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Suspension and Impeachment of the  
President**

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## **Romanian Constitutional Jurisdiction. Suspension and Impeachment of the President<sup>1</sup>**

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### **Abstract**

In year 2012, following a change in the majority of the Romanian Parliament, the measure of suspending the President of Romania and the procedure to dismiss him have occurred. This situation gives us the opportunity to analyse, in this particular case, the intervention of the constitutional jurisdiction in solving the dispute.

The situation is particularly interesting because, in addition to the inherent internal disputes, this case has also triggered to some extent opinions expressed by European officials, opinions interpreted by domestic political actors as biased to one or other of the parties involved.

Therefore, currently, the internal discussions on the amendment of some constitutional provisions and possibly, on the clarification of the character of the Romanian state in terms of type of the republic - parliamentary or presidential - are of great interest.

In this dispute between the Parliament and the Presidency, which has reflected, on the political level, the positions of the parliamentary majority in relation to the opposition, a number of laws and other normative acts have been adopted, while the dispute had to be resolved by state institutions, namely by the Constitutional Court within its legal procedures of reviewing the constitutionality of laws.

**Keywords:** constitutional jurisdiction, Constitution, President, referendum

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## Introduction

If we define the constitutional law as the branch of the “unitary law formed of the legal norms regulating the fundamental social relationships which arise in the process of establishment, preservation and exercise of the power by the state”<sup>1</sup>, or as a “branch of law and its science referring to the Constitution”<sup>2</sup>, then it is obvious that there is a connection in the relationships between the constitutional law and other law branches, mainly with administrative law, but not limited to such. This branch of law moderates the tendency of the state as structure, to become autonomous, to regulate in detail the individual’s conduct, but also has the role to conciliate authority with freedom of individuals.

At least from this standpoint, the constitutional justice is the decisive factor for the functioning of the rule of law, mainly with regard to the observance of public rights and liberties, limitation of the state’s power in relation to its citizens<sup>3</sup>. As such, the importance of constitutional justice is obvious in the functioning of the state, of its institutions and, implicitly, of the political, social and administrative life in the respective state.

Although it was contested by some authors<sup>4</sup>, the semi-presidential system is however established by the Constitution of Romania: the will of the people is expressed two times, both by the direct election of the President, and by the election of the Parliament: ministers are accountable before the Parliament, the President has quite extended duties, from external affairs to appointment of key persons, as for instance the Prime Minister or other important offices.

As it was moreover presented in the specialized literature in Romania<sup>5</sup>, in this case, the political life and the exercise of presidential prerogatives is determined to a great extent by the political environment, by traditions or election modality.

## Factual Situation

For this reason, the situation which shall be subject to analysis originates in the change of parliamentary majority in year 2012. If, prior to this moment, a coalition had provided a close majority to the President – the main party of such majority had been nominally led by the current President, who, in fact, gets involved in the political activity of this party – from the spring of 2012, the political majority changed, but not following elections, but following a vote

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<sup>1</sup>See I. Muraru, E.S.Tănăsescu, *Drept constituțional și instituții politice [Constitutional Law and Political Institutions]*, Volume I, All Beck Publishing House, Bucharest, 2003, p. 12.

<sup>2</sup>See D. Cl. Dănișor, „Drept constituțional și instituții politice, Vol. I, Teoria generală, Tratat” [*Constitutional Law and Political Institutions. Volume I, General Theory, Treaty*], C.H.Beck Publishing House, Bucharest, 2007, p. 3

<sup>3</sup>See D.Cl. Dănișor, *op.cit.* p. 623.

<sup>4</sup>See, for instance, M. Duverger, „*Les régimes semi-présidentiels*”, P.U.F. Paris, 1986, p. 99

<sup>5</sup>See D. Cl. Dănișor, *op.cit.* p. 491.

withdrawing the confidence granted to the former government and a new government was formed by another party than the one which supported the President.

In the summer of 2012, the new parliamentary majority considered that the President breached his constitutional duties, invoking a long list of articles of the Constitutions which had allegedly been breached and which may be all summed up by the fact that, through his activity, the President eroded democracy and the rule of law, undermined the institutions of the rule of law, and that the political will and actions were concentrated at the discretion of the President.

