of national interest" may include any provision, either at legal level. This article can be interpreted even as a derogation from Article 61 and article 151, so that allowing the popular vote to express in adopting a law is a consequence of people's sovereignty, which is the holder of the original constituent and is not held on the constitutional provisions adopted by himself having the jurisdiction of modifying them according to his will. Such an interpretation would turn our constitution into a soft law, not being needed the Parliament's vote for revision, but only of a simple consultation, only on the proposal of the President.

Our Constitution contains the phrase "a national interest issue." The controversy is between Tudor Drăganu and Ion Deleanu regarding on whether a law can be invalidated under this article, because its enactment is only of the Parliament's competence. Disregarding the theory of exemption, the application of the Article 90 would not be possible only than in the field organic or ordinary laws, because the constitutional law's enactment is subjected to article 151. If the referendum procedure is imperative for the constitutional provisions, *a fortiori rationese* may apply also to the organic or ordinary legislation.

Florin Vasilescu appreciate that this article proposes to use the referendum as an expression of semi-direct democracy, specific to the Constitution.¹⁴ The author describes two types of referendum, which may be mandatory, when it is expressly required by the Constitution, or optionally a case in which is chosen the popular consultation only if the factors that can initiate it, considers it as being necessary.

In this case, Florin Vasilescu calls the referendum described in Article 90 as optional. "Speaking from the point of view of the object or the referendum can see a problem of national interest or a legislative proposal, for which are asked voters to express an opinion."¹⁵ It results that legislator has allowed the appeal to the electorate only for big problems, not about the approval or the rejection of a law, because it does not have legislative initiative.

¹³ Catherine Clessis, Didier Claus, Jacques Robert and Patrick Wasjsman, *Exercices pratiques-Droit constitutionnel* (Practical Exercises - Constitutional Law), Montchristien, Paris, 1989, p. 285.

¹⁴ Mihai Constantinescu et. al., *op. cit.*, 1992, p. 204.

¹⁵ *Ibidem*.

The Referendum, especially the legislative one, is the most democratic way regarding the legislative policy of a country.

In order not to give discretion to the President, Article 90 imposes some limitations and specifications, able to provide a legal framework and a proper conduct.

Thus the subject of the referendum can only be made from the matters of national interest. Another limit requires prior consultation of the Parliament. The author believes that the consultation period should not be minimized, as in the case of a negative opinion and if a referendum was held, however, there is danger of a conflict whose consequences cannot provide. Other limits lie in respecting the provisions of the organization laws of the referendum and of the regular consultation which is in the competence of the Constitutional Court.

The issues of national interest are listed in Article 12 of Law no. 3 of 2000:

“A. Taking some measures regarding the country's economic reform and strategy

B. Taking some special political decisions regarding the:

- a) The general arrangement of the public and private property
- b) The organization of the public local government, of the territory, and of the general regime on local autonomy
- c) the general organization of education
- d) The structure of the national defense system, the military organization, the participation of the armed forces in some international operations
- e) The conclusion, signature or ratification of some international instruments for an indefinite term or for a period exceeding 10 years.
- f) The integration of Romania into the European and Euro-Atlantic structures
- g) The general regime of religions.”¹⁶

The question that arises is whether these problems are listed exhaustively, because the law of organization and conduct of the referendum is an organic law that must not make revisions or limitations to the constitutional provisions. The conclusion that it is only an enumeration with exemplary character it is required.

¹⁶ www.superlex.ro Law n.3/2000 regarding the organization and development of the referendum, published in the *Official Monitor* Part I, no.84, on 24 February with the ulterior modifications, art.12

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