

## “Constitutional Court and Participatory Democracy or Citizen Participation in the Law-Making Process”

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### 1. Citizen participation in the exercise of State power in the current Romanian society

The idea of democracy tracing back to the Greek antiquity was taken over by modern societies, and then developed and adapted to the realities of the modern world. The etymology of the term also reveals its initial meaning, i.e. direct ruling of the State by citizens. In the city-state of Athens, democracy has represented the form under which *demos*, i.e. the people, were exercising their power, called *kratos*, through direct participation in the management of public affairs and in taking decision of general interest<sup>1</sup>. The practical impossibility to apply democracy in this originating form in modern States has led to its rethinking and rearrangement, to the transformation of the concrete modalities whereby citizens express their will within the State, from direct to representative democracy, in which the prerogatives of the power belong to the people, which exercise them sovereignly, but this time through an electoral body<sup>2</sup>. Besides the system of representative democracy, nowadays there is also the so-called **semi-direct** or **participatory democracy**, resulting from the institutionalisation of certain means of direct intervention of the people in the law-making process.

In Romania, the Constituent Assembly adopted at its meeting of 21 November 1991 the first truly democratic basic law after World War II. The new Constitution of Romania, entered into force following its approval through the national referendum on 8 December 1991. It enshrined, in its very first article, the Romanian democratic State, also referring to the constitutional democracy within which the State operates according to the principle of the separation and balance of powers.

At the same time, it is also significant the fact that one of the basic principles governing the organisation and functioning of the Romanian State is that according to which national sovereignty lies with the Romanian people, who shall exercise it through their representative bodies or by referendum. The importance of this principle was underlined by its inclusion in the Article 2 of the Constitution, just immediately after the article establishing the characteristics of the Romanian State.

The first modality referred to in Article 2 (1) gives expression to the **representative democracy**, where citizens take part in the exercise of State power through the designation of representatives who, once elected, will exercise the prerogatives of power on behalf of and for

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<sup>1</sup> For a description of the mechanism of operation of the ancient Greece *polis*, and for an overview on the evolution of the concept of democracy and the application method, see, for instance, Anthony Arblaster, *Democracy*, DU Style Publishing House, Bucharest, 1998, Robert A. Dahl, *Democracy and Its Critics*, European Institute, 2002, Leonardo Morlino, *Democracy and Democratisation*, European Institute, 2015.

<sup>2</sup> Ion Deleanu, *Instituții și proceduri constituționale – în dreptul român și dreptul comparat* (Constitutional concepts and procedures - in Romanian law and comparative law), C.H.Beck Publishing House, Bucharest, 2006, pp. 103-104

the entire people. The Parliament and the President of Romania are the representative authorities to which the Basic Law refers, whereas they are elected by means of free, regular and fair elections, in accordance with the democratic requirements. Both the MPs and the President of Romania are elected by universal, equal, direct, secret and free vote, representing a specific voting mechanism characterising the rule of law, which grants all citizens the opportunity to express their option with regard those to whom they are to entrust the exercise of sovereignty.

The Romanian Basic Law also provides a means for direct participation of citizens in political decision-making process, stating that national sovereignty can be exercised also directly, through referendum. Therefore, the referendum is the instrument of **direct democracy**. The Constitution grants the casting vote to the people as concerns the revision of the Basic Law, whereas the citizens express their will, through referendum, on the adoption of the Law amending the Constitution, by approving or rejecting it. In accordance with Article 151 (3) of the Basic Law, the 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<sup>3</sup>. The same binding effect attaches also to the referendum organised under the terms of Article 95 of the Basic Law for the dismissal of the President of Romania, both in terms of organisation and in terms of outcome thereof. The Constitution has also established another type of referendum, i.e. the advisory referendum, by means of which, under Article 90 of the Constitution, the President of Romania, after consulting the Parliament, may ask the people to express their will on matters of national interest.

Besides the specific instruments of direct democracy and representative democracy — the referendum and the elections — the Romanian constitutional legislator has also established another legal mechanism meant to facilitate the involvement of the entire people in the political decision-making process: **citizens' legislative initiative** as a means of expression of **participatory democracy**. Thus, in Article 74 (1), the Constitution recognises citizens' right of legislative initiative, and in Article 150 (1) it establishes their right to initiate a revision of the Basic Law. The procedural conditions have been established by Law no. 189/1999 concerning the exercise of legislative initiative by citizens<sup>4</sup>.