Consequently, by Decision no. 33 of 6 July 2012, the Parliament decided to suspend the President and to follow the corresponding procedure of interim of office and referendum for the people to express its will on the suspension.

From this moment on, the involved political players resorted to the Constitutional Court which, moreover, was subject to strong contestation and accusations of political bias by all the involved parties, taking into account mainly the modality of appointment of the constitutional judges.

### **The Constitutional Court is called to Rule**

Initially, the suspended President filed with the Constitutional Court an application for establishment and settlement of an alleged legal conflict of a constitutional nature between the President and the Parliament, grounded by the fact that the suspension was made by willingly ignoring the provisions of Article 95 (1) of the Constitution, namely that the suspended President had committed grave acts.

In his application, the President also resorted to the consultative endorsement of 6 July 2012 of the Constitutional Court, which, following the application submitted on 5 July 2012 by the Parliament, and based on Article 95 of the Constitution, issued a consultative opinion on the suspension proposal. By this endorsement, the Constitutional Court had decided that it could not be concluded that the President had committed grave acts infringing the Constitution.

By Decision no. 730 of 9 July 2012, the Constitutional Court decided, with majority of votes, that the application for settlement of the constitutional legal dispute between the President and the Parliament is inadmissible, and that the Parliament has to decide, within its direct control powers, if the President had committed grave acts and, consequently, if the President shall be suspended or not from office.

### **The Citizens are called to Referendum**

On the same day when the suspension of the President was decided, namely 6 July 2012, by Decision no. 34, according to Article 95 (3) of the

Constitution, the Parliament called the citizens to express their will within a referendum regarding the removal from office of the suspended President.

It should be mentioned that, in the Romanian legislative system, based on the current Constitution, two types of referendum are regulated<sup>1</sup> namely: a consultative referendum, regulated by Article 90, and a mandatory referendum, regulated by Article 95 (3) and Article 151 of the Constitution.

In the case of the first type – regulated under Article 90 of the Constitution – the people are called to express their will regarding matters of national interest.

The second type of referendum is (i) regulated by Article 151 of the Constitution – and the citizens are called to vote upon revision of the fundamental act and (ii) regulated by Article 95 (3) of the Constitution – when, after suspension of the President, the people are called to express their will on his/her removal from office.

The constitutional regulation failed to establish and, moreover, could not establish in detail the legal regime for each type of referendum, and such legal regime was regulated in detail, in particular in respect of its technical aspects, based on Article 73 (3) of the Constitution, by an organic law, *i.e.* Law no. 3/2000 on the organization and performance of referendum (hereinafter called the “*Referendum Law*”).

### **Which is the Minimum Quorum?**

Article 5 of this normative act establishes a mandatory participation quorum for a referendum to be considered valid, namely the absolute majority of the persons recorded on the electoral roll.

However, it should be noticed that the “Guidelines on the organisation of constitutional referendum at a national level” adopted by the Venice Commission on the occasion of the 47<sup>th</sup> general assembly of 6-7 July 2001 mentioned that the participation quorum in such people consultations is not as essential as the approval quorum. And this is because it was found that, in fact, given that the participation rate in such popular consultations does not exceed in any state 40-50% of the voters, the requirement of a participation quorum which is too high gives the impression that, in fact, those who do not participate are in fact those who decide.

In the concrete case raised for discussion, it may be found that, by initiating the suspension procedure, the parliamentary majority and the government attempted to bypass the requirement of the participation quorum of half plus one of the persons with a right to vote, established by the Referendum Law, and by Government Emergency Ordinance no. 41 of 5 July 2012, Article I (hereinafter called “*G.E.O. no. 41/2012*”), they decided the amendment of this legislative provision establishing that, for the referendum regarding the

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<sup>1</sup>See also I. Muraru, E. S. Tănăsescu, „Drept constituțional și instituții politice” [*Constitutional Law and Political Institutions*], Volume II, C.H.Beck Publishing House, Bucharest, 2009, p. 146

removal of the President from office, the quorum is formed of the majority of votes validly expressed of the citizens who took part in the referendum.

