

The Revision Procedure, the Role of the Constitutional Court in the Referendum Procedure and the President Dismissal

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Abstract

The revision procedure combines specific techniques of the representative democracy with those specific to direct democracy, both by enshrining popular constitutional initiative, and by giving the social corpus the possibility to intervene at the end of the revision process towards a referendum. The Constitutional Court has no constitutional control on any laws resulting from the referendum. The referendum is actually a popular revocation, so the president is revoked, not dismissed.

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1. The Referendum of Revision

Article 151 paragraph 3 of the Constitution:

“The revision is definitive after its approval by a referendum held within 30 days from the date of adoption or proposal of the revision.”

Mihai Constantinescu and others comment that Article 151 regulates the hypothesis of derived constituent power and states that it belongs to the two Chambers of Parliament, invested as Chambers of revision by the text of the Constitution.¹ The revision procedure of the Constitution is a special one, different from that used for the adoption of other types of laws: a qualified majority of two thirds is needed for the debate and adoption a constitutional law. The comparison

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. 340.

of this regulation with articles 75 and 76 underlines the relatively rigid character of the Romanian Constitution, which enjoys greater stability than other types of laws.

The revision combines specific techniques of the representative democracy with those specific to direct democracy, both by enshrining popular constitutional initiative, and by giving the social corpus the possibility to intervene at the end of the revision process towards a referendum. The referendum provided in the final paragraph of Art. 151 is ulterior to the adoption of the constitutional law made by the representative forum with the role of constituent derived power and it has the meaning of a popular confirmation of the achieved changes and the role of suspenseful condition to produce legal effects of the revision. It makes the further intervention of any other state authorities in the revision procedure unnecessary and lacking legal effects. The period laid down by the Constitution for organizing this referendum is one of decay and its expiration before organizing the referendum has as an effect the invalidity of the decision adopted by the derived constituent power.

The revision from 2003 did not alter the provision on the referendum.

The revision of the Constitution is final after its adoption by referendum. Cristian Ionescu notes that, although the Constituent refers to the adoption by the two Chambers of the draft revision of the Constitution and to the completion of the revision, this does not mean that the revision's approval by referendum would be a procedural phase of the adoption of a legislative initiative regarding the revision by the Chambers. The two stages of the revision are distinct and complementary, the completion of the revision having an intrinsic legal value, similar to that of adopting the draft or proposing the revision by the Chamber of Deputies and the Senate. Each phase has distinct but legal effects.²

The introduction of the revision's approval by referendum implicitly operates an adjournment of the procedure stipulated by article 77 of the Constitution, meaning that the revision law adopted under constitutional provisions is not sent to the President of Romania for promulgation, awaiting the outcome of the referendum. This does not mean that the revision law adopted by the Parliament would be provisory until the results' referendum confirmation by the Constitutional Court.

The referendum is made within 30 days from the date of passing the draft or the proposed revision and it is necessary because the Constitution was approved in

² Cristian Ionescu, *Drept constituțional și instituții politice, Sistemul constituțional românesc* (Constitutional Law and Political Institution. Romanian Constitutional System), vol. II, Lumina Lex, Bucharest, 2001, p. 107.

The revision procedure

a similar procedure. The author believes that by the silence of the Constituent Legislator, the law of revision will have to be promulgated by the President. An opinion considers that the law of revision must be promulgated after being adopted by referendum. In reality, the Constitution promulgation procedure is not necessary, because constitutional provisions clearly state that it “shall enter into force after the approval by referendum.”

Ion Deleanu found that the revision of the Constitution is made in two stages: the debate and adoption in both Chambers and the completion of revision by referendum. In fact, the Constitution promulgation procedure is not necessary, because the constitutional provisions clearly state that it “shall enter into force after the approval by referendum.” Without a referendum within 30 days from the adoption of the project by Parliament, the decision of the elect will be invalidated.

Cristiana Sandru makes a difference between the original constituent power and the constituent derived power. She considers that constituent power is original when it manifests through the development of a constitution and the derived constituent power is the competent one to amend the constitution³. If the Romanian Constitution is declared rigid, and it is so because it needs a special procedure for its revision, then the constituent power must be special, but in our case the Parliament is competent to vote for change, in quorum of 2/3 or ¾.