Therefore, the citizens' initiative may be aimed either at the revision of the Constitution or at the adoption or amendment of legislation, resulting in the submission to Parliament of legislative proposals which, emanating from a considerable number of citizens with a right to vote, send a signal to Parliament in the sense that, in addition to the intrinsic value of the legal provisions constituting the subject matter of the legislative proposal and enjoying the support of a large part of the population of the country, they also reveal an issue worthy of consideration by the legislator. The fact that citizens initiate a legislative amendment or even the adoption of a new law in a given area is a strong indicator for Parliament, which must analyse it in a responsible manner and, even though, for various reasons, it does not convert it into law in the form proposed, it must take account of the significance of such popular approach, namely of the fact that the

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<sup>3</sup> The terminology used in the Constitution — used, subsequently, also in Law no. 24/2000 on legislative technique for drafting legislative acts — is differentiated, i.e. the draft laws are submitted by the Government to the Parliament, while the Deputies or the Senators, as well as the citizens — when exercising their right of legislative initiative — make legislative proposals, which must take the same form as required for draft laws. See, in this regard, Article 74 (3) and (4) of the Constitution, and Article 3 (1) of Law no. 24/2000.

<sup>4</sup> Published in the Official Gazette of Romania, Part I, no. 611 of 14 December 1999, republished in the Official Gazette of Romania, Part I, no. 516 of 8 June 2004.

citizens' initiative was driven by a real problem, which part of the population has emphasized through this mechanism, trying to find a solution thereto. Therefore, the legislative authority will need to consider that a thorough analysis of the cause triggering the initiation of this procedure is necessary.

In other words, the citizens' legislative initiative is primarily intended to bring solutions to the Parliament for resolution of a specific problem by means of legislation and, in the alternative, if the proposed solution is not accepted by Parliament, to draw the attention on the existence of a problem requiring resolution. The right afforded to Romanian citizens to express their political will by means of this legal instrument may be regarded as the most effective means through which they can get actively involved in the decision-making process at national level.

In the Romanian system, there is also another means through which citizens can express their views on decisions that public authorities intend to take, as it results from the provisions of Law no. 52/2003 on decision-making transparency in public administration<sup>5</sup>, a law governing certain procedures on citizens and legally established associations participation in the legislative acts drafting process and in the decision-making process. It refers to the public debate on legislative drafts, a mechanism providing the persons and organisations concerned an opportunity to submit written proposals, suggestions and opinions on such drafts and to participate in public meetings of the public authority whose legislative acts are at issue, occasion on which they may express their viewpoints on the issues listed on the agenda.

However, the aforementioned law seeks to facilitate the active participation of citizens in administrative decision-making and in secondary legislation drafting by central government bodies — ministries, other central bodies of public administration subordinated to the Government or its Ministries, decentralised public services thereof and self-managed administrative authorities, as well as authorities of local public administration — local councils, county councils, mayoralities, public institutions and services of local or county interest. However, Article 74 (1) of the Constitution grants citizens the right to promote and initiate legislative proposals which Parliament would examine, look into and, possibly, translate into a law, therefore a regulatory act with higher legal force than those envisaged by Law no. 52/2003.

In all these three situations — the initiatives for the revision of the Constitution, the initiatives for the adoption of various laws and the referendum — which constitute the expression of democracy, charactering the societies nowadays, where citizens are actively involved in the general management of the State, the Constitutional Court of Romania has an important role and has developed a quite extensive case-law in each of these areas, and has thus contributed to increasing people's power as a result of the use of these legal mechanisms.

## **2. The power of the Court to adjudicate on initiatives for the revision of the Constitution**

The Constitutional Court of Romania is among the few constitutional courts in Europe that are expressly empowered by the Basic Law itself to rule on the constitutionality of initiatives for the revision of the Constitution. The Court must determine whether the draft law or the proposal for revision respects the limits on matters of revision imposed by the Constitution, which are considered to be the "hard core" thereof. In this respect, Article 152 of the Basic Law

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<sup>5</sup> Published in the Official Gazette of Romania, Part I, no. 70 of 3 February 2003, republished in the Official Gazette of Romania, Part I, no. 749 of 3 December 2013

provides that none of the provisions in this Constitution concerning the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of judiciary, political pluralism, or official language shall be object of revision. Likewise, no revision shall be possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards. It is also stipulated that the Basic Law may not be revised during a state of siege or a state of emergency, or at wartime.

In accordance with Article 150 of the Basic Law, a revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of all Deputies or Senators, as well as by at least 500 000 citizens having the right to vote, who must belong to at least half the number of the counties in the country, and in each of these counties or in the Municipality of Bucharest, at least 20 000 signatures must be registered in support of such initiative.

To date, in Romania there have been seven initiatives for amendment of the Basic Law, but only one went through all the stages laid down by the Constitution, being completed in 2003. During each of these initiatives for revision, the Constitutional Court ruled on matters within its competence and made numerous declarations on the examined projects or proposals, as the case may be, in respect of the limits on matter of revision or the constitutionality of the law for revision.

2.1. As regards citizens' initiatives for revision, it should be noted that, in 2000, the Court was asked to review the constitutionality of a popular initiative for revision of the Basic Law<sup>6</sup> supported by 689 237 citizens, concerning the constitutional provisions on private property, regulated by Article 44 of the Constitution. It provided, in the version of 1991, that "*Private property is equally protected under the law, irrespective of its owner*" and the proposal examined by the Constitutional Court aimed at replacing the term "*protected*" with the term "*guaranteed*".