On 17 July 2012, Law no. 131/2012 for the amendment of Article 10 of the Referendum Law is adopted and published in *Monitorul Oficial al României* (the Romanian Official Gazette). This law reiterates in its single article the provisions of G.E.O. no. 41/2012 and establishes that “the removal of the president from office is approved if, following the referendum, the proposal obtained the majority of votes validly expressed”.

Under these circumstances, at the referendum organized for this purpose and which took place on 29 July 2012, a presence of 46.24% voters was established, of which 87.52% voted for the removal from office (7,403,836 citizens), and 11.15% against the removal from office (943,575 citizens).

### **The Constitutional Court is called again to Rule**

Before the final result of the referendum, based on the constitutional provisions, a group of deputies and senators, belonging to the new opposition, challenged the amendment of the Referendum Law at the Constitutional Court.

Consequently, for the settlement of this challenge, the Constitutional Court issued Decision no. 731 of 10 July 2012, whereby it established that the challenged amendment “is constitutional to the extent that it ensures participation to the referendum of at least half plus one of the number of persons recorded on the permanent electoral roll”.

Analysing this decision and, in particular, its reasons, we consider that the solution adopted by the constitutional court is not beyond any criticism.

### **Judiciary and Political Character of the Constitutional Court**

First of all, it should be noticed that, in the Romanian constitutional system, the Constitutional Court is strongly contested – although its decisions have always been applied and observed in full – and such challenge originate in its legal nature and in the system of appointment of the constitutional judges. It was even said that, in fact, this Court sort of subrogates in the duties of the Parliament, since important decisions of the legislative power are interpreted in one way or the other by the constitutional judges who would be not at all impartial, being frequently accused that the “play” for one involved party or the other.

As regards the legal nature of the Constitutional Court, it should be noticed that it is considered – as moreover in most of the European States and not only there – as having a hybrid character, a mixed political-jurisdictional nature which “ensures compliance with some fundamental constitutional rules”<sup>1</sup>.

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<sup>1</sup>L. Philip, *Les Cours Constitutionnelles* in J. Leca et M. Grawity, *Traité de Science Politique*, Paris, 1985, p. 406.

As regards the modality of appointment of the constitutional judges, the so-called system of “extreme politicizing”<sup>1</sup> was adopted in Romania, whereby, like in the French system, the judges are appointed in equal proportion by the President of Romania and by the two chambers of the Parliament, one third each. In this context, given that until 2012, the parliamentary majority and the President – having the same political colour – each time imposed the appointment of the judges, the former opposition and, from 2012, the new parliamentary majority, constantly claims that the judges in office are politically submitted to the head of the state and the current opposition.

### **Decision of the Constitutional Court no. 731/10 July 2012**

As regards the case subject to analysis, more precisely Decision no. 731/10 July 2012, it may be found that the reasons presented by the Constitutional Court are contradictory.

Mainly, reference is made to a similar earlier decision of such court – Decision no. 147 of 21 February 2007 – where it decided that the application of the principle of legal symmetry upon election of the President of Romania in the second poll – when the majority of the votes validly expressed is necessary for the President’s election – and for the removal of the president from office, is not possible in the public law, and such principle was considered by the constitutional judges as falling under the exclusive field of the private law.

However, after reviewing its earlier practice in this matter, the Court specifies, under item 4 of its considerations, that “The law for the amendment of Article 10 of the Referendum Law is constitutional, taking into account that no constitutional text conditions the lawmaker’s right to opt for establishing a certain majority which is expressed for the removal of the President of Romania from office by referendum”.

In other words, nothing prevents the lawmaker from establishing, at a certain time, a certain majority necessary for the referendum to be valid. Moreover, the following paragraph of the considerations shows *expressis verbis* that “the removal of the President of Romania from office by referendum represents a sanction for having committed grave acts, for which reason the Court establishes that it is justified that it is approved by the citizens with majority of votes validly expressed”.