Here we see a change in the Constitution of 1991, which stipulated that if the law was found unconstitutional by the Constitutional Court, it would return to Parliament and be adopted with a quorum of two thirds; it was a final law and the promulgation was compulsory.

The conclusion was that the revision of the Constitution could be done without a referendum and a necessary quorum needed to revise the fundamental law. The Legislature from 2003 has rectified this aspect, stipulating in article 147 “In cases of unconstitutionality of laws, before promulgation, Parliament is obliged to reconsider those provisions to bring them into line with the Constitutional Court.” Therefore, the Revision without a referendum is not possible; the question remains whether it can be a revision with referendum, but without Parliament under the Article 90.

2. The Role of the Constitutional Court in the Referendum Procedure

Article 146 letter i) from the Constitution:

“The Constitutional Court shall:

³ Cristiana Sandru, “Despre revizuirea constituției” (On the Revision of the Constitution) in the *Dreptul Magazine*, year V, no. 3, 1994, p. 40.

i) supervises the observance of the procedure for organization and holding of a referendum and confirms its outcomes.⁴

“Ion Deleanu issues on the text some considerations, which he calls” summary”⁵:

a) The organization and holding of a referendum, the confirmation of the results have been subject to organic laws that detail the prerogatives of the Constitutional Court.

b) On the basis of the powers conferred by the Constitution and the organic law, the Constitutional Court is not called just to confirm the results, but also to ensure the organization and unfolding.

c) Because the Constitution does not distinguish between different forms of referendum laws, the author concludes that the designation conferred to the Constitutional Court in the field is concerning all forms of national referendum.

The Control of the Constitutional Court on organizing the referendum and its results involve two dimensions:

a) The Court’s Control involves controlling the organic laws of the referendum, a previous control, a preventive, and an abstract and political one only for sensing and not by default.

b) Solving under the conditions of the law, the actions in electoral contentious and confirming the referendum results represent in fact the substance of the constitutional provisions in subparagraph i).

So, the Constitutional Court has no constitutional control on any laws resulting from the referendum. Given that Parliament would decide to hold a legislative referendum the motivation “such a law-expression of the original will-power is above the will of any power.”⁶

3. The President’s Dismissal

Article 59 of the Constitution:

“If the proposal of suspension from the office has been approved, within 30 days it is organized a referendum on the president’s impeachment.”

Mihai Constantinescu explained that a referendum is justified because it was chosen by throughout the electorate body inside a constituency comprising the entire country, and can not be dismissed than still by the defined electorate body.⁷

⁴ *Constituția României* (Romanian Constitution), Erc Press, Bucharest, 2003, p. 49.

⁵ Ion Deleanu, *Instituții și proceduri constituționale* (Constitutional Institution and Procedures), vol. II, Servo-Sat, Arad, p. 452.

⁶ *Ibidem*.

⁷ Mihai Constantinescu et. al., *op. cit.*, p. 153.

Cristian Ionescu believes that to ensure the symmetry that justifies a referendum for the President's dismissal, it should be that the Constitutional Court to declare the suspension in order to hold the referendum.⁸

The president's dismissal is defined by Tudor Drăganu as "the act by which the President of the Republic is deprived of the mandate's exercise received from the voters as a result of a referendum... that has declared him guilty of a serious violation of the Constitution."⁹ One problem is setting the date of dismissal: the date when the Constitutional Court could declare the referendum as being valid.

There are raised more questions about this referendum of dismissal.

The first question is whether the president can be dismissed. If the referendum is an expression of legal symmetry elevated into a principle, it should be mentioned that only the president is elected by the people, without the intervention of the Parliament. In the procedure described in Article 95, this procedure can not be initiated until after the suspension in a joint session of both Chambers. The referendum is actually a popular revocation, so the president is revoked, not dismissed. The dismissal should involve only the players who have given him the mandate: the people and for legality and fairness the Constitutional Court.

Also such revocation is a feature of the imperative mandate, which is expressly prohibited by the constitutional law. The introduction of such provisions may be interpreted as a derogation from the principle stipulated in Article 69.

The President is elected, and *per se* he can be revoked.

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⁸ Cristian Ionescu, *op. cit.*, p. 164.

⁹ Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Constitutional Law and Political Institution. Elementary Treatise), vol II, Lumina Lex, Bucharest, 1998, p. 305.

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