The Court reviewed the legislative initiative pursuant to Article 144 (a) and (h) of the Constitution<sup>7</sup>, and Articles 35 and 36 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, republished, which enshrine the powers of the Court to adjudicate on initiatives for the revision of the Constitution and to determine whether the conditions are met for citizens to exercise legislative initiative.

Upon determining whether the conditions had been met for citizens to exercise legislative initiative and whether the territorial dispersion requirement had been complied with, the Court noted that Law no. 189/1999 concerning the exercise of legislative initiative by citizens, which entered into force on 14 December 1999, laid down procedural rules for the setting up and composition of the initiative committee, the publication in the Romanian Official Gazette of the proposal for revision of the Constitution, the preliminary opinion of the Legislative Council, the template of lists of signatures from supporters, the data to be mentioned on those lists, the conditions for certification of such lists, the registration of the legislative proposal and the verification by the Constitutional Court.

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<sup>6</sup> The Court has ruled on that initiative by Decision no. 82 of 27 April 2000, published in Official Gazette of Romania, Part I, no. 193 of 4 May 2000.

<sup>7</sup> The current Article 146 (a) and (j) of the Constitution, republished, following the 2003 revision.

In that regard, the Court held that the attached documentation showed that the collection of signatures in support of the initiative for revision of the Constitution has been carried out prior to the entry into force of Law no. 189/1999. Consequently, having regard to the constitutional principle banning the retroactive application of the law, with the exception of the more favourable criminal law<sup>8</sup>, the Court has held that those operations could not be verified by reference to the conditions laid down by the latter law. Therefore, in view of the fact that, before the enactment of Law no 89/1999, there was no other legal framework in this field, the Court has held that the absence of any law in force at the time when the supporters lists were drawn up, signed and certified cannot restrict the exercise by citizens of their constitutional right to initiate legislative proposals, including initiatives for revision of the Constitution, the provisions of Article 146 being directly applicable. As such, the Court held that, in the absence of such a law, it is not possible to verify the authenticity of signatures on the lists, the signatories' capacity of citizens having the right to vote and their territorial dispersion, in order to rule on compliance with the conditions laid down in Article 146 of the Constitution.

The Court took the view that the proposed amendment is consistent with the limits on matters of revision, set out in Article 148 of the Constitution<sup>9</sup>. However, although the proposal was not adopted by the Parliament at that time, it has not gone unheeded, so that in 2003 its provisions were taken and incorporated in a legislative proposal for revision, signed by 233 Deputies and 94 Senators, on which the Constitutional Court has ruled of its own motion, by Decision no. 148 of 16 April 2003<sup>10</sup>, in accordance with the constitutional provisions contained in Article 144 (a), second sentence of the 1991 Constitution. The amendment of the constitutional text of Article 44 in accordance with the purpose of the above-mentioned citizens' initiative was eventually carried out through this follow-up, whereas the proposal for revision initiated by parliamentarians encompassed, by its broad and complex content, also the will of the people expressed by means of the citizens' initiative. The legislative proposal initiated by parliamentarians became Law no. 429/2003 for the revision of the Constitution of Romania<sup>11</sup>, which was approved by the national referendum of 18-19 October 2003, and which entered into force on 29 October 2003, the day of publication in the Official Gazette of Romania<sup>12</sup> of the Constitutional Court Decision no. 3 of 22 October 2003 confirming the outcome of the national referendum of 18-19 October 2003 on Law for revision of the Constitution of Romania<sup>13</sup>. Subsequently, the Constitution of Romania has been republished, with updated designations and new successive numbers for the texts, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. As a result, currently, Article 44 of the Basic Law, whose amendment was initiated by the citizens' legislative initiative of 2000, includes both characteristics of private property, in the sense that private property is equally guaranteed and protected by the law, irrespective of its owner.

What is important to note is the fact that the Constitutional Court has allowed citizens' access to this mechanism meant to amend the Constitution, even though the legislation in force

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<sup>8</sup> The more favourable law which lays down administrative sanctions was introduced as an exception to the principle of non-retroactivity of the law during the 2003 revision of the Constitution.

<sup>9</sup> Now, after republication, with renumbering of the texts, Article 152.

<sup>10</sup> Published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

<sup>11</sup> Published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

<sup>12</sup> Published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

<sup>13</sup> Published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

at the time of the collection of the signatures of support contained no provision in this area. The Constitutional Court found in that regard that, on the date on which the lists of supporters were drawn up, there was no law governing the procedural rules on the setting up and composition of the initiative group, the template of lists of signatures from supporters, the conditions for certification of such lists or other procedural conditions. However, the Court found the initiative to be in line with the general principles of the Constitution. The Constitutional Court adjudicated in this manner taking into account the fact that the lack of an infraconstitutional legislative framework to regulate this matter should not affect the possibility for citizens to exercise a right enshrined in the Basic Law.