Further on, in the same considerations, it is established that the referendum would be conditional upon cumulatively meeting two conditions: the minimum number of citizens participating in the referendum and the number of votes validly expressed, and refers to Article 5 (2) and respectively Article 10 of the Referendum Law. Moreover, it is asserted that “in the drawn up version submitted to control in terms of constitutionality in the case at issue, the Law for amendment of Article 10 of the Referendum Law provides a unitary regulation for all the types of referendum established in the Constitution ...”

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<sup>1</sup>D. Cl. Dănişor, op.cit, p. 671



However, the argument used by the Court in these considerations is not real or it uses precisely the texts of law amended by the law submitted to control in terms of constitutionality, and, therefore, the argument is not valid.

Reference is made to Article 5 (2) of the Referendum Law providing the requirement of participation of half plus one of the persons recorded on the electoral roll; but, the Law submitted to control in terms of constitutionality eliminates this principle, by its single article, and establishes the necessity of participation of half plus one of the votes validly expressed, so an implicit abrogation of the earlier provision.

Consequently, in its arguments, the Court relies on the provision which was amended, without indicating why the Law for amendment is erroneous, respectively not constitutional, and it does this after it had previously established, as we showed above, that the lawmaker has the right to choose a certain majority in the case.

Moreover, the Court states that the law submitted to control in terms of constitutionality would provide a unitary regulation for all the types of referendum. However, this is not true, because this is precisely what this law stipulates: it establishes that, in a referendum for removal of the president from office – and only in such referendum, since it refers only to it – the presence of at least half of the votes validly expressed is necessary at the poll. Then, how can the Constitutional Court assert that the text submitted for control in terms of constitutionality offers a unitary regulation for all the types of referendum?

With such argumentation, the Constitutional Court decided that the amendment of Article 10 of the Referendum Law is constitutional, *to the extent that it ensures participation to the referendum of at least half plus one of the persons recorded on the permanent electoral roll.*

It is well-known that, in all the European countries and not only there, where the vote is not mandatory, such majorities are difficult to attain, and, in the concrete case at issue, the President and the parties which supported him publicly requested the population not to participate in the poll.

The result was the one mentioned above, so that the President remained in office although those who voted for his removal from office were much more numerous than those who had voted for the election of the President in 2009 (at the elections of 2009, out of 18,303,224 persons recorded on the electoral rolls, 10,481,568 citizens participated in the poll and 5,275,808 voted for the election of the president, namely 50.33% of the voters, more precisely, 2,128,028 citizens less than the number of those who voted for his removal from office in 2012).

These aspects led to a state of dissatisfaction, frustration, not only at the level of the parliamentary and governmental majority – which is understandable – but also at the level of the average citizen, of the public opinion, which has the feeling that the President kept his office by results based on technicalities, due to the politicization and bias of the judges at the Constitutional Court, which were moreover appointed by the President or his supporters, and not as a result of the expression of democratic vote.

Some even ask whether this is the true democracy or whether democracy bends under the interests of one person or the other, taking into account even more the fact that there were interventions by the European officials which were interpreted as biased.

### **The Role of the Constitutional Judge in Settlement of the Conflict**

In this context, which is the role of the constitutional judge and up to where such judge can “create the law”?

As it was presented above, the judicial and political character of the Constitutional Court is justified to a certain extent by the important duties it has<sup>1</sup>. It is a jurisdictional character because it interprets the law, and also a political character because it interferes with the lawmaking process. Both these sides should be in a certain balance, and none of them may be stressed too much to the detriment of the other, like it happened in various historical stages and in various states, precisely in order not to break up this quite fragile balance.

If the justification itself of the constitutional justice is primarily based on the protection of human rights and limitation of power, all these are subsequent to the supremacy of the Constitution and observance of the democratic rules, and even the constitutional justice finds by itself its legitimacy in the fundamental freedoms of the citizens, in the observance of democratic principles, in the assertion of democracy.<sup>2</sup>

In the case of referendum, if a legislative norm and not a constitutional norm is raised for discussion, can the constitutional justice intervene? In essence, the procedure itself is not discussed, but only a legal norm regulating such procedure and, just like any legal provision, such norm is subject to control in terms of constitutionality.