2.2. Another citizens' initiative for revision of the Basic Law was examined by the Constitutional Court in 2007, this time by reference to the procedural requirements imposed by Law no. 189/1999. That initiative was aimed at the revision of Article 48 of the Constitution on family which, in the proposed version, would have been supposed to provide expressly that polygamy is prohibited and marriage is allowed only between a man and a woman. Having now detailed procedural rules, a legislative gap that had previously rendered the Court unable to ascertain the compliance with the constitutional conditions for the exercise of legislative initiative, i.e. for the revision of the Basic Law in the specific case, the Constitutional Court carried out a structured and detailed analysis on the compliance with the requirements laid down by law. Finally, the Court found that that the requirement on the minimum number of citizens with a right to vote who can initiate the revision of the Constitution had been complied with, since, out of a total of 612 251 signatures registered on lists, originating from 37 counties and 4 districts of Bucharest, 509 975 signatures were certified in compliance with Article 48 (1) (c) of Law no. 47/1992 and Article 5 of Law no. 189/1999, republished, and therefore exceeded the minimum number required by the Constitution, i.e. 500 000 signatures. However, as regards the requirement relating to the territorial dispersion, the Court found that it had not been satisfied, whereas only in 10 counties at least 20 000 supporters in support of the initiative had been legally certified. The Court held that the legally certified lists from the other 27 counties, which did not contain at least 20 000 signatures, could be taken into account and, consequently, the supporters on these lists could not be included in the total number of supporters of legislative initiative, whereas the requirements set out in Article 150 of the Constitution should have been cumulatively met. Therefore, the Constitutional Court found that citizens' legislative initiative for revision of the Constitution did not meet the condition of territorial dispersion per counties and Bucharest Municipality under Article 150 (2) of the Constitution cumulatively with that of the minimum number of supporters.

2.3. The most recent action of this type was that on which the Court ruled by Decision no. 580 of 20 July 2016<sup>14</sup>, i.e. the citizens' legislative initiative entitled "revision of the Constitution of Romania", whereby it was proposed the amendment of Article 48 (1) of the Constitution, according to which the family is founded on the freely consented marriage of the spouses, for the purpose to replace, in its wording, the term "spouses" with the term "man and woman". The Court found that the legislative initiative met the requirements laid down by Articles 150 and 152 of the Constitution, and that it was to be further subjected to the parliamentary procedure required by law.

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<sup>14</sup> Published in the Official Gazette no. 857 of 27 October 2016

### **3. The Constitutional Court's power consisting in verification of fulfilment of the conditions for the citizens' exercise of the legislative initiative**

A mechanism similar to the one presented above can be used by a smaller number of citizens in order to promote and initiate a legislative proposal, which the Parliament will examine, look into and, possibly, translate into a law, thereafter enacted as to render effective the citizens' initiative.

On this issue, it should be noted that according to Article 61 of the Constitution, the Parliament is the supreme representative body of the Romanian people and the sole legislature of the country, but the Basic Law gives people an opportunity to promote and submit legislative proposals to the Parliament. When a sufficient number of citizens agrees that legal regulation is needed in a particular area or an already existing act requires some changes, they can initiate a proposal and forward it to Parliament after being examined by the Legislative Council and the Constitutional Court. As stipulated in Article 74 (1) of the Basic Law, citizens' legislative initiative must belong to at least 100 000 citizens with the right to vote. The citizens who put into action their right to initiate legislation must belong to at least one quarter of the Country's counties, while, in each of those counties or in the Municipality of Bucharest, at least 5 000 signatures should be registered in support of such initiative.

The Constitutional Court adjudicates, on the basis of the act submitted by the President of the Chamber of Parliament where the citizens' legislative proposal has been registered, on the fulfilment of the conditions relative to the publication of the proposal in the Official Gazette of Romania, whether the lists of supporters were duly certified by the mayors of the administrative-territorial units or by their empowered representatives, whether the minimum number of supporters required for the promotion of such initiative had been attained, as well as whether their territorial dispersion in counties and in the Municipality of Bucharest had been complied with. These procedural requirements were established by Article 48 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, and by Article 7 of Law no. 189/1999 on the exercise of legislative initiative by citizens, which, in a similar wording, has established the subject matter of the verification that the Court is required to carry out in the exercise of its constitutional power, referred to in Article 146 j) the Basic Law.

The condition relating to the certification of the lists of supporters is detailed in Article 5 (1) and (3) of Law no. 189/1999. In the light of these legal provisions, the Constitutional Court is to verify whether the supporters' capacity of citizens holding the right to vote and their domicile have been duly certified by the mayors of the administrative-territorial units either personally - in urban establishments - or by their empowered representatives. The certification is done by checking the list of supporters, and in respect of domicile, such verification is carried out in cooperation with the local police, where appropriate. The Court is required to ensure that the certification by the mayor of the supporters' list bears the signature of the person who verified the lists, mentioning also the act of empowerment, if any, and the date when the certification took place, as well as that a stamp has been affixed thereto. If the mayor has requested the assistance of the local police, also his representative must sign and clarify the aspects verified. The signature must be affixed on the back cover of the file containing the verified lists, kept by the initiative committee, after having been confronted with the file submitted at the town hall. The non-certified issues must be deleted from the list in accordance with the above-mentioned legal text.

After checking these formal conditions, the Constitutional Court must examine the content of the legislative proposal initiated by citizens, in order to check whether it respects the limits set forth in Article 74 (2) of the Basic Law, which states that a citizens' legislative initiative may not touch on matters concerning taxation, international affairs, amnesty or pardon.

The effect of the decision handed down by the Constitutional Court is that, on receipt of the ruling of the Constitutional Court, the Chamber of Parliament where the citizens' legislative proposal has been registered initiates the parliamentary law-making procedure, but it remains, however, at the discretion of the legislator to adopt the law as proposed by the initiators.

In terms of the number of citizens required in order to initiate a legislative proposal, there is an obvious trend of reduction thereof, which is likely to confer greater effectiveness to this legal mechanism, whereas promotion will be facilitated by the relaxation of this numerical condition. Consequently, in the 1991 version, the Basic Law required that 250 000 citizens express their will to submit to Parliament the legislative proposal [Article 73 (1)]. Following the 2003 revision, the Basic Law has reduced this condition to the number currently required, i.e. 100 000 citizens. The same trend results also from the legislative proposal for revision of the Constitution initiated in 2014, signed by 108 Senators and 236 Deputies, still pending, which envisages, along with many other changes, the cutting of this numerical condition to 75 000 citizens. Examining the constitutionality of this proposal for revision, the Court noted, by Decision no. 80 of 14 February 2014<sup>15</sup>, that the purpose of such a rule is to facilitate the legislative process at citizens' level.

#### **4. The case-law of the Constitutional Court in the matter of citizens' legislative initiatives**

Since its establishment until now, the Constitutional Court has handed down six rulings relating to compliance with the requirements contained in the Constitution for the exercise of people legislative initiative.

In respect of rulings handed down by the Constitutional Court upon verifying the constitutionality of citizens' legislative initiatives on which it was notified in the first years, it can be noted that they reveal the Constitutional Court's concern to render effective the right enshrined in the Basic Law, whereas, as it has been pointed out above, a law regulating in detail the procedure to be followed was adopted only in 1999. Until then, three legislative proposals were initiated, and the Constitutional Court examined the constitutionality thereof by direct application of the Basic Law, informing, at the same time, the Parliament and the Government of the need to develop and adopt a law on citizens' legislative initiative, in order to ensure the effectiveness of the exercise of that constitutional right and the conditions for its implementation.

4.1. The first ruling in this matter dates from 1995. Its subject matter was a draft law on education in minority languages<sup>16</sup>, the initiative being registered at the Constitutional Court on 19 September 1994. Finding itself logistically unable to verify whether the initiative supporters entered on the lists submitted to it were indeed citizens having the right to vote, as required in Article 73 (1) of the 1991 Constitution, the Constitutional Court decided, on 30 September 1994, to refer the matter to the Government so that it would take the necessary steps for certification by public administration authorities of the fact that those who have signed the supporters lists

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<sup>15</sup> Published in Official Gazette of Romania, Part I, no. 246 of 7 April 2014.

<sup>16</sup> Ruling no. 1 of 27 July 1995, published in the Official Gazette of Romania, Part I, no.172 of 3 August 1995,



have the right to vote and reside in the counties concerned. The requested endeavour proved to be difficult, and a report on the partial results of the verification of the authenticity of civil status of persons included in the lists of signatures was submitted to the Constitutional Court by the Ministry of Interior — Police General Inspectorate only on 9 June 1995, the verifications being carried out on less than a quarter of the respective citizens, although, as stated at the end of the report, a very intense activity had been carried out in order to achieve those results. At the same time, the Court was requested to grant a new deadline of at least 9 months for completion of the verifications.

Taking this situation into account, the Court noted that this would mean that the conclusion of verifications would take place after a period of more than 1 year after the submission of the initiative, which would be excessive and would mean obstructing the exercise of a constitutional right. The initial deadlines set by the Court, i.e. 2-3 months, were reasonable in order to ensure the timeliness and effectiveness of the initiative, but in view of the government authorities' failure to comply with these time limits, and whereas the Constitution did not make the exercise of citizens' initiative conditional on the existence of a specific law, the Court held that it is not right that citizens who correctly signed the lists of supporters be unable to exercise the right of legislative initiative as a result of a conduct which cannot be attributed to them. In this respect, the Constitutional Court noted that, out of almost a quarter of the signatures verified by the Ministry of Interior, only around 9 % showed irregularities, meaning that the remaining 91 % were correct, a finding which in any event could not have any meaning on the other signatures, around three quarters, which had not yet been verified.