If this is the case, the discussion regards the compliance with the Constitution of a law amending another law which regulated such procedure, and nothing more.

The Constitution does not regulate itself a certain threshold for the validity of a referendum and leaves this attributed at the latitude of the Parliament, by means of a law.

The Constitutional Court did not ground its decision on the recommendations of an international court or on the provisions of the Constitution, but only on the provisions of the earlier law, which were, however, amended by the provisions submitted to control in terms of constitutionality.

Even the idea of observance of the democratic principles may be raised for discussion by the requirement of quorum with reference to the total number of voters, because, if voters exceeding 50% of the total voters on the roll – namely

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<sup>1</sup>See D. Cl. Dănişor, op. cit. p. 645

<sup>2</sup>See also M. Troper, „*La logique de la justification du contrôle de la constitutionnalité des lois*”, in Melanges P. Pactet, Dalloz, 2003, p. 921.

all the citizens with a voting right – do not participate, the decision is practically made by those who refuse to get involved in the process of elections, being disinterested in the result. This is not only the case of Romania, because the participation in most of the referendums in Europe is between 25 and 40 percent.

It should be mentioned that voting is not mandatory in the Romanian system, and all the citizens over 18 years of age are automatically recorded on the electoral roll, not only those who effectively want to be recorded on the electoral roll.

For this reason, it is also very difficult to establish the total number of voters – and there were challenges regarding this issue – given that some of the persons who deceased or are missing still appear on the roll (sometimes there is an electoral interest that they also appear on the roll), sometimes such rolls do not include persons who did not obtain their identity documents, etc.

Besides this aspect, it should be taken into account that, in the electoral campaign, the President and his supporters – including the respective political parties – officially requested the citizens not to participate in the poll, in other words, not to exercise a constitutional right, and, we believe that this is a unique case when, in an European state, a head of state requests such a thing.

Analysing in a few words the evolution of the idea of constitutional legitimacy, it can be found that, besides its increasing prestige and its acceptance throughout the entire Europe after the fall of the “Iron Curtain” in 1989, in various stages, the concepts underlying such legitimacy were modified in time, in correlation with the reduction in the prestige of parliaments and of the institution of representation in general.

Gradually, the parliaments are considered that they can become by themselves instruments of despotic regimes representing majorities which no longer take into consideration the respect of freedoms, which requires the existence of a superior authority, even higher than the lawmaker.<sup>1</sup>

For this reason, the constitutional justice went from the idea of denial to its assertion as central institution of a state governed by the rule of law precisely due to the protection it grants to freedoms, to its transformation into a redistributive justice.

Consequently, the Constitutional Court can only be an institution which examines the constitutional provisions and the decisions of the policy makers from the standpoint of the citizens’ rights.

Between two elections, by delegation, the people’s voice is uttered by its representatives, and, in this interval, its power is abandoned. The Constitutional Court is the one moderating this effect, being called to rule in the name of the Constitution, re-establishing the people’s will before its elected representatives<sup>2</sup>.

If this is the role of the constitutional justice, are the citizens’ rights observed when, by its decisions, this justice allows that the highly important

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<sup>1</sup>Y.A. Jolowicz, „*Droit anglais*”, Dalloz, Paris, 1992, p. 293

<sup>2</sup>D. Rousseau, „*La justice constitutionnelle en Europe*”, Montchrestien, Paris, 1998, p. 43.

decisions are made by a minority? More precisely, if participation over 50% of the total number of citizens is imposed for a referendum, are the citizens' rights actually observed, when this actually decides the prevalence in making the respective decision of the persons who are not at all interested in the respective issue?

It would be understandable, to a certain extent, to condition the presence in the poll of over 50% of the total citizens, in the states where voting is mandatory and absence from voting is sanctioned; but if voting is not mandatory, this condition imposed by the Constitutional Court determines that the absence from vote prevents important decision-making in the state, as for instance, the amendment of the Constitution or – as in the case at issue – that an essential office in the state is held by a person challenged by a number of citizens which is higher than the number of those who had voted for him at the elections.