In relation to the second requirement that the legislative initiative belong to a number of at least 250 000 citizens, the Constitutional Court held that the submitted supporters lists included 492 380 supporters. The partial verifications showed some irregularities, but even if they had been taken into account, it could not have been concluded that the minimum number of 250 000 had not been met.

As regards the territorial dispersion requirement that citizens who have taken the initiative must come from at least one fourth of the counties of Romania, the Court has held that it may be regarded as satisfied only if within these counties there were at least 10 000 signatures per county. The documentation submitted showed that in 11 counties the territorial dispersion requirement had been met.

The Court concluded that whereas the only provision on the conditions for the exercise of legislative initiative by citizens consists of Article 73 of the Constitution, it was not possible to verify the authenticity of signatures on the lists of supporters, the supporters' capacity of citizens holding the right to vote or their domicile, given that the law did not regulate the procedure for the exercise of this initiative as provided for in Article 36 of Law no. 47/1992. However, the Constitutional Court emphasised that this circumstance cannot render citizens unable to exercise their legislative initiative, whereas the constitutional provisions of Article 73 (1) were not conditional on the existence of a subsequent law, but, on the contrary, they were directly applicable.

The Court noted that a consequence of the lack of a law on citizens' legislative initiative was that there was no initiative group to represent the citizens whose signatures were registered on the lists of supporters both before the Constitutional Court and during parliamentary debates, a group with whom such irregularities could be discussed so as to prevent any subsequent appeal.

The Court also found that the content of the legislative proposal showed that also the conditions governing the exercise of legislative initiative by citizens banning that it purpose touch on matters concerning taxation, international affairs, amnesty or pardon had been complied with.

Therefore, the Court found constitutional the legislative initiative on education in minority languages and, quite atypically, in the operative part of the ruling, it called on the Parliament and the Government to prepare and adopt a law in line with the citizens' legislative initiative, in order to ensure the effectiveness of the exercise of this constitutional right and the conditions needed to achieve it.

4.2. On the same day, by Ruling no. 2 of 27 July 1995<sup>17</sup>, the Court ruled on another citizens' legislative initiative concerning a draft law on the legal status of mutual associations which was sent to the Court on 27 October 1994, shortly after the one concerning the draft law on education in minority languages, mentioned above. Following a series of steps similar to those undertaken in the previous case, not followed by a timely response by the Government, the Court found that, from the documentation submitted, it follows that the legislative initiative satisfied the formal conditions laid down in the Constitution and stated that, in the absence of a law to regulate the exercise the citizens' right to legislative initiative, it was not possible to verify the authenticity of signatures on the supporters lists, whether the signatories are of citizens with voting rights and whether they were domiciled in the counties on the lists of which they had affixed their signatures.

4.3. The Court was then notified with a new legislative initiative relating to the Education Law no. 84/1995, by which citizens expressed their will to amend Article 9 (1) on religion as a school subject<sup>18</sup>. The respective text provided that in primary education curricula, religion was mandatory, in secondary education it was optional, and in secondary and vocational education it was voluntary. The legislative initiative proposed that the respective article would provide that the primary, secondary and vocational education curricula shall include religion as a subject and that participation in religion classes will be based on religion and belief.

Whereas the citizens' lists of signatures were submitted by the Romanian Patriarchate grouped not per counties, but per eparchies (episcopates, archiepiscopates, dioceses), and noting the practical impossibility to regroup these lists per counties, the Constitutional Court used a clever algorithm of verification of the territorial dispersion as required by Article 73 (1) of the Constitution. The Constitutional Court imagined this algorithm materialised in the development of a clarifying logical and mathematical reasoning, in order to avoid a considerable delay in the examination of the legislative proposal by Parliament if the materials were to be returned to the Romanian Patriarchate to be reorganised.

Finally, the Constitutional Court found that, according to the documentation submitted, the legislative initiative satisfied the formal conditions laid down in Article 73 (1) of the Constitution, as well as the conditions laid down in paragraphs (2) and (4) of the same Article.

At the same time, the Court reiterated that, in the absence of any law governing the procedure for exercising the legislative initiative by citizens, it cannot verify itself the

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<sup>17</sup> Published in Official Gazette of Romania, Part I, no. 172 of 3 August 1995.

<sup>18</sup> The Court adjudicated on this legislative initiative by Ruling no. 1 of 16 April 1997, published in the Official Gazette of Romania, Part I, no. 82 of 6 May 1997.

authenticity of signatures on the lists, the signatories' capacity of citizens holding the right to vote or their domicile. However, the Court emphasised once more that such circumstance cannot deprive citizens of their right of legislative initiative, whereas the constitutional provisions of Article 73 (1) are not conditional on the existence of a subsequent law, but, on the contrary, they are directly applicable.

With regard to the proposed regulation, the Court recalled that, by Decision no. 72 of 18 July 1995, it stated that the provisions of Article 9 (1) of the Education Law concerning religion as a school subject were constitutional only if the right of parents or guardians to ensure the education of the minor children in their care according to their own beliefs, in accordance with the provisions of Article 29 (1) and (6) of the Constitution, which guarantee freedom of conscience, was duly observed. As such, the Court found that since the legislative initiative in question also covered religion as a school subject, its constitutionality was conditional on the fulfilment of the same conditions, i.e. compliance with Article 29 (1) and (6) of the Constitution, which needed to be observed also as regards the new wording of Article 9 (1) of the Education Law no. 84/1995, proposed by the authors of the legislative initiative.

It should be noted that the purpose of that citizens' legislative initiative has been reached, but not through the parliamentary legislative procedure, but through the issuance by the Government of an Emergency Ordinance<sup>19</sup>, which together with several amendments to the Education Law no. 84/1995, included also the amendment envisaged by citizens in the legislative initiative in question, meaning that the will of the people got through and received an adequate response by its integration into a legislative act having the force of law.

4.4. Education has been an issue of great interest, as demonstrated by the fact that the next citizens' legislative initiative, initiated after a relatively long period of time, i.e. in the year 2004, covered the financing thereof. The proposal concerned the amendment of the provisions of Article 170 of the Education Law no. 84/1995 for the purpose to allocate from the State budget for the financing of State education a percentage of the gross domestic product of at least 6 % from 1 January 2005 and at least 7 % from 1 January 2007, indicating as a source of funding, as a matter of priority, the shares of the value added tax.

The Court found that<sup>20</sup> the citizens' legislative initiative for the amendment and supplementation of Article 170 of the Education Law no. 84/1995 met the minimum number of supporters and the territorial dispersion per counties and Bucharest Municipality under Article 74 (1) of the Constitution, republished. In reaching that conclusion, the Court proceeded to a thorough and scrupulous verification of the files containing the lists of signatures of the initiators. The lists examination included also the verification of the personal identification number to ascertain whether there were any minors among signatories and checks relating to fact that some of the first names or surnames were illegible or that there were erasures on the entries. The verification also regarded the fact that there were corrections that had not been confirmed by the initiative committee representative; incorrect entries regarding the ID details and the personal identification number had been found or such entries were actually lacking in some cases.

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<sup>19</sup> Government Emergency Ordinance no. 36/1997 amending and supplementing Education Law no. 84/1995, published in Official Gazette of Romania, Part I, no. 152 of 14 July 1997, approved with amendments and supplementations by Law no. 151/1999, published in Official Gazette of Romania, Part I, no. 370 of 3 August 1999.

<sup>20</sup> By Ruling no.1 of 30 June 2004, published in the Official Gazette of Romania, Part I, no. 660 of 22 July 2004.

The Court has also held that the legislative initiative met also the substantive conditions required by the Basic Law, given that the increase in the coming years of the share of gross domestic product devoted to State education, as envisaged by this legislative initiative, did not seek to regulate in any of the areas that cannot be subject to a legislative initiative, as set out in Article 74 (2) of the Constitution, republished.

4.5. Also health funding represented a problem which constituted the subject matter a legislative initiative undertaken by the citizens for the purpose of settlement thereof. In 2009, the Constitutional Court has been called on to examine the citizens' legislative proposal entitled "Law on the minimum obligatory annual funds aimed to finance health", whereby, in essence, it was proposed the allocation from the State budget for health funding, of a percentage of the gross domestic product of at least 6 %, and for the primary health care funding, a percentage of at least 12 % of the Unique National Fund of Health Insurances, and, for this purpose, it was sought the amendment of the provisions of Article 81 of Law no. 95/2006 on health reform, with subsequent amendments and supplementations.

As regards compliance with the provisions of Article 74 (2) of the Constitution, the Court held<sup>21</sup> that the legislative proposal envisaged the future vision on the State budget constitution, the change of the budgetary health policy and, in particular, that on the financing of primary care in Romania, for the purposes of determining by law the percentage allocated to medical care and primary care. As a consequence, the Court found that the legislative proposal was constitutional, since it did not seek to regulate in any of the areas that cannot be subject to a legislative initiative, set forth in the aforementioned constitutional text.

Following the examination of all the files containing the signatures of the supporters of the initiative from 25 counties and 3 sectors of the municipality of Bucharest, the Court found, however, that the condition relating to the territorial dispersion had not been fulfilled, as only in 8 counties at least 5 000 signatures in support of legislative initiative had been legally certified.

4.6. Finally, in 2015, a citizens' legislative initiative entitled "The Law amending Law no. 53/2003 — the Labour Code" formed the subject of verification by the Constitutional Court. The respective legislative initiative was aimed, as it clearly arises from the explanatory memorandum accompanying it, at strengthening the partnership-based dimension in shaping the rights and obligations of employees, as well as at strengthening the legal safeguards which they enjoy, the flexibilisation of employment relations by establishing new ways of verification of the professional and personal skills of the person seeking employment, but also by regulating new forms of work organisation — teleworking. These objectives were expected to be achieved by means of a number of legal provisions that would amend and supplement the Labour Code.