We consider that such a decision no longer complies with the Constitution itself and no longer observes the citizens' rights to decide on issues related to sovereignty of the people, the observance of its rights being thus affected.

As a matter of fact, the Constitutional Court is called to ensure, by the observance of the sovereign rights of the people, inclusively the social peace, but how can we talk of such a thing when the predominant majority of the citizens have the feeling that the head of the state no longer represents them?

This discussion does not end with the decision of the Romanian Constitutional Court, because, in 2013, more precisely on 29 May, the Parliament amended the Referendum Law, reducing the threshold of presence in the poll, in the case of referendum from 50% to 30%, with the condition of a threshold of 25% of the voters for validation of the result (so at least 25% of the total voters recorded on the roll vote for the respective proposal).

This amendment was initially challenged by the main party of the opposition, more precisely on 4 June 2013, but, by Decision no. 334 of 26 June 2013, the Constitutional Court rejected the challenge establishing that the provisions of the law “are constitutional to the extent that they do not apply to referendums organized within one year from the date of coming into force of the law”, a condition inserted by the Constitutional Court for the reason that “the regulation of a quorum for participation in a referendum of 30% in the same year when the revision of the Constitution of Romania is intended ... infringes a recommendation of the Code of Good Practice on Referendums adopted by the Council for Democratic Elections at its 19<sup>th</sup> meeting (Venice, 16 December 2006), and the Venice Commission at its 70<sup>th</sup> plenary session (Venice, 16-17 March 2007).

The considerations of the decision of the Constitutional Court include the reproduction of Article II (2) (b) of the Code mentioned above, according to which “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”.

When it was sent to the President for promulgation, the Referendum Law was sent back by him to the Parliament for re-examination, based on Article 77

(2) of the Constitution, requesting that it is rejected because the quorum amended at 30% would not ensure sufficient representativeness to reflect the will and sovereignty of the people.

Further to the re-examination, the Parliament rejected the President's assertions on 10 September 2013 and sent the law to the President for promulgation and publication in *Monitorul Oficial al României*.

Again, the President challenged the law at the Constitutional Court, alleging that it would be non-constitutional, because it would infringe the provisions of Article 1 (3) of the Constitution, and also Article 2 of the Constitution, which establish that "the national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum".

In essence, the President alleges in his notification that the quorum of 30% would infringe the provisions of the Constitution because the "assumption of a democratic exercise of sovereignty by the people may be ensured only by participation in the referendum of the majority of citizens, consisting in half plus one of the number of the persons recorded on the permanent electoral roll".

By Decision no. 471 of 14 November 2013, the Constitutional Court rejected the challenge filed by the President and established that the amendment of the law is constitutional, maintaining however the term of one year from the adoption of the law for the enforcement of the two quorums.

### **Instead of Conclusion**

As a parenthesis, this entire polemic and the repeated requests to the Constitutional Court were actually underlain only by the referendum for removal of the President from office, even if the amendment made to the Referendum Law shall also apply in the case of amendment of the Constitution, which was moreover almost impossible to adopt. As regards the President, the practical purpose of this entire procedure was the impossibility to remove him from his office because, at any rate, his mandate expires in November 2014.

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- Consultative endorsement of 6 July 2012 of the Constitutional Court, published in Monitorul Oficial al României no. 456 of 6 July 2012;
- Decision no. 730 of 9 July 2012 published in Monitorul Oficial al României no. 473 of 11 July 2012;
- Decision no. 731 of 10 July 2012 published in Monitorul Oficial al României no. 478 of 12 July 2012;
- Decision no. 334 din 26 June 2013 published in Monitorul Oficial al României no. 407 of 5 July 2012;
- Decision no. 471 of 14 November 2013 published in Monitorul Oficial al României no. 754 of 4 December 2013;

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- Constitution of Romania, republished in Monitorul Oficial al României no. 767 of 31 October 2003;
- Decision no. 33 of 6 July 2012 published in Monitorul Oficial al României no. 457 of 6 July 2012;
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### **Other acts**

- Guidelines on the organization of constitutional referendum at a national level adopted by the Venice Commission on the occasion of the 47<sup>th</sup> general assembly of 6-7 July 2001;
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