Having examined the texts proposed by reference to the substantive limits of citizens' legislative initiative enshrined in Article 74 (2) of the Constitution, the Court found<sup>22</sup> that only the text under which "The non-compete payment represents an expense incurred by the employer, and it is deductible from the calculation of the taxable profit, while the beneficiary is subject to taxation in accordance with the law" is of a fiscal nature, and therefore the legislative initiative is unconstitutional exclusively in relation to that text. In addition, on the same issue,

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<sup>21</sup> By Ruling no. 38 of 3 December 2009, published in the Official Gazette of Romania, Part I, no. 880 of 16 December 2009.

<sup>22</sup> By Ruling no.1 of 21 January 2015, published in the Official Gazette of Romania, Part I, no. 95 of 5 February 2015,

the Court noted that the other texts of the legislative proposal forming the subject matter of the citizens' legislative initiative, were envisaging, in essence, amendments to Law no. 53/2003 — the Labour Code on the employee—employer relationship, the non-compete clause, the confidentiality clause, the performance targets, the probation period, the modification/suspension of the employment contract, the collective redundancies, the fixed-term employment contracts, the activity through temporary work agent, the teleworking, the working time and the overtime, the guaranteed minimum gross national wage, the social dialogue, and the labour jurisdiction, and did not touch on areas exempted from the constitutional rules of reference.

Having verified the files containing the signatures of the initiators, the Court found that after cutting from the total number of legislative initiative supporters the number of those whose signatures had not been legally certified, it resulted a total of 134 160 supporters whose signatures had been legally certified, i.e. fulfilling the condition under Article 74 (1), first sentence, of the Constitution, namely that on the number of at least 100 000 citizens with voting rights necessary to promote the initiative.

Furthermore, on the basis of the examination of files with the legislative initiative supporters, the Court found that also the territorial dispersion requirement laid down in Article 74 (1), second sentence of the Constitution, had been met.

### **5. European citizens' legislative initiative**

The trend aimed at increasing the role of citizens' participation in the decision-making process has materialised also at European level, whereas Article 11 (4) of the Treaty on the European Union recognised the right of initiative of European citizens<sup>23</sup>. The European Economic and Social Committee noted in the Opinion rendered on this instrument that, by the aforementioned provision, the Treaty “enshrines, for the first time in history, a direct cross-border, transnational democratic procedure”<sup>24</sup>.

This is, however, a non-binding instrument, aimed at a simple setting of the European Commission agenda, through which citizens can invite the Commission to propose a legal act within the framework of its powers. This is conditional on the fact that, within one year from the date of registration, the citizens' initiative meets a considerable number of supporters from among the citizens of the Member States of the European Union. The participation of European citizens in the initiation of the legislative proposal must give expression to its representativeness on the one hand in terms of a minimum number of one million citizens and, on the other hand, by reference to the number of Member States from which they originate, i.e. at least a quarter of them.

The relevant provisions in European primary law are Articles 11 (4) TEU and Article 24 (1) of the Treaty on the Functioning of the European Union, and in secondary law, Regulation 211/2011 on the European Citizens' Initiative (Regulation (EU) no. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65), and the

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<sup>23</sup> See for details on the genesis of this mechanism and the procedural rules Auer, A., “European Citizens' Initiative”, *European Constitutional Law Review*, 2005, pp. 79-86; Levrat, N., “L'initiative citoyenne européenne: une réponse au déficit démocratique?”, *Cahiers de droit européen*, 1/2011, p. 53-101; Ponzano, P., “L'initiative citoyenne européenne: la démocratie participative à l'épreuve”, *Revue du droit de l'Union européenne*, 4/2012, pp. 615-626.

<sup>24</sup> Opinion of the European Economic and Social Committee on the implementation of the Lisbon Treaty: participatory democracy and the citizens' initiative, paragraph 1.5. (<http://www.eesc.europa.eu/?i=portal.en.civil-society-european-citizens-initiative-documentation.19065>).

Commission Implementing Regulation (EU) no. 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) no. 211/2011, OJ L 301).

The latter determine the detailed requirements and conditions that must be met and the specific procedure to be followed during the whole process from registration and the start of such an initiative, until its submission to the European Commission. It should be noted that although, in practice, it is also used the online signature collection system, the European legislation has laid down procedures and conditions that ensure at all stages the safe use and the protection of personal data.

In the above-mentioned Opinion of the European Economic and Social Committee, with regard to the importance of the European Citizens' Initiative, it is stated that "such a process, set in motion step by step, which fosters debate on issues of European magnitude, will automatically lead to the formation of a European consciousness and a sense of European public awareness"<sup>25</sup>.

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<sup>25</sup> Opinion of the European Economic and Social Committee on the implementation of the Lisbon Treaty: participatory democracy and the citizens' initiative, paragraph 4.4.